

An Economic Analysis of Adverse Possession Statutes

– The Case of China and Germany

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Abstract: Adverse possession, a doctrine whereby a possessor of land who is not the true owner acquires title to the land without the consent or compensation of the "true" owner, while simultaneously appearing to be a trespasser's possession of the land adverse to the owner's interests from an economic perspective. This paper explores the economic implications of adverse possession statutes, focusing on China and Germany. It provides an overview of adverse possession, comparing relevant national laws, particularly those of Germany. Despite its economic efficiency, China has not established an adverse possession system. The analysis examines the current legislative status in China and explores inherent reasons for its absence. Evaluating the necessity for China to adopt such a system, potential problems are identified, including issues related to homeless individuals seizing property and challenges in replacing existing systems. However, the study highlights the economic benefits, such as enhancing transaction certainty reducing costs, and preventing errors through adverse possession.

Keywords: Adverse Possession, Economic Analysis, Chinese Property Law, Efficiency

1. Introduction

Adverse Possession doctrine was first seen in ancient Roman law; in modern times, this doctrine was first adopted for the French Civil Code, and later inherited by most civil law countries. China, is also a civil law country, although in the formulation of property law reference and reference to the German property law, the adverse possession doctrine in China has been a gap in the legislation, should China draw on the laws of other countries for the establishment of the adverse possession doctrine?

This paper will be divided into three parts: from the introduction of adverse possession doctrine, and German law as an example to analyze the economic advantages of the doctrine; to analyze and compare why China has not set up the doctrine and to clarify the internal reasons based on the national conditions; and finally, to analyze and solve the adverse possession doctrine in the social context of China's problems and analyze the establishment of the doctrine may bring potential economic value, to put forward a new approach. Finally, by analyzing and solving the possible problems of the adverse possession doctrine in China's social context and analyzing the potential economic value that the establishment of the doctrine may bring to China, it puts forward the view that it is necessary for China to learn from and establish an adverse possession doctrine.

2. Overview of Adverse Possession

2.1. Definition of Adverse Possession

Adverse possession is a doctrine under which a person in possession of land owned by someone else may acquire valid title to it, so long as certain requirements are met, and the adverse possessor is in possession for a sufficient period of time, as defined by a statute of limitations [1].

The common law requirements have evolved over time and they vary between jurisdictions. Typically, for an adverse possessor to obtain title, their possession of the property must be

Continuous: The single adverse possessor must have continuous possession of the property.

Hostile: In this context, "hostile" does not mean "unfriendly." Rather, it means that the possession violates the rights of the true owner. If the true owner consents to or gives license to the adverse possessor to use the property, the possession is not hostile and is not a genuine adverse possession.

Open and Notorious: The possession must be obvious to anyone paying attention and observing so that the true owner will notice that the intruder is in possession. A claim of adverse possession will not succeed if the possession is secret.

Actual: The adverse possessor is in actual possession of someone else's property.

Exclusive: The adverse possessor does not share control of the property with any other person.

2.2. Overview of relevant national laws: Germany as an example

German land law provides for two different methods of acquiring property by way of adverse possession [2].

2.2.1. Acquisition by registrant through possession

A person who is registered in the land registry as the owner of land and has continuously occupied and physically possessed the land for 30 years acquires ownership of the land, even if he has not acquired ownership when registered (§ 900 BGB). Good faith and motivation of the possessor of the possession are irrelevant in this right-acquisition process.

2.2.2. Acquisition by proprietary possession and cancellation proceedings

If the owner of a piece of land hasn't been exercising his rights over it for 30 years, his rights can be excluded by another person through public summons. Yet, if the owner has been registered in the land registry, a public summons is only permitted if he is dead or disappeared and no registration requiring his consent has taken place for 30 years. (§927 BGB)

The acquisition of property under §927 is not applicable to individuals whose registration in the land registry is inaccurate. Instead, it provides favourable conditions for the acquisition of property for those who are not registered in the register but have had possession over land for 30 years.

2.2.3. Good faith

Whether the possessor is in good faith or not, neither method of adverse possession requires proof thereof. Adverse possession can occur even where the possessor is in bad faith, e.g., when the possessor intentionally possesses bequest land that is not owned by the deceased. Good faith or not is immaterial; what is only decisive is the registration in the land registry. In contrast, with regard to movable property, acquisition of movable property by adverse possession is possible only when the possessor is and was in good faith regarding his right to possession, see § 937 (2) BGB.

2.2.4. Compensation

Under German law, the acquisition of property by adverse possession does not entitle the person who has lost ownership to compensation. Moreover, the concept of unjust enrichment provides no legal basis for the claim. Equally, the principles of tort law cannot assist the previous owner, since the acquisition of the property itself was lawful and consistent with existing legislation.

