

Land custom and the development of adverse possession in HKSAR: Taking the case of "Adverse possession" at A Kung Ngan Village Road, Shau Kei Wan as an example

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Abstract. Land laws vary across regions due to geographical and cultural differences. This paper examines the evolution of land laws in common law and civil law nations, focusing on Hong Kong's transition from British common law to Chinese civil law post-1997. Despite Hong Kong's historical adherence to British legal traditions, the adoption of the Basic Law signifies a pivotal shift in legal authority. Utilizing qualitative analysis and case studies, including the landmark LEE BING CHEUNG case, this study explores Hong Kong's unique land administration model. Adverse possession, inherited from English common law, remains pivotal in land disputes but faces challenges under evolving legal frameworks. Concerns arise regarding the future of land administration in Hong Kong under Chinese governance post-2047. As Hong Kong integrates with the mainland legal system, the dynamics of land laws, including adverse possession, are subject to ongoing examination.

Keywords: land custom, adverse possession, land laws, land administration, Hong Kong.

1. Introduction

Even within comparable legal systems, variations in interpretation and application of legal provisions arise due to geographical and cultural disparities. This holds true for land laws and administration globally, shaped by the historical evolution of common law and civil law systems. Hong Kong, a former British colony, transitioned from British common law to Chinese civil law after 1997, posing unique challenges to its land administration. Despite the continuity of British legal traditions, Hong Kong developed its distinct legal factors over time. With the adoption of the Basic Law as the supreme legal authority, Hong Kong faces unresolved issues and evolving legal frameworks. Adverse possession, a concept inherited from English common law, remains central in land disputes but confronts challenges under the evolving legal landscape.

The land registration system reforms of the 20th century weakened adverse possession in the UK, sparking calls for similar reforms in Hong Kong. However, Hong Kong's legal system integration with mainland China complicates reform efforts. Land disputes, particularly those involving adverse possession, reflect broader societal debates on land utilization in Hong Kong's densely populated landscape. Judicial analysis, including the landmark LEE BING CHEUNG case, sheds light on the complexities of land administration and legal heritage in Hong Kong.

Key issues include the government's role as a landowner and confusion over legal relationships in land disputes. As a unique case study, Hong Kong's land practices offer insights into the convergence and divergence of common law and civil law systems. Academic research has explored various dimensions of adverse possession, from legal history to macro-economic analyses, providing valuable context for understanding its implications in Hong Kong. Yet, gaps remain in understanding the interplay between legal principles and practical realities, necessitating interdisciplinary research methods.

This study employs interpretivism, integrating literature research, empirical analysis, comparative analysis, and interdisciplinary research. By examining the historical origins of adverse possession in Hong Kong and comparing legislative provisions between the UK and Hong Kong, it seeks to illuminate the complexities of land laws and administration in a unique legal context. Ultimately, this research aims to provide insights for addressing the challenges and opportunities in Hong Kong's land administration system.

2. The Creation Of Adverse Possession And Its Development In He UK

2.1 What is adverse possession

According to the legal definition, adverse possession refers to the title of any person who, through continuous possession of land that does not belong to him or her in conflict with the rights of previous owner, legally acquires the land from the person from whom it was appropriated. Specifically, if an adverse possessor of an unauthorized land continues to occupy that land in question and the title holder does not exercise his or her right to recover the land or make some remediations within the time allotted by relevant law, the opportunity for redress of the land owner even his or her title to the land will be expired automatically, and the adverse possessor will become the new owner of this land. In order to prevent improper land transactions, the adverse possessor should not acquire a possession that exceeds the right of original holder in scope or duration.

The most critical part in the terminology *adverse possession* is the “possession”, which means a concept from property law and commonly used in the common law system. The characteristics of physical possession are “*public, exclusive and long-lasting*”. “Possession” is the foundation upon which the land tenure institution was established and developed in the United Kingdom. In both the civil law and common law systems, the term “possession” refers to the act of occupying something physical. However, in the common law context, there is no absolute ownership of land in the same sense as in the civil law system. This ownership reflects the existence of a property right of a relative nature and expresses the attribution of land rights to the subject of law, i.e., the subject of law does not directly own the immovable property itself but rather owns the rights associated with the immovable property. Unlike the description in civil law system emphasizing complete ownership, the right to obtain and keep property in the common law system is centered on possession or holding, and what the law protects is the legitimacy of possession by different people at different times for different reasons. Possession is the basis of property rights under the background of English land tenure system whereas property rights are rather relative: a person acquires a property right through the legal provisions of the common law system, but this property right cannot be opposed to a more effective and superior property right, and the status of “possession” could only be an external manifestation of the superiority of property rights. In common law system, ownership has no special significance and is explained in a much more general sense. The land tenure institution necessitates a statute of limitations on property rights, and the limitation of the statute of limitations in adverse possession is coupled with the ability of current land user to generate income from the land. Although the existing scope of land rights centered on the notion of “*fee simple*” is already very similar to the concept of ownership in civil law systems, it is still remained unclear whether the notion of “*fee simple*” is identical to any particular notion of ownership in civil law systems. The statute of limitations system is centered on the characteristics of the common law system itself, that is, for the adverse possession action to seek a more reasonable form of possession as opposed to for the infringement of ownership remedies. From this perspective, the adverse possession system can only exist within the cultural background and discourse mode of common law.

