Manhattan, and expressing some surprise that so many lost items get turned in, even though the finders can claim no reward, nor do they get unclaimed goods, which go to charity. Or consider a letter to the editor by Greg Smithsimon, published in the N.Y. Times, Mar. 25, 2007. Students in Smithsimon's urban studies course at Barnard College conducted an experiment; they dropped wallets all over New York City to see if finders returned them; "in 132 drops from the Bronx to Brooklyn, the wallet was stolen only two times." And the two that weren't returned? They had been "taken during drops made on the tony Upper East Side, from blocks where median family income is $126,000 per year. Perhaps what goes around doesn't come around."

B. Acquisition by Adverse Possession

This section continues the inquiry begun in the last, on finders. Something is owned by *A*; subsequently, and without *A*'s consent, it comes into the possession of *B*. *B* might become the thing's owner; short of that, *B* still has some rights. But, again, when is *B* in "possession," and why is *B*'s possession — which might be openly adverse to the claims of *A* — even recognized by the legal system? These are exactly the questions considered in the last section, examined now in a new setting.

1. The Theory and Elements of Adverse Possession

Powell on Real Property §91.01
(Michael A. Wolf gen. ed. 2009)

Every American jurisdiction has one or more statutes of limitations that fix the period of time beyond which the owner of land can no longer bring an action, or undertake self-help, for the recovery of land from another person in possession. These statutes of limitations differ substantially in the duration of the established periods, in provisions for extending the normally operative period, and in other particulars. These statutes are complemented and amplified by a large body of case law that elaborates on the kind of possession by another that is sufficient to cause the statutory period to begin to run, and to continue running, against the true owner. Thus, the law of adverse possession is a synthesis of statutory and decisional law.

Statutes of limitations have a long history in Anglo-American law, extending back beyond the thirteenth century. In a 1275 statute, the practice began of naming past events, beyond which no suitor in an action affecting land could search and retrieve evidence supporting title. This permitted recent seisin, even if tortiously acquired, to become protected ownership. As time passed, and as the

historical events named in the statute receded into antiquity, this kind of statute lost its usefulness. A statute of 1540 adopted the more modern procedure of stipulating a period of years within which various actions had to be commenced by the real property owner. This type of statute reached its culmination in a 1623 version, which furnished the pattern for many American enactments.[8] . . .

Adverse possession functions as a method of transferring interests in land without the consent of the prior owner, and even in spite of the dissent of such owners. It rests upon social judgments that there should be a restricted duration for the assertion of "aging claims," and that the passage of a reasonable time period should assure security to a person claiming to be an owner. The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment (or other action for possession of real property) by the record owner would be barred by the statute of limitations.

Henry W. Ballantine, Title by Adverse Possession

32 Harv. L. Rev. 135 (1918)

Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

> For true it is, that neither fraud nor might
> Can make a title where there wanteth right.[9]

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

8. 21 Jac. I, Ch. 16, §§1, 2 (1623): "For quieting of men's estates and avoiding of suits [described types of action] shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; . . . and that no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right of title which shall hereafter first descend or accrue to the same, and in default thereof, such persons, so not entering and their heirs, shall be utterly excluded and disabled from such entry after to be made. . . ."

9. Quoted in Altham's Case, 8 Coke Rep. 153, 77 Engl. reprint, 707.

Oliver Wendell Holmes, The Path of the Law

10 Harv. L. Rev. 457, 476-477 (1897)

Let me now give an example to show the practical importance, for the decision of actual cases, of understanding the reasons of the law, by taking an example from rules which, so far as I know, never have been explained or theorized about in any adequate way. I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation. Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example. . . .

I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

NOTES AND QUESTIONS

1. What do you make of the passage from Oliver Wendell Holmes (written a few years before he joined the U.S. Supreme Court)? Does it suggest that adverse possession is motivated by economic concerns, or psychological ones, or moral ones? As it happens, each view finds some support. See, e.g., Richard A. Posner, Economic Analysis of Law 78-79 (7th ed. 2007) (Holmes was suggesting an economic explanation, based on diminishing marginal utility of income); Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 Chi.-Kent L. Rev. 23, 39 (1989) (Holmes "is more faithfully interpreted as anticipating (in a primitive way)" much later developments in cognitive psychology — in particular, prospect theory, which holds in part that people regard loss of an asset in hand as more significant than forgoing

3. Adverse Possession of Chattels

O'Keeffe v. Snyder

Supreme Court of New Jersey, 1980
416 A.2d 862

POLLOCK, J. This is an appeal from an order of the Appellate Division granting summary judgment to plaintiff, Georgia O'Keeffe, against defendant, Barry Snyder, d/b/a Princeton Gallery of Fine Arts, for replevin of three small pictures painted by O'Keeffe. In her complaint, filed in March, 1976, O'Keeffe alleged she was the owner of the paintings and that they were stolen from a New York art gallery in 1946. Snyder asserted he was a purchaser for value of the paintings, he had title by adverse possession, and O'Keeffe's action was barred by the expiration of the six-year period of limitations . . . pertaining to an action in replevin. Snyder impleaded third party defendant, Ulrich A. Frank, from whom Snyder purchased the paintings in 1975 for $35,000.