2.3. Adverse Possession and Efficiency

According to legal economics, an important role of law is to give limited resources to those who can give full play to their maximum value through the institutional arrangement of ownership, including the initial definition, redefinition, and continuous confirmation of ownership, so as to ultimately complete the optimal allocation of resources and realize the maximization of social utility (or social welfare) [3].

Adverse possession is precisely based on other legal system arrangements as well as rational market transactions, through transferring resources from the hands of those who are unable to utilize them to those who enable to maximize their utility, on the one hand, providing a means for further effective allocation of resources, and on the other hand, providing essential incentives to facilitate the utilization of resources efficiently, thereby further exerting the role of the legal system for resource allocation on the basis of the ownership system.

For example, A, who has no means of transportation, is willing to buy a bicycle for \$120; meanwhile, B buys a car and leaves his original bicycle unused (in B's opinion, the bicycle is only worth \$20, and B neglects to dispose the bicycle); furthermore, the market price of the bicycle is \$100. There are three possible scenarios (Table 1) :

Table 1: Analysis of Bicycle Transactions and Social Utility

Scenario	Transaction Value to A	Transaction Value to B	Incremental Social Utility
Without Adverse Possession (Scenario 1)	\$20	-\$20	0
With Adverse Possession (Scenario 2)	\$120	-\$20	100
With Adverse Possession (Scenario 3)	\$50	\$50	100

As can be seen, Scenario 1 is clearly inefficient; in the absence of the adverse possession system, total social utility is not increased, whereas the adverse possession system in Scenario 2 makes it possible to increase total social utility, contributing to the Kaldor-Hicks efficiency. However, Scenario 3 is closer to the actual situation, in the game between A and B, B is bound to take into account the potential adverse effects of the adverse possession system on himself, and thus actively trade with A. Thus, Pareto efficiency is realized in this scenario, where the adverse possession system also successfully steers A and B into market transactions.

The above analysis can also be concluded that the incentive effect of the adverse possession system is more significant than its direct resource allocation effect, which is more through the civil subject (i.e., the market transaction participants) to provide an incentive mechanism to maximize the utilization of resources, so as to indirectly promote the optimal allocation of resources, and ultimately enhance the overall welfare of the society.

From this, it can draw the following points about the value of adverse possession doctrine in terms of efficiency:

2.3.1.Resource Allocation

Adverse possession doctrine exists in part to ensure efficient use of land and resources. If a property is left abandoned or unused for an extended period, and the true owner is not exercising their rights, adverse possession allows someone else to put the property to productive use.

2.3.2.Property Market Dynamics

Adverse possession, when successful, can transfer property rights to individuals who actively use and maintain the property. This contributes to the overall efficiency of the property market by preventing the stagnation of properties due to absentee ownership.

2.3.3.Encouraging Property Maintenance

Efficient land use involves maintaining properties in good condition. Adverse possession, by incentivizing individuals to care for and invest in the properties they occupy, can contribute to the overall maintenance of real estate.

2.3.4.Avoiding Vacancy Issues

Adverse possession ensures continuity of occupancy, preventing properties from sitting empty and contributing to housing shortages.

2.3.5.Resolution of Ownership Status

Adverse possession provides a mechanism for resolving ownership uncertainties. If a prospective purchaser knows that the present owner has been in possession of a property for the requisite statutory period, he is assured that he is getting a good title. This assurance can be very valuable in situations where record keeping is inefficient [4].

3. China's Legal Landscape and the Absence of Adverse Possession

3.1. China's legislative status

In China, although in the formulation of property law reference to draw on the content of the German property law, adverse possession has always been a gap in the legislation. After the founding of the People's Republic of China in 1949, China's civil regulations, following the Soviet Union Civil Code on the provisions of the statute of limitations system, using only a single statute of limitations (extinctive prescription), without adopting the adverse possession system.

At present, China's system in civil legislation mainly includes: registration of real estate (PRC Civil Code Act. 209-233), statute of limitations (PRC Civil Code Act. 188-199), bona fide acquisition (PRC Civil Code Act. 311-313).

3.2. Inherent reasons

The reason why China's legislation rejects the adverse possession system is that, on the one hand, influenced by the legislation of the former Soviet Union, it considers the acquisition of the ownership or other property rights of others without compensation as immoral and unearned, which contradicts the moral concept of "not pocket the money one picks up" advocated by socialist states and socialist ethics, and is very likely to induce those who are misbehaving to loot and seize public property. On the other hand, most scholars believe that with the independence of the land law, the popularization of the real estate registration system, the wide application of bona fide acquisition system of movable

property and the provisions of the statute of limitations on extinction have made adverse possession lose its applicability. The notion of opposing the establishment of an adverse possession system also prevailed at one stage.