2.2 The historical variations of adverse possession in the UK

The historical development of Britain is inextricably linked to the evolution of adverse possession there. Since the Enclosure Movement, the British land administration had undergone a lengthy process of change: from a traditional land distribution model that was highly related to the social status of landowners with strong feudal characteristics, to a private land rights system with distinctive industrialization-related characteristics. In feudal Europe, the traditional land system was closely tied to the status hierarchy. The old feudal institution of Western Europe was a pyramid of social relations between lords and vassals built around the land, with the holder of the lord's land assuming corresponding obligations to the lord in exchange for the military protection. The holder merely possessing but not owning the physical land outright, with the power to hold the land deriving from the king (the actual landowner) and from the authorization of the lord. This ancient English custom

also indirectly influenced the fundamental principles of litigation about adverse possession: Plaintiffs shall only sue for the right to use, not the right to own, and typically not against the ultimate owner of land (British Royal Family or government).

With the advent of the Industrial Revolution in Britain at the end of the 17th century, the society and daily life of British people underwent dramatic changes, and the rising bourgeoisie began to undermine the social status of the traditional landowners and aristocracy gradually. The expansion of capitalism fostered the growth of the British real estate exchange market. During this time period, Britain still had a variety of feudal land relations, which increased the burden on the guarantor in land transactions and led to high land transaction costs. Also, the lack of transparency in the land transfer procedure has resulted in a great deal of confusion regarding the allocation of rights and responsibilities, which has ultimately led to resentment among the bourgeoisie in London. As a result, beginning in the second half of the nineteenth century, the British Parliament took a number of tentative steps to reform the land laws: both *the Real Property Limitation Act 1874* and *the Act of Limitation 1874* stipulated that the right of action could not be recovered in any form or rent due for a period of 12 years after it accrued. This principle is also confirmed by the current limitation regulations in the United Kingdom, and after the restoration of the incompetent person's capacity, the limitation period was shortened from 10 years to 6 years, and after the expiration of the period, the rights of action and substantive of claimant disappeared, as well as the subsequent right of the restored property was also abolished. *The Limitation Act* which was enacted in 1980 and has been in effect ever since, systematized the statute of limitations for all actions involving real estate in the Chapter 15 "*Actions to recover land and rent*".

The growth of social productivity also spurred the establishment of the British land registration institution, which weakened adverse possession. The initial land registration system in Britain was established on the basis of "*deeds*" and had numerous flaws: for instance, only the deeds of land transactions were registered officially, but the content of the registration was just a written record of the transaction and did not directly indicate the ownership of property rights, which could only be determined by the parties to the transaction based on the original contents of the registration. Unquestionably, the registration institution based on land deeds had impeded land transactions. In 1862, in response to the growing prosperity of the British land transaction market, the British government enacted *the Land Registration Act* based on practical needs. While retaining the original transfer of property rights based on the delivery of the deed, it gradually guided all the owners of property rights to conduct registration transactions: the former was directly registered by the registry office as the only basis for determining the ownership of property rights, and the latter was indirectly registered by the registry office as the only basis for determining the ownership of property rights. After two unsatisfactory reforms of the land registration system in 1862 and 1875, British parliament passed *the Land Transfer Act in 1897*, which made it abundantly clear that registered property rights applied to the registration of leaseholds as well as freeholds, and that such rights had the effect of challenging the statute of limitations, preventing the direct acquisition of conflicting interests in land through usurpation. The buyer in a real estate transaction only needed to examine the title deed and the instrument being registered, as opposed to the numerous documents required nowadays. This system laid the groundwork for the modernization of the land registration administration in the UK. Late in the 19th century, the land registry system was still of limited application, but by the beginning of the 20th century, there was a significant decline in land transactions due to the unwillingness of landowners in the English suburbs and countryside to accumulate wealth in order to avoid being taxed by the government. To ensure a reliable source of tax revenue, the British government increased its efforts to remove political barrier to the reform of the land administration. Therefore, the British Parliament passed *the Law of Property Act* in 1922, a bill to reform the land law of that time. Notwithstanding, the law did not take effect as expected, as it was absorbed and replaced by other newly enacted laws in 1925, such as *the Law of Property Act 1925*, *the Land Registration Act* and *the Administration of Estate Act*. These laws constituted the fundamental framework and set of rules for the modern British land administration system. *The Law of Property Act 1925* established a