The trial court granted summary judgment for Snyder on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft. The Appellate Division reversed and entered judgment for O'Keeffe. A majority of that court concluded that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. Consequently, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.

. . . We reverse and remand the matter for a plenary hearing in accordance with this opinion.

The record, limited to pleadings, affidavits, answers to interrogatories, and depositions, is fraught with factual conflict. Apart from the creation of the paintings by O'Keeffe and their discovery in Snyder's gallery in 1976, the parties agree on little else.

O'Keeffe contended the paintings were stolen in 1946 from a gallery, An American Place. The gallery was operated by her late husband, the famous photographer Alfred Stieglitz.

An American Place was a cooperative undertaking of O'Keeffe and some other American artists identified by her as Marin, Hardin, Dove, Andema, and Stevens. In 1946, Stieglitz arranged an exhibit which included an O'Keeffe painting, identified as Cliffs. According to O'Keeffe, one day in March, 1946, she and Stieglitz discovered Cliffs was missing from the wall of the exhibit. O'Keeffe estimates the value of the painting at the time of the alleged theft to have been about $150.

About two weeks later, O'Keeffe noticed that two other paintings, Seaweed and Fragments, were missing from a storage room at An American Place. She did not tell anyone, even Stieglitz, about the missing paintings, since she did not want to upset him.

Before the date when O'Keeffe discovered the disappearance of Seaweed, she had already sold it (apparently for a string of amber beads) to a Mrs. Weiner, now deceased. Following the grant of the motion for summary judgment by the trial court in favor of Snyder, O'Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning to O'Keeffe their interest in the sale.

O'Keeffe testified on depositions that at about the same time as the disappearance of her paintings, 12 or 13 miniature paintings by Marin also were stolen from An American Place. According to O'Keeffe, a man named Estrick took the Marin paintings and "maybe a few other things." Estrick distributed the Marin paintings to members of the theater world who, when confronted by Stieglitz, returned them. However, neither Stieglitz nor O'Keeffe confronted Estrick with the loss of any of the O'Keeffe paintings.

There was no evidence of a break and entry at An American Place on the dates when O'Keeffe discovered the disappearance of her paintings. Neither Stieglitz nor O'Keeffe reported them missing to the New York Police Department or any other law enforcement agency. Apparently the paintings were uninsured, and O'Keeffe did not seek reimbursement from an insurance company. Similarly, neither O'Keeffe nor Stieglitz advertised the loss of the paintings in Art News or any other publication. Nonetheless, they discussed it with associates in the art world and later O'Keeffe mentioned the loss to the director of the Art Institute of Chicago, but she did not ask him to do anything because "it wouldn't have been my way." O'Keeffe does not contend that Frank or Snyder had actual knowledge of the alleged theft.

Stieglitz died in the summer of 1946, and O'Keeffe explains she did not pursue her efforts to locate the paintings because she was settling his estate. In 1947, she retained the services of Doris Bry to help settle the estate. Bry urged O'Keeffe to report the loss of the paintings, but O'Keeffe declined because "they never got anything back by reporting it." Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. The record does not indicate whether such a registry existed at the time the paintings disappeared.

In September, 1975, O'Keeffe learned that the paintings were in the Andrew Crispo Gallery in New York on consignment from Bernard Danenberg Galleries. On February 11, 1976, O'Keeffe discovered that Ulrich A. Frank had sold the paintings to Barry Snyder, d/b/a Princeton Gallery of Fine Art. She demanded their return and, following Snyder's refusal, instituted this action for replevin.