4. Assessing the Need for Adverse Possession in China

4.1. Possible problems of adverse possession

4.1.1. Possible problems in the application of adverse possession: the example of vagrant squatters' occupation of a house

Considering the current national conditions in China, the establishment of an adverse possession system may lead to the following phenomena:

Firstly, China's unbalanced urban-rural development has led to the flow of rural residents to work in cities, resulting in their own homesteads being left unused for a long period of time; Also, real estate investment in China (especially in Tier 1 and Tier 2 cities) is currently a big hit, with investors occupying multiple properties for investment rather than residential purposes, which can lead to long-term vacancy; Furthermore, some existing cities in China have undergone extensive real estate development due to over-planning (e.g., Changzhou New Town, Ordos Kangbashi New District, etc.), resulting in inadequate resources and amenities, and ultimately turning into an uninhabited new town.

If the properties mentioned above are not properly managed and regulated, the establishment of the adverse possession system may become an "enabler" for homeless people and the like to legitimize the illegal possession of other people's properties, resulting in increased loss of individual property, social instability, and an upsurge in legal disputes.

In practice, adverse possession is not involved in the case of vagrant encroachment because many homeowners will take action upon knowledge of the encroachment, i.e., notify the encroacher to vacate, take legal action, or call the police to declare non-abandonment of ownership of the home. If the homeowner fails to notify the encroacher, the encroacher can still make a declaration even if the encroachment is illegal and the encroacher is eligible under the statute.

Therefore, the issue of vagrant forcible occupation of a home has nothing to do with adverse possession and instead involves the local police excluding the unlawful occupant rather than transferring ownership. Then, the resulting failure to detect, notify or set up ownership protection mechanisms within the statutory period and the transfer of ownership by vagrants may not be resolved, but only in minority circumstances.

4.1.2. The question of existing systems as a substitute for adverse possession

A considerable number of scholars who deny adverse possession believe that, with the maturity of modern civil legislation, the emergence of such systems as registration of immovable property, the statute of limitations, and acquisition in good faith has made the adverse possession system unnecessary.

4.1.2.1. Real estate registration system

On the one hand, some scholars believe that the real estate registration system has safeguarded transaction security and regulated the order of the credibility requirements. The establishment of adverse possession makes the wrong registration of real estate ownership applicable; adverse possession will destroy this credibility and destroy the order of the transaction, i.e., the two in the concept of the conflict. Secondly, in the case of wrongful registration, the owner can safeguard his

legitimate rights and interests by applying for registration of amendment, registration of opposition, or filing a lawsuit, and there is no need for subsequent application of adverse possession [5].

This paper holds that registration and adverse possession systems aren't necessarily contradictory as errors between the registration of real estate and factual rights are inevitable. If no objection is filed for a long period of time and it is not possible to harmonize the registration of rights and actual rights through adverse possession, it will lead to an unstable property rights relationship and affect utilization and transactions. Although registration errors can be corrected through, for example, objection registration, the long period of registration is not conducive to stabilizing property relations. Overall, adverse possession does not undermine the public trust principle of registration, and both work to ensure that outsiders have a correct perception of the status of rights.

On the other hand, from the perspective of the applicable space, some scholars believe that the establishment and regulation of the real estate registration system will significantly diminish or even eliminate the unregistered real estate property rights; thus, the adverse possession of real estate property rights will no longer be useful.

This paper argues that China's real estate registration system presents some deficiencies that lead to inconsistencies between facts and rights regarding many real properties. An adverse possession system might be applied to resolve such inconsistencies. It is briefly argued in three cases:

(1) When the possessor is the real owner and the registrant is the unentitled holder, although the possessor can claim the right through change registration or objection registration, the law may support the unentitled holder on the register if no objection is filed over a long time, especially if the possessor fails to claim the right after a certain time period.

(2) When the possessor is an unentitled owner and the registrant is the real owner, the strict registration system may lead to idleness and waste of property rights. A balancing of interests approach is proposed, whereby legislation may give the possessor right to claim a public notice, and if the real owner fails to defend the right within the stipulated period of time, then adverse possession may be considered to be applied, vesting the property right in the possessor.

(3) When both the possessor and the registrant are unentitled, adverse possession may be applied to confirm the state of facts in line with the constitutive elements stipulated in the law. If the possessor and the registrant are different unentitled owners, similar to the second situation, the possessor is allowed to claim public notice within a certain period of time, and after expiration of the period, if the request of the true owner is not received, adverse possession can be considered to be applied.

Overall, through analyzing the actual situation, the application of adverse possession doctrine can allocate rights more scientifically, especially in case of inconsistency, and help to resolve problems in the real estate registration system.