compulsory registration system for land titles, i.e. the government declared which areas were to be subject to compulsory land titling, the registered title was the sole legal basis for the existence of a land interest, and the transfer of land was subject to a change in the title record. Land transfer was totally contingent on a modification to the official title record. In England and Wales, a uniform system of title registration was in place by the 1960s, and the vast majority of land in these two regions was registered. At this time, the dualistic structure of common law estates and land rights of *equity* was introduced to English real estate land rights. The land tenure institution almost eliminated all restrictions on the development and management of land, and the contents of adverse possession were divided into the realm of *equity* to ensure that the landowner managed the land adequately. Since the turn of the 21st century, approximately 75 percent of British land titles have been registered, the land registration institution about the titles further restricts the statute of limitations applicable to adverse possession. With the introduction of the land title registration system, the role of the statute of limitations in adverse possession is diminishing and the conditions for its application in the United Kingdom are becoming increasingly stringent.

3. Foundation And Development Of Land Administration Of Hong Kong

3.1 Land Laws and Institutions in Hong Kong during the British Colonial Period

After being defeated in the First Opium War in 1842, the Qing government signed *the Treaty of Nanking* with Britain, ceding the Hong Kong Island to Britain loyal family. Following the promulgation of *the Hong Kong Letters Patent 1843*, the British government began to formally exercise control over Hong Kong, marking the beginning of the British colonization of Hong Kong. In 1860, the Qing government and the British government signed the *Treaty of Peking*, which ceded the Kowloon Peninsula to Britain. In 1861, the British government issued the Order in Council, which applied the British land laws of Hong Kong Island to Kowloon. In the same year, Britain parliament issued the Order in Council, which extended Hong Kong Island's land laws to Kowloon. The land laws of the Qing Dynasty were no longer applicable, and the British Parliament had ordered the British Hong Kong Government to assume direct control. In an effort to maximize the interests from land transaction, the British Hong Kong Government granted long-term leases to all sectors of the society in order to collect land title transfer fees and rents as quickly as possible. From 1900 to 1904, when the New Territories was fully occupied by British army, the British Hong Kong Government, in the name of conducting a comprehensive land title survey, census and registration of land in the New Territories, forcibly collected all the land title certificates from the residents, and subsequently promulgated *the New Territories Land Court Ordinance 1900* as well as *the Lands Resumption Ordinance in 1911*, the change of originally privately-owned land into Crown land owned by the Government in a grandiose manner, resulting in the conversion of indigenous residents of the New Territories from the so-called "owners" to "*lessees*" of Crown land. Since then, the land administration of Hong Kong Island, Kowloon and the New Territories had basically been harmonized. The distinction among these three areas lied in the adoption of *the New Territories Ordinance in 1910*, which specifically provides for detailed regulations of land in the New Territories and recognizes through legislation the land rights and interests of the Chinese traditions and customs, as well as the indigenous inhabitants involved. *The Sino-British Joint Declaration* in 1984 further clarified that after the reunification in 1997, the Chinese Government would recognize all the land policies of Hong Kong (including the New Territories) that had existed during the British colonial era. It is worth mentioning that in 1843, the British Home Secretary emphasized to the British Hong Kong Government that land in Hong Kong could only be leased, not sold. All other land is *Leasehold*, with the exception of The Cathedral Church of Saint John the Evangelist in Central, Hong Kong Island, which was designated as the only Freehold land. In the modern British land administration, all land had been privatized with the exception of a small number of royal fiefs; landowners were permitted to use the land without any restrictions and are free to divide it. Since the British Crown conquered

Hong Kong as a colony, the British Hong Kong Government automatically became the absolute ruler of colony. The Governor of British Hong Kong exercised the representative sovereignty of the British Empire by granting land to the private sector for development and use through government auctions and tenders. This leasehold institution not only brought enormous benefits to the British Hong Kong Government, but also ensured that the British land property laws and the deed registration institution had been transplanted to Hong Kong largely, laying the groundwork for the establishment of a land title system in Hong Kong within the common law system.

The British deed registration system was introduced to Hong Kong in 1844, and *the Land Registration Ordinance* was subsequently enacted. Up to now, the land registration institution adheres to the deed registration established by *the Land Registration Ordinance* during British rule, i.e. the recording of land interests via the deeds stored in the Land Registry of British Hong Kong. Specifically, all the land property in Hong Kong must be created and transferred by using a government-issued deed, which means an official document signed, stamped and sealed by corresponding departments. In Hong Kong, the purpose of deed registration is to facilitate the retrospective the records rather than the institutionalization of titles in land transactions. The disadvantage of this system is that the Land Registry records could only indicate which deeds had been registered. The Registry could not guarantee the legislative of the registered deeds and was only responsible for disseminating information regarding land ownership. To circumvent the restrictions imposed by the domestic laws in the United Kingdom and to ensure the efficiency of land transactions, the British Hong Kong Government had to obtain the consent of the Privy Council of the United Kingdom frequently, which was the highest judicial authority. As a result, the Hong Kong courts adopted a more flexible approach of settling disputes on a case-by-case basis, like interpreting and applying the law flexibly in accordance with the actual circumstances.