Frank traces his possession of the paintings to his father, Dr. Frank, who died in 1968. He claims there is a family relationship by marriage between his family and the Stieglitz family, a contention that O'Keeffe disputes. Frank does not know how his father acquired the paintings, but he recalls seeing them in his father's apartment in New Hampshire as early as 1941-1943, a period that precedes the alleged theft. Consequently, Frank's factual contentions are inconsistent with O'Keeffe's allegation of theft. Until 1965, Dr. Frank occasionally lent the paintings to Ulrich Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Ulrich Frank, who kept them in his residences in Yardley,

Pennsylvania and Princeton, New Jersey. In 1968, he exhibited anonymously Cliffs and Fragments in a one day art show in the Jewish Community Center in Trenton. All of these events precede O'Keeffe's listing of the paintings as stolen with the Art Dealers Association of America, Inc. in 1972.

Frank claims continuous possession of the paintings through his father for over thirty years and admits selling the paintings to Snyder. Snyder and Frank do not trace their provenance, or history of possession of the paintings, back to O'Keeffe.

As indicated, Snyder moved for summary judgment on the theory that O'Keeffe's action was barred by the statute of limitations and title had vested in Frank by adverse possession. For purposes of his motion, Snyder conceded that the paintings had been stolen. On her cross motion, O'Keeffe urged that the paintings were stolen, the statute of limitations had not run, and title to the paintings remained in her. . . .

The Appellate Division accepted O'Keeffe's contention that the paintings had been stolen. However, in his deposition, Ulrich Frank traces possession of the paintings to his father in the early 1940s, a date that precedes the alleged theft by several years. The factual dispute about the loss of the paintings by O'Keeffe and their acquisition by Frank, as well as the other subsequently described factual issues, warrant a remand for a plenary hearing. . . .

Without purporting to limit the scope of the trial, other factual issues include whether . . . the paintings were not stolen but sold, lent, consigned, or given by Stieglitz to Dr. Frank or someone else without O'Keeffe's knowledge before he died; and [whether] there was any business or family relationship between Stieglitz and Dr. Frank so that the original possession of the paintings by the Frank family may have been under claim of right.

On the limited record before us, we cannot determine now who has title to the paintings. The determination will depend on the evidence adduced at trial. Nonetheless, we believe it may aid the trial court and the parties to resolve questions of law that may become relevant at trial.

Our discussion begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft. Proof of theft would advance O'Keeffe's right to possession of the paintings absent other considerations such as expiration of the statute of limitations.

Another issue that may become relevant at trial is whether Frank or his father acquired a "voidable title" to the paintings under N.J.S.A. 12A:2-403(1). That section, part of the Uniform Commercial Code (U.C.C.),[30] does not change the basic principle that a mere possessor cannot transfer good title. Nonetheless, the

30. Uniform Commercial Code §2-403 provides:

§2-403. *Power to Transfer; Good Faith Purchase of Goods; "Entrusting."*

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A per-

Georgia O'Keeffe
Seaweed (1926)
Collection of Juan Hamilton

U.C.C. permits a person with voidable title to transfer good title to a good faith purchaser for value in certain circumstances. If the facts developed at trial merit application of that section, then Frank may have transferred good title to Snyder, thereby providing a defense to O'Keeffe's action. . . .

On this appeal, the critical legal question is when O'Keeffe's cause of action accrued. The fulcrum on which the outcome turns is the statute of limitations . . . , which provides that an action for replevin of goods or chattels must be commenced within six years after the accrual of the cause of action.

The trial court found that O'Keeffe's cause of action accrued on the date of the alleged theft, March, 1946, and concluded that her action was barred. The Appellate Division found that an action might have accrued more than six years before the date of suit if possession by the defendant or his predecessors satisfied the elements of adverse possession. As indicated, the Appellate Division concluded that Snyder had not established those elements and that the O'Keeffe action was not barred by the statute of limitations. . . .

The purpose of a statute of limitations is to "stimulate to activity and punish negligence" and "promote repose by giving security and stability to human affairs." Wood v. Carpenter, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879). A statute of limitations achieves those purposes by barring a cause of action after the statutory period. In certain instances, this Court has ruled that the literal language of a statute of limitations should yield to other considerations.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law. . . .

[W]e conclude that the discovery rule applies to an action for replevin of a painting. . . . O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings. . . .

In determining whether O'Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O'Keeffe used due diligence to recover the paintings at the time of

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son with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which was later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale," or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law. — Eds.

the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. . . .

To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous. . . . There is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. . . . For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes. . . .

The problem is serious. According to an affidavit submitted in this matter by the president of the International Foundation for Art Research, there has been an "explosion in art thefts" and there is a "worldwide phenomenon of art theft which has reached epidemic proportions."

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer

be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.

For example, under the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.

Properly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin. . . .

It is consistent also with the law of replevin as it has developed apart from the discovery rule. In an action for replevin, the period of limitations ordinