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Analysis of Adverse Possession from the Economic Perspective

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Abstract: Adverse possession has long been a subject that has attracted researchers from a diverse range of fields including politics and law. The emphasis of this study lies in revealing the economic logic behind the adverse possession. This paper mainly uses Coase's Theorem, Posner's Theorem and the Pareto Optimality Model to analyse classic cases related to the adverse possession regime, analyzes the economic rationality behind the adverse possession system from the economic perspective, and compares the adverse possession regime with the acquisitive prescription of the civil law. The studies performed show that to a certain extent, the system of adverse possession is conducive to promoting social productivity, but the instability inherent in the system also makes it weaker in terms of its survival in modern society. All the results throw light on the meaning of adverse possession. This study not only proposes a new angle for understanding the historical institution and adapts it to the recent society, but also helps contribute to the development of legal economics.

Keywords: common law, adverse possession, economic perspective

1. Introduction

Adverse possession is an essential legal institution with a long history in the world of Common Law. And the word adverse possession originates from the *Code of Hammurabi*. The Code contains 282 rules, three of which deal with the concept of adverse possession [1]. With the development of Common Law, many countries have legislatively recognized the legal effects of the adverse possession regime such as Spain and Australia. Studies over the past decades have proved important information on the rationality of adverse possession. However, the research on this issue whether the adverse possession has its meaning in the recent society presents conflicting findings. So far, there has been very little discussion about the economic logic behind the adverse possession. This study is aimed at revealing the rationality of adverse possession from the perspective of the economics with some theories and scientific models, and proposes a new angle for understanding the historical institution and adapts it to the recent society, also contributes to the development of legal economics.

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2. Introduction to Adverse Possession

2.1. Definition and Historical Origins of the Adverse Possession

Adverse possession is a concept that is originated in the common law system, and English and American scholars do not link it to Roman law or even set aside its relationship with it when they speak of the origins of the system of adverse possession, which can be traced back as far as the *Code of Hammurabi*, and more recently to the *Westminster Act of 1275* [2], which specifically means that after a possessor of property has been in open, public and continuous possession of the property of another person for a period of time regulated by law, not only this condition, but also during that period, if no owner of the property has asserted a right or otherwise acted to exclude possession, then the original right holder loses that right by not exercising it for a long period of time, i.e., the possessor may acquire ownership of the property. The authoritative Black's law dictionary explains the regime this way that when a party claims ownership of a property they have been in for more than 12 years. It can also be claimed on abandoned property or it can go unchallenged by the actual owner [3].

2.2. The Constituent Elements of the System of Adverse Possession

The components of this regime mainly include the followings: from the objective aspect, (1) public possession, that is, the possession is visible to others, not private; (2) the possession has exclusivity, which means the use of the present possession can not be shared with the original owner, and at the same time the third party can not infringe on the use of the possessor; (3) the continuous possession, which mainly refers to the continuous period of time stipulated by the law. But the common law on how to calculate the period of possession of several different conditions, not only includes a continuous possession but also refers to combining the length of previous possession with subsequent possession [4]. From the subjective aspect, (1) subjectively with the intention of acquiring the property ownership, which means the possessor hopes to become the real owner of the property through the regime. It is different that the common law system and the civil law system present in this point. The acquisitive prescription of civil law system similar to adverse possession requires the possession of the subjective good faith, while the common law system does not ask; (2) the possession of contrariety that it is without the consent of the owner that the possessor acts. At the same time, the benefits of the two sides are of mutual exclusion [5]. Frankly speaking, a possessor who takes possession of a property in a manner that is actually contrary to the interests of the true owner of that property, who fails to bring an action to protect his interests within the statute of limitations period, acquires ownership by adverse possession [6]. In addition to this, the length of time specified in the definition may vary slightly depending on the actual practice and the legislative practice of each country.

3. Linkages Between Adverse Possession and Land Registration Systems

As a legal concept associated with the property system, adverse possession is closely related to the land registration system. In the United Kingdom, once the *Land Registration Act 2002* was published, a new system of adverse possession was created. Prior to the Act coming into force on 13 October 2003, regardless of when the trespass began, if an intruder had been in open and continuous occupation of the land for 12 years, the intruder could become the beneficial owner of the land and the original owner lost the paper title to the land, the old rules applied mainly to unregistered land; whereas the Land Registration Act 2002 provides that for houses and land registered in accordance with the regulations, although the intruder can obtain the title after 10 years of continuous public occupation of the land, the original owner still has two years to object, which is equivalent to splitting

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the original 12 years into two time periods of 10 years and 2 years. Compared with the original provisions, the new rules actually give the original owner more protection and initiative [7].

4. The Economic Rationality Behind the Adverse Possession System from the Economic Perspective

4.1. General Introduction

Legal economics is a special subject that applies theories about economics and economic methods to study the economic logic behind the design of legal systems and to analyse various legal phenomena. With the analysis of the theory of ownership, based on the provisions of legal economics about transaction costs, and guided by Coase's theorem, Posner's theorem and Pareto optimality, it is by observing the relevant cases of the system to make a conclusion about the economic logic behind adverse possession.