3.2 The local characteristics of Hong Kong in Adverse Possession

Along with the common law and the law of equity, the law of Hong Kong recognizes "acquiring an interest in land by the expiration of the statute of limitations" as a method of acquiring an interest in landed property, which was similar to the English land laws as the parent law of land laws in Hong Kong. However, the Hong Kong judiciary has never systematically described the complete framework of adverse possession in the relevant legal provisions, particularly its "*empowering effect*" on squatters, as evidenced by the jurisprudence of judges in actual practice. This chapter will focus on the comparison between *the Limitation Ordinance* in Hong Kong and *the Limitation Act* in the United Kingdom in order to analyze the local characteristics of adverse possession in Hong Kong.

3.2.1 A statute of limitations for suits against the Government

Section 7 of *the Limitation Ordinance* in Hong Kong specifies two types of limitation periods. First, the limitation period applicable to the Government is regulated as 60 years, after which the Government cannot bring an action for resumption of land, and the subject could theoretically deprive the Government of its rights and interests in land. In contrast, there is no need to establish statute of limitations against the government or the crown in the United Kingdom. The ownership of the monarch of the British State is entirely nominal, and the Crown has no control over the specific ways in which land is used or traded, so there is no need to limit the personal interests of monarch. As the highest administrative body in the Special Administrative Region of China, the Government of Hong Kong has the actual possession of the land. Although the property right of the owner to use, benefit from, and transfer the land after receiving a land grant is not interfered with, the Government dominates the exercise of the land lease and the right to use the land. If the Government fails to effectively exercise its power within the limitation period, its land may be converted from government ownership to an adverse encroachment ownership, and the Government will lose its right of granting land absolutely. The government would lose the right to grant leases if it fails to exercise its authority within the prescribed time frame. These characteristics will be illustrated through the following examples.

3.2.2 Detailed provisions on the statute of limitations for litigants' acquisition of real and future rights

Section 8 of *the Limitation Ordinance*, the provision most frequently cited in Hong Kong court decisions, outlines the prerequisites for the creation of a land-based right of action. In the case of an action for the recovery of a land belonged to a deceased person, the right of action commences on the date of the person's death; and in the case of a person who acquires a title by conveyance, the limitation period for an action against a seller commences on the date of the conveyance. Section 9 of *the Limitation Ordinance* specifies that the statute of limitations for reversion of estate rights and residual estate rights does not commence until the prior interest has expired. Simultaneously, the Ordinance establishes a six-year regulation as the length of the period of limitation for residuary title holders varies according to the general limitation period minus the time remaining after the commencement of the squatter's encroachment to the time of the decedent's death, guaranteeing the litigant at least six years; and a similar rule applies in respect of the Government, with the limitation period being changed from 6 years to 60 years. In contrast, section 15 of the English Limitation Act only regulates future interests as part of the limitation provisions for restoration of title claims, and does not go into such detail as to include the point at which the limitation period begins to run.

3.2.3 The point of termination of the time limitations on adverse possession and the relevant effects

Under section 13 of *the Limitation Ordinance* in Hong Kong, the statute of limitations must be computed during the period of adverse possession, which automatically expires upon its interruption or extinction. In addition, Hong Kong law allows a second adverse possessor to acquire adverse possession from a previous adverse possessor while maintaining continuity of possession of the land: the second possessor may add the period of time during which the first one was in possession of the land to his own, and the total period of time satisfies the basic requirements for acquiring title. However, according to *the Limitation Act* in the United Kingdom, there is and should be only one appropriator applicable in adverse possession cases. If the owner of a property fails to file a lawsuit against the holder of an adverse right before the statute of limitations expires, his or her right of action and ownership of the land will expire.

3.3 The Conflict between land ordinances of Hong Kong and the Basic Law after the reunification to China

After the reunification of Hong Kong with China on July 1st, 1997, the Chinese Government, in accordance with the provisions of the Sino-British Joint Declaration and *the Basic Law*, essentially retained the previous land administration in Hong Kong and maintained it for 50 years, in addition to clearly vesting the land ownership and the paramountcy in the Government of the People's Republic of China and eliminating language and narratives applied in colonial era. Provisions in the Basic Law on the land administration of Hong Kong after the reunification include the following issues: (1). The principle of separation of land ownership and use remains unchanged. According to Article 7 of *the Basic Law*, all the land in HKSAR is owned by the Government of the People's Republic of China, which grants the Hong Kong Government the authority to exert the rights. Article 40 of the Basic Law stipulates that the Hong Kong Special Administrative Region shall protect the traditional rights and interests of the indigenous inhabitants of the New Territories, but not those of Hong Kong Island and Kowloon. (2). The land lease that was in effect prior to unification remains valid. Section 2 of Chapter V of *the Basic Law* is devoted to the provisions on land leases, stipulating that lessees will continue to enjoy the rights under the original land leases after the reunification, but they are required to pay annual rent to the HKSAR Government for the use of the land, and stipulating the administrative power to repossess land leases without a right of renewal. As is common knowledge, *the Basic Law* serves the same function as a constitution in Hong Kong. *The Basic Law* is the supreme law of many of existing laws as a matter in Hong Kong of course. However, the interpretation of the Basic Law is based on the local legal discourse of China Mainland. In accordance with Article 160

