

Legal Servitude of Passage: An Economic Analysis

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Abstract

In the Taiwan Civil Code, six articles (779, 786-789, and 854) stipulate legal servitude of passage. Four of them address the access problem for landlocked land, whereas the other deals with drainage work that has to pass through adjacent land and “incidental actions” by the owner of the dominant land. Generally, under certain circumstances, the Taiwan Civil Code prescribes that a landowner in need (often because of the landlocked nature of the plot) may use an adjacent plot, as long as the use is necessary and causes the least damage to the owner of the adjacent plot, who will be compensated by the landowner.

Using economic analysis of law, this article examines the efficiency of the above stipulations, and makes the following claims. First, a statute-prescribed servitude of passage is necessary to reduce the asymmetrical bargaining power the neighbor has vis-à-vis the landowner. Second, the legal servitude of passage is available in only certain circumstances to make sure that the social benefit of passage is high. The necessity requirement can further ensure the social benefit of passage is larger than the social cost. In addition, the necessity requirement should be interpreted to prescribe that passage be set at a level where social benefit is larger than (rather than equal to) social cost, because the court can at best appraise the fair market value of the plot used for passage, but fair market value is lower than economic value, the true loss of the neighbor. A sub-optimal passage minimizes the neighbor’s loss and at the same time reduces the transaction cost enough to pave the way for future voluntary transactions between the two parties, which generally increases efficiency. Third, the least damage rule is one of the

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four prototypical rules and is not necessarily the most efficient. Sometimes, the neighbor-name-it rule is more efficient. Nevertheless, overall speaking, the least damage rule has enough efficient properties to be kept. Fourth, from the ex ante viewpoint, the legal servitude of passage doctrines should not apply to voluntary landlocked land. Finally, the doctrine that is called “statutory easement” in the U.S. makes economic sense, because it induces the relevant parties to make arrangement of passage beforehand and internalize the cost of passage.

Keywords: legal servitude of passage, landlocked land, ex ante viewpoint, least damage, necessity, single owner, transaction costs, normative Coase theorem, normative Hobbes theorem, liability rule