4.1.2.2. Statute of limitations system

From the surface, the expiration of both periods has similar consequences: the old owner loses, and the new owner gains; thus, some scholars think that the statute of limitations can replace adverse possession. This paper argues that both are systems in different fields and are not interchangeable. The statute of limitations regulates the creditor-debt relationship, while adverse possession regulates the property right relationship. There are significant differences in object, conditions and legal consequences of their application. Adverse possession requires the possessor with the intention of possession, publicly, peacefully and continuously possessing other people's movable or immovable property for a certain period of time, and the conditions are more complicated. In contrast, the statute of limitations involves only the time element, and the rightholder loses his procedural rights upon expiry of the limitation period. Although adverse possession may be applied less frequently in practice, it is considered irreplaceable by the statute of limitations as a substitute for adverse possession due to the irreplaceability of its regulating relationship and institutional content.

4.1.2.3. Bona fide acquisition system

Although there are similarities between bona fide acquisition and adverse possession: both have the function of promoting the effective utilization of things, protecting the trust interests of the third party and maintaining the security of transactions, there are significant differences in terms of their nature and constituent elements. Bona fide acquisition emphasizes the good faith of the transferee, while adverse possession focuses on long-term objective facts. In addition, bona fide acquisition requires the intention of both parties, while adverse possession requires only the intention of the possessor [6]. Bona fide acquisition applies only to transferred goods, whereas adverse possession is not so limited [7]. The two also differ in terms of the transaction for consideration, the time element and the scope of adjustment of the legal relationship.

Therefore, the view that bona fide acquisition is an alternative to adverse possession is unfounded. Although bona fide acquisition without regard to the element of time, and its role in maintaining the transaction security and social order stability is superior to that of adverse possession in a fast-moving society, this doesn't mean that adverse possession loses its value. Legislation should provide support for resolving divergent issues, rather than competing or deleting different provisions.

To sum up, even if the establishment of real estate registration, statute of limitations, bona fide acquisition and other systems make the space for the application of adverse possession smaller, it can not be logically equated with adverse possession has no value and space for its own application.

4.2. The value of the adverse possession system under the current social conditions established in China

4.2.1. Enhance transaction certainty and reduce transaction costs

Analyzed from the perspective of economics, adverse possession is an effective means of controlling the risk of transactions; in essence, it is a design to reduce transaction costs. When something is openly, peacefully and constantly possessed for some time, the potential transaction counterparty has generated considerable trust in the exterior rights of the possessor and the legal protection of adverse possession; subsequently, the transaction succeeds. From this, the credit investigation and right conformation cost generated in the transaction can be effectively controlled.

4.2.2. Preventing and Reducing the Costs of Errors

Adverse possession also prevents and reduces the misuse of other people's property, thus avoiding wasted social costs. For example, in cases of unclear boundaries between neighbouring lands, the best practice is to clarify the ownership of the land before development, and if one party needs to cross the border to exploit other's land, one should negotiate to buy or lease at an appropriate price beforehand. If land with unclear ownership is developed arbitrarily, border land will increase in value as investment increases. If it is proved that the border land belongs to the neighbour, he will have to spend more money or rent to acquire the legal rights to the border land to prevent all the investment from being wasted.

Although prior negotiation is efficient for both parties, in practice, misperceptions can still occur when asymmetries in information and limitations in access to information exist [8]. With the gradual increase of one party's investment, the price he was forced to pay for the wrong possession of the land also rises, which gives the neighbour an opportunity of selling at a higher price, and open-ended ownership becomes means of blackmailing the wrongdoer into making unjustified profits. Whereas adverse possession makes the neighbor's ownership no longer absolute and permanent, he will act within a reasonable time to avoid errors from occurring and expanding, thus saving social costs.

5. Conclusion

Through theory, practice, and comparative law, the paper believes that the adverse possession system can not only answer the real needs of China, resolve more property disputes, enrich and improve the theory of China's civil law, but also has greater value of efficiency.

Although the attitude of the academics is generally consistent, it must be clear that the specific content of the adverse possession system, such as legislative position, constituent elements, object scope, etc., exists much disagreement, and the theory is not very mature. Therefore, if the establishment of adverse possession is planned in the future, there is still much room for discussion on the design of the system, which requires not only rational academic discussion but also active empirical research. At the same time, the guiding principle of careful balancing of interests must be applied throughout the legislation so as to minimize existing and new disputes. The adverse possession system involves the protection of people's property rights, on the one hand, guaranteeing others' ownership rights, while on the other hand, taking into account the protection of ownership rights or other property rights under adverse possession provisions. It should be reasonably regulated both in terms of its constituent elements and legal effects, and properly interpreted and applied.

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