of the Basic Law, any contract, document or law in effect under the laws previously in force in Hong Kong that is in conflict with the Basic Law shall be deemed null and void. It is not clear from the legislation whether the meaning of *continuance* includes the renewal of a lease, since the existence of which has a fundamental effect on the right to acquire title to land in Hong Kong through adverse possession. The preceding reasons suggests that a conflict between the existing land laws in Hong Kong and the Basic Law is inevitable.

3.3.1 Arguments about land tenure and private property

In the case *Harvest Good Development LIMITED and Secretary for Justice and others*, since February 1961, the plaintiff *Mr Lee Shau Kee*, the legal representative of that enterprise, had his lawfully acquired land encroached by others for nearly 30 years. Although his claim for repossession of the land was upheld by the Court of Appeal previously, the judgment was ultimately reversed by the Privy Council of the United Kingdom (the highest court in British Hong Kong) in 1996, and there had been no litigation since then. In 2006, the plaintiff sued the Department of Justice of Hong Kong on the grounds that the 1996 judgment was contrary to the judicial interpretation of the Basic Law. He also claimed that Sections 7 and 17 of *the Limitation Ordinance* violated the protection of private property under Articles 6 and 105 of *the Basic Law*, and required the Supreme Court of Hong Kong to conduct a constitutional review of the Limitation Ordinance. In this case, there are two points of contention: (1). Did the Article 105 of *the Basic Law* recognize adverse possession as a deprivation of private property by administrative or judicial means? (2). Should adverse possession be considered a violation or even a deprivation of private lawful property as described in Article 6 of *the Basic Law*? Comparing this case to *J.A. Pye (Oxford) Limited v. United Kingdom*, the 1st chamber of the European Court of Human Rights ruled that adverse possession was in conflict with the property clause of *First Protocol of ECHR* as a superseding law for all member countries in Council of Europe, as it infringed the legal right of owner to peaceful enjoyment of possessions. If the logic of the Basic Law is applied to the cases of adverse possession in Hong Kong, the so-called possession and the concept of property are nearly identical; therefore, the judicial decision in this case directly contradicts the private property provisions of the Basic Law. In the context of common law, however, the purpose of adverse possession is not to deprive a person of his property, but rather to regulate the property rights attaching to land; therefore, the concept of property in the Basic Law is inapplicable to the land disputes in Hong Kong. In addition, as discussed in *5.1 Land Laws and Institutions in Hong Kong during the British Colonial Period*, the existing land registration records can only provide *prima facie* evidence of ownership and cannot establish the legal ownership relationship. Therefore, the contradiction between *the Basic Law* and the original land administration in Hong Kong cannot be resolved instantly.

3.3.2 Problems with the Government as the subject of litigation

As mentioned above, *the Basic Law* made it clear that land in Hong Kong belongs to the State (China), and *the Limitation Ordinance* stipulates that the Government must bring an action against a holder of a reversionary right within 60 years, after which it loses the right to sue the user of the land and its title to the land. *The Limitation Ordinance* was enacted under the British rule, and the practice of land laws in Hong Kong differs from that of the United Kingdom in that its land administration take lease hold as the key element of privately owned estates. In Hong Kong, property rights acquired through government leases are the "*highest*" property rights, the recipient of a land lease may utilize or transfer the property. While the 60-year limitation period for government land may appear to only apply to the right to use government land, it actually applies to state land ownership. Under the "*one country, two systems*" policy, this difference stems from the fact that the civil law system and the common law system interpret the relationship between real estate ownership differently. Since the ultimate ownership of land in Hong Kong is held by the Government of the People's Republic of China, the so-called official statute of limitations could jeopardize the Government's ownership, which is not only contrary to the interpretation of *the Basic Law*, but also creates the possibility of the loss of state-owned land. In addition, the existing statute of limitations provides no indication of

the potential consequences of adverse possession of government land. If an unauthorized occupier acquires government land after the 60-year limitation period, is he or she permitted to sell or convey it back to the government for a profit? Does he or she still possess Freehold rights to the property? The case study will later focus on this contradiction.