4.2. Classic Cases Analysis

In Van Valkenburgh v. Lutz, one of the most famous property law cases of the United States, the basic facts of the case were that Van Valkenburgh had not used or transferred the land after acquiring the ownership of the land, and after a period of time, he discovered that Lutz had carried out activities and built a house on the piece of land without his consent. So subsequently, Valkenburgh took Lutz to the court [8]. From the perspective of economics, Coase's Second Theorem has two main meanings: (1) In the real world where transaction costs are greater than zero, the initial state of distribution of property rights cannot be changed to the optimal state through cost-free transactions, and thus the initial definition of property rights will have an impact on economic efficiency. (2) Adjustment of rights occurs only when it favors the growth of total output, and only when the increase in output caused by the adjustment is greater than the transaction costs incurred in making the adjustment. First the transaction cost is set to X and the physical value to Y. Therefore, the plaintiff and the defendant's negotiation costs can be set as x1 and x1>0, that is, the transaction costs; the output value by the defendant using the matter is set as y1, while the output value of the plaintiff is set as y2, and can be learned that y1>y2 because the plaintiff did not have too much actual use of the subject matter of the act. X is mainly related to the plaintiff and the defendant for the transfer of property rights or property disputes, such as attorney's fees. disputes, such as legal fees, etc., while Y would have a greater value, including land tax, infrastructure construction and economic value created by production activities (farms), so it can be inferred that y1>x1, that is, property rights should be adjusted in due course. Secondly, according to Coase's third theorem, that is, in the case where transaction costs are greater than zero, a clear definition of property rights will help to reduce the cost of people in the process of transactions and improve economic efficiency. In layman's terms, it means that every kind of resource that may lead to disputes should have an owner, and it is better to have only one owner, so the core key of this case lies in how to determine the owner of the land.

In addition, in social life we need to find a way to achieve the optimal allocation of resources and guide the distribution of property rights, in order to achieve this purpose. While affirming the first theorem of Coase, the Justice Posner combined the Coase theorem and the legal market and concluded that when the transaction costs are relatively low, people can achieve the optimal allocation through private negotiation. He also made a correction and proposed that the cost of the rise is very high and the law must be through the "simulation of the market" to improve the efficiency of the allocation of resources [9]. Therefore, the rights should be given to those who value them most and can create the greatest benefits, while the responsibility is attributed to those who can avoid the case by the smallest cost, so the cost of the plaintiff and the defendant can be stipulated as a1 and a2, because the true owner exercises its rights more conveniently than the defendant, so a1 < a2; and further speaking, the

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plaintiff in the acquisition of land ownership for a long period of time is in the "sleep on the right" state, and did not create any economic value for the community, while the defendant, on the other hand, who built a house and did land farming in the process, was the actual user of the benefits of ownership and created economic value for the society. In conclusion, the court ultimately ruled against the plaintiff and was in favour of the defendant, with the doctrine that "don't sleep on the right" at the core. It happens that there is a similar case, in Morose, et al. v. Fitch, et al. decided in 2022, the court also ruled that the Morris's had acquired ownership of part of the subject matter by adverse possession, based on the principle of "don't sleep on the right" [10]. However, the Morrisons failed to prove the other parcels of land and were therefore liable for the infringement.

5. Comparison of the Adverse Possession Regime and the Acquisitive Prescription of the Civil Law

5.1. Definition of the Acquisitive Prescription Regime

The acquisitive prescription system is a civil law legal concept similar to adverse possession, which is clearly documented in the *Twelve Copper Table Laws* and was established to protect private ownership. Prior to Justinian's legal reforms, the acquisitive prescription could be applied to both movable property and independent private immovable property in the ancient Italian city-states. According to the *Law of the Twelve Copper Tables*, when possession of movable property was one year and of the immovable property two years, and other prescribed conditions were fulfilled, the person in possession acquires the ownership of the Roman citizen [11]. The acquisitive prescription means the continuous possession and use of another person's property and the acquisition of ownership of the property after the statutory period.

5.2. Specific Differences Between the Two Regimes

The difference between the common law system of adverse possession and civil law system of acquisitive prescription is mainly manifested in the following aspects:

(1) In the object of application, the provisions on acquisitive prescription of movable property for the civil law including the Japanese civil code and our country Taiwan region are stipulated in principle that general property can be used, but in the common law, the application of adverse possession focuses on the field of land. In the case of land, the civil law countries do not recognize that originally registered rights are extinguished by prescription, because civil law countries (regions) tend to emphasize the credibility of registration. (2) In the constituent elements, from the subjective aspect, the system of acquisition by prescription emphasizes the possession must be in good faith, and takes more consideration into the possession of the state of the protection of the object's usefulness; but the adverse possession doesn't care about the good faith, and the main concern is the original right of the person who does not exercise the right of the punishment. (3) The effectiveness in the application of the regime, adverse possession results in the loss of a substantive right, on the contrary acquisition prescription results in the acquisition of the substantive right [2].

6. Conclusion

To sum up, with the development of common law, adverse possession is also constantly improving and combined with the characteristics of the development of the times. At present, some common law countries have made more detailed provisions for this regime. In the horizontal comparison of adverse possession and prescription, although there are many differences between the both, the essence lies in the possessor acquiring the right through a certain legal time of possession. The complexity of the elements of the system of adverse possession and the strict proof burden on the possessor has made

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countries maintain a more cautious attitude towards the trial of cases. From the perspective of economics, the existence of the adverse possession system has its own economic logic: in the case that transaction costs are not zero, the society improves productivity, and increases the adjustment of property rights through the optimal allocation of resources and property rights, which can level up the economic value created by the community, that is, the rights should be given to those who cherish them most and can create the greatest benefits. The economic study on adjusting transaction costs and how different configurations of property rights might specifically affect economic efficiency need to be further explored.

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