

Date: 1996/10/06

Here is again an excerpt from Law and Economics by Coote and Ulen showing the origins of the English law on adverse possession and the statute of limitation.

"Adverse possession originated in the ancient common law, but at an early date it became part of statutory law. In 1275 an English statute named 1189, as the date beyond which no one could go in adducing evidence of his title to land. The effect was to enable ownership claims based on recent events, including the seizure of land by the Norman invaders from the indigenous Saxons after 1066, to prevail against claims whose origin was lost in the mists of time. Furthermore, and more germane to adverse possession, ancient claims by owners who never occupied or improved the land would lose against the claims of current users of the land. Periodically this benchmark was changed until, in 1540, instead of referring to a calendar year in the past, the statute stipulated the maximum number of years that could elapse between a legal action and the event cited as evidence of ownership in court. This new method of creating by statute a limiting period during which ownership claims must be exercised has become the modern norm. Every state now has a statute that establishes the procedures by which someone may acquire rights to another's property through adverse possession.

As in England, adverse possession statutes were initially important in America in securing the title of land essentially acquired through conquest, in this case from the Indians. To illustrate, when the Cherokee Nation in Oklahoma was dissolved by Act of Congress, the land belonging to the tribe was divided as follows: each Cherokee household was given 60 acres around the homestead and 60 acres some distance from the homestead. However, white settlers who occupied Cherokee land could acquire title simply by paying taxes on it for five years. This was one of the devices by which the Cherokee ownership of most of eastern Oklahoma in 1880 was reduced to a small part of two counties by 1950.

Thus, the first efficiency justification for the rule of adverse possession is made on the basis of minimizing the costs of administering property claims:

stale evidence is bad evidence. The second efficiency justification for the rule of adverse possession is that it tends to prevent valuable resources from being left idle for long periods of time by specifying procedures for a productive user to take title from an unproductive user. Under the rule of adverse possession, a person who does not put his land in production and monitor its boundaries runs the risk of losing it to someone who makes use of it. In this respect the rule tends to move property to higher-valued uses, as required for efficiency, by redistributing it to aggressive owners.

However, there is a potential inefficiency of the rule: if the original owner values not using his property more than the adverse possessor values its use, then title should remain with the original owner. These considerations must be balanced when deciding the rules for determining title through adverse possession. As the box on legal requirements for adverse possession points out, the statutory requirements for transferring title to an adverse possessor seem to minimize the possibility of inefficiently transferring title from a higher-valuing original owner to a lower-valuing adverse possessor.

I hope, this should be clear to anybody who can read English. And please note:

- 1) This is probably the most widely accepted justification for the rule of adverse possession in the USA.
- 2) This theory was developed by Chicago-school people (economists and lawyers) and has absolutely no relation to Marxism or communism.
- 3) It goes con of most claims of Kkostrouch and Zaricky about laws of "civilized" countries, namely that they
  - a) require return of property to "rightful" owners,
  - b) "at least for two to three generations",

c) and that "thief cannot give a good title".

4) I do not claim--and never did--that this can or should be applied without change to privatization and restitution problems of formerly communist countries.

It does indicate, though, that

a) economic efficiency and not only "justice" should be taken in account;

b) there should be set a date back in time to which the restitution claims would be considered. In the USA the statute of limitation on adverse possession of property is usually about 10 years. In this context it is difficult to argue that 40 years set by CR is too short.

Misc Notes:

Prescription -

1. Based on Adverse Possession Statute

2. Provides only an easement interest

3. Ault v State - Conflicts w/ constitutional requirement of just compensation - higher burden of proof on state

4. Gravel 2 Pavement projects - ROW Certification

5. Prescription identified during acquisition - Cushman/Gaffney Intersection

6. Alaska Case Law - Nome 2000 (COntinuous use)

Homer Snowmobile - Only for Specific Use

7. 2003 Legislation to eliminate adverse possession