4. Introduction Of Case And Relevant Judicial Inerpretations

4.1 Cause and history of the case

This case involved a piece of land located at A Kung Ngan Village Road , Shau Kei Wan, Hong Kong Island (Leased Lot No. AKNL 28). The case covered a period of more than 100 years and is therefore quite representative for the purpose of this study. The plaintiff *Mr. Lee Bing-cheung* sued the Hong Kong Government in 2010 for the infringement of his interests as a landlord of AKNL28 on the basis of adverse possession and for damages under the doctrine of proprietary estoppel; The Defendant (*Secretary for Justice, Hong Kong Government*) denied the Plaintiff's claim, determined that the plaintiff's acts of habitation constituted trespassing on Government property, and found the plaintiff liable.

Over the course of more than a century, AKNL 28 had changed hands for three times, with the current plaintiff being the third owner. The British Hong Kong Government leased AKNL 28 and its buildings to *Cheung Yung Fat* (first owner) for a period of 999 years under the terms of the B.C.L. (the deed) dated on January 1st, 1894. The property at issue, House No. 29, also belonged to AKNL 28 and was recorded in the land lease. After the death of *Cheung Yung-fat*, AKNL 28 was granted to *Cheung Wan-po* (the second owner) in accordance with the terms of *the Deed of Partition of Titles* dated on June 18, 1937. *Cheung Wan Po* conveyed AKNL28 and the property and buildings on the land to the plaintiff in this case at the price of HKD\$700.00 per unit on April 1, 1952. In May 1952, the plaintiff hired a contractor to demolish the original structure and reconstruct a two-story concrete structure on the alienated tenement and Crown land, namely Nos. 29, 29A, and 29B on A Kung Ngan Village Road. Nos. 29 and 29A occupied approximately two-thirds of the total building site and were located within the boundaries of AKNL 28; No. 29B occupied approximately one-third of the total building site and was located on Crown land; therefore, No. 29B Room was the *Disputed House* for the purposes of this litigation. The Government claimed that the land under 29B was land that the Government had failed to lease out in a timely manner, and on January 29, 2010, it conducted a mandatory Clearance Action on Room 29B and had the right to forbid plaintiff from continuing to use the land. This litigation was directly caused by the direct administrative intervention of the Hong Kong government in the disputed land.

4.2 The outcome of the judgment and the judicial interpretation

The court's judgement revealed that the Hong Kong Government was aware that the plaintiff's Room 29B occupied government land prior to December 18, 1990, but no action was taken promptly to prevent the plaintiff from continuing to use Crown land. In addition, the Government conducted three geological surveys in 1990, 1992, and 1995 to confirm the ownership of the land under Room 29B. According to Section 7(1) of *the Limitation Ordinance, Cap. 347*, the Government's right of action had to be exercised between March 1, 1949 and February 28, 2009; however, the Government did not file the suit until the prescribed period had expired. Before the Government learned that Crown land was occupied, 19 years had passed. Not until October 29, 2009 did the Labour Department of HKSAR decide to post a Government Notice (No. DLO/HKE2407) in front of Room 29B and send a notification letter to the plaintiff and land tenants requiring them to vacate Room 29B by January 29, 2010. The Government also issued a notice to the plaintiff and the tenant *Chung Hon-ping*, requesting that they had to vacate Room 29B prior to the expiration of the allotted time. *Ms. Lee Wai Oy Vivien*, the second daughter of the plaintiff, informed the Labour Department that the inspector they had hired would complete the geographical survey within three working days and asked the

Government to extend the deadline for vacating the premises to March 15, 2010. She also hired a lawyer to write to the Hong Kong Government claiming that the plaintiff was entitled to the Crown land and able to build houses on it under the principles of adverse possession. Subsequently, on January 29, 2010, the Government dispatched personnel from the Lands Department to execute a Clearance Action against Room 29B, evicting the tenant of the land on the spot and seizing the restaurant he operated, while simultaneously revoking the plaintiff's right to use it. Obviously, this action violated the provisions of the Hong Kong land law regarding the power to reclaim land.

In the end, the judge ruled that the Government was not only required to return the land below Room 29B to the plaintiff, but also to pay the plaintiff HKD\$231,685 as the loss of rental income and business profits from January 29, 2010 to January 15, 2013 with interest at an annual rate of 8%. In addition, the Government was obligated to pay HKD\$9,510 per month in legitimate profits earned during the vacancy period of Room 29B. In addition, the judge viewed the Clearance Action carried out by the government in Room 29B as a violation of private property by the government in abuse of public power. The court ordered the Defendant (the Government) to pay compensation for the damages caused by the trespass, and prohibited the Government from regaining possession of the land before the midnight of December 31, 2892.

If the plaintiff wishes to occupy the land based on the legal doctrine of adverse possession, he must fulfill and prove enough evidence for the following three conditions: First, the length of time the trespasser has occupied the land; the trespasser must have resided on Crown land for sixty years or the property must be built there. Second, the trespasser must prove that he or she is in possession of the land, thereby assuming the responsibility of the original owner. The third condition is to demonstrate that the adverse possessor has a clear intent to possess the land or affiliated property (*animus possidendi*). Based on the past behavior of adverse possessor and relevant evidence, the court will determine whether the usurper has the intent to own or possess the land in question, and will take this as a significant evaluation in determining whether the plaintiff can obtain the land property right through the "*inverse right of usurpation*". Specifically, the conditions for the success of the plaintiff in this case could be interpreted as follows:

The analysis begins with the statute of limitations in the law and the right of action of the Government. According to Sections 7 and 17 of the Limitation Ordinance (Cap. 347), the limitation period for land claims initiated by the government is sixty years. If the 60-year period expires, the Government as owner loses its right to sue for resumption of the land without having to satisfy any conditions, and the occupier will acquire the land. The plaintiffs resided on the disputed property with their family and tenant *Chung Hon-ping* from February 1, 1949 to January 29, 2010, the exact 60-year period required by law. Since the Government did nothing to prevent the resumption of the land during this time, it automatically forfeited its right to file a lawsuit for resumption of the land. Therefore, the plaintiffs could retain ownership of the land until the end of the lease term.

From the perspective of factual possession, the plaintiff did not have the subjective intent of encroaching on government land when signing the land transaction deed and was unclear about the nature of the land to which the property (Room 29B) belonged; consequently, the plaintiff had completed factual possession of the land in question. The actions of possession involved both leasing and purchasing the land, and the plaintiff had been using and managing the property under a lease arrangement since 1949. The plaintiff and his family relocated to the premises in the spring of 1949 to escape the war in mainland of China and to renovate the leased property. The plaintiff alleged that in or about February 1949, the previous owner expressly leased to the plaintiff the entire building at A Kung Ngan Village Road, as recorded in the original rental contract, as well as left a rent receipt evidencing that the previous owner had received the rent of HKD\$8 and *the Lease Premium* of HKD\$500 from the plaintiff in 1949. Furthermore, the plaintiff and the previous owner discussed the purchase of the leasehold land in late 1951 and early 1952. On April 1, 1952, the agreement was finalized and the transaction was completed for HK\$700 per unit. On May 15, 1952, the plaintiff in this case entered into a written agreement with the building company to demolish the house constructed by the previous owner and to rebuild the structure on the same site as the original structure

for a total of HK\$18,900, the new structure to include Nos. 29, 29A, and 29B. The Court determined, following a site investigation, that the location of Room 29B had been occupied by its original owners well before the outbreak of World War II. However, it was still unclear to the plaintiff whether Room 29B was situated on unleased government land and whether the previous owner had transferred to him the right to use the land. In order to confirm the exact location of Room 29B, the expert of the court retained by the court reconfirmed the condition of the land in question and its surroundings based on aerial photographs Nos. 6091 and 6092 taken by the British Air Force from an altitude of 8,400 feet on May 8, 1949, and determined that possession had been established. Therefore, the plaintiff had satisfied the requirements for adverse possession enforcement.

From the standpoint of proving whether or not the adverse possessor intended to take possession of the land, the existence of intent could typically be established only if the plaintiff interrogated by a judicial officer, demonstrates the behaviors carried out by he or she before consistent with that kind of intent. In the case *LEE BING CHEUNG (李炳章) and SECRETARY FOR JUSTICE*, firstly, the trespasser intended to seek exclusive control for his own benefit, i.e. the intention to take possession of the land to the exclusion of all other persons, including the rightful owner at the time, and the plaintiff's complaint to the Government about the loss of rental income as a result of the administrative intervention reflected his management of the land at issue. Second, the trial judge determined that the mistaken belief of the plaintiff that he owned the land and property could still constitute; in the absence of a clear understanding of the facts, the plaintiff had rented Room 29B to *Chung Hon-ping* on September 1, 2008, and that the two people had signed a lease agreement stating that *Chung Hon-ping* had the right to use the room for a catering business from September 1, 2008 to August 31, 2011, and that Chung would pay the plaintiff HKD\$1,500 per month. Even if the user of land had changed due to the lease, it would still be possible to conclude that the plaintiff had fulfilled its obligation to operate the land.

Notably, the expiration date listed on the lease issued by the British Hong Kong Government in 1894 corresponds to the expiration date of the judge-ordered right of use in the case mentioned above. In 1848, under pressure from British merchants, the British Hong Kong Government was compelled to apply to the British Government to change the term of the land lease from 75 years to 999 years, symbolizing that those who participated in the land auction could enjoy something akin to "freehold" rights. In the subsequent fifty years, 999-year leases of land on Hong Kong Island, including the island and the waterfront, were issued. The British Hong Kong Government did not cease issuing 999-year leases until 1898, but the leases that had already been issued were still valid. In this instance, AKNL28 was found in the Eastern District of Hong Kong Island. The 999-year lease was used as the basis for calculation when the land was auctioned off by the British Hong Kong Government to the first lessee in this case on January 1, 1894, so according to the Judge, the plaintiff's right of dominion over the land here should have expired on December 31, 2892. This also demonstrates that Hong Kong courts continue to prioritize the customary use of land when resolving land disputes.

4.3 Analysis and further cogitation

Due to the failure of the government agency to reclaim the Crown land in a timely manner, the plaintiff in this case was able to use the land for an extended period of time. The outcome of the case leaves unanswered questions: Will the title become freehold laid upon transfer? Can the government use the Crown Lands Resumption Ordinance to resume the land forcibly? The judge did not answer these questions explicitly in the judgement, but merely denied the right of action of the Government under the statute of limitations, thereby allowing the plaintiffs to take possession of the land indefinitely in disguise. The outcome of this case demonstrates that despite the fact that the statute of limitations for government land is 60 years and it is extremely difficult for the encroacher to prove encroachment, it is still difficult to eliminate any potential encroachment on the right. The Hong Kong government, which is a symbol of regional power and has the functions of land lease as well as the management of administrative organs, cannot be equated with the civil capacity of ordinary cases; consequently, the use of traditional civil litigation thinking to deal with the government as the subject

of litigation in land disputes will be fraught with many challenges. Since the Basic Law and *the Land (Miscellaneous Provisions) Ordinance* already addressed the relevant issues, it is unnecessary for the Government to enact additional legislation in this area.

To the HKSAR Government, the so-called 60-year statute of limitations period has become null and void. As discussed in Chapter 4.2 *The historical changes of the adverse possession system in the United Kingdom*, since the land title registration system can effectively restrict the scope of application of the statute of limitations on adverse possession, the most effective solution to the problem of adverse possession in Hong Kong is to establish and improve a modernized land title registration system by learning from the experience of the United Kingdom. With the full implementation of land title registration system in the United Kingdom in the early of 21st century, the HKSAR Government hopes to follow the progression of the land registration system in the United Kingdom to maintain the normal pattern of transactions as it used to be without abolishing the original land laws. All the same, unlike the United Kingdom which started its gradual reform in the early 20th century, the Legislative Council of HKSAR did not draft *the Land Titles Ordinance* so as to replace the LTRS with a title registration system until 2004. Despite being enacted 19 years ago, *the Land Titles Ordinance* has not yet taken effect due to problems with administrative procedures. Actually, it was unrealistic to repeal *the Limitation Ordinance* outright and only a brand-new land title registration institution could effectively limit the scope of application of adverse possession. On a long view, this strategy will be beneficial in preserving the rights about private property and interests of people while upholding the basic functions of the Government, as well as enabling the effective interface between the current land administration of Hong Kong and the supreme law.

5. Conclusion

Every system arises and evolves not only because of unique historical circumstances, but also due to the necessity of its application. As a statute of limitations, adverse possession is constantly evolving in the common law system, and its meaning is continuously changing in the context of the modernization of the land system in the region where it is located. Additionally, the judiciary has amassed a wealth of experience in resolving a vast array of practical issues. When the system was transplanted to Hong Kong, adverse possession was introduced based on the framework of the common law system, to which the unique characteristics of Hong Kong were added. As a result, the adverse possession system continues to play a significant role in Hong Kong. Even though there are still a great deal of problems in the current judicial practice, the adverse possession institution in Hong Kong is relatively enduring. The construction of a system is the result of a comprehensive evaluation of the needs and interests of various subjects; however, there is no perfect law or institution. When considering the construction of a system, legislators should, on the one hand, consider comprehensively whether it has the legal source and framework for the application of the system; on the other hand, they should consider from the perspective of solving practical problems, whether it can play the expected role after its establishment or solve the problems that were difficult to solve by the original law or system. Simultaneously, the new system must also fully consider its potential negative effects: whether the new system will disrupt the original, relatively stable mechanism, whether new problems will arise as a result, or even whether it will have catastrophic long-term effects.

In the Sino-British Joint Declaration, the deadline for "maintaining the previous land system in Hong Kong unchanged for 50 years" is approaching. The majority of land leases issued prior to the reunification of Hong Kong will be expired after 2047, and many Hong Kong residents are concerned that the policies of the Chinese government after 2047 will drastically alter the original land administration in Hong Kong, thereby negatively impacting their private property. The Article 123 of *the Basic Law* stated, "where leases of land without a right of renewal expire after the establishment of the Hong Kong Special Administrative Region, they shall be dealt with in accordance with laws

and policies formulated by the Region on its own". Due to the frequent policy shifts of the Chinese Government and the persistent problem of executive interference in the administration of justice in China, the Chinese Government would not be able to win the trust and recognition of the majority of Hong Kong residents even if it provided such an assurance. The reason why the Chinese Government allowed the retention of previous laws in Hong Kong is to provide a buffer period for guiding the integration of the existing social system in HKSAR with the mainland of China, so as to maintain and strengthen the status quo of national unity and territorial integrity. In conclusion, it is possible that the conditions of application and legal interpretation of adverse possession will continue to change, and with time, the integration with the Chinese domestic legal system will be realized in the future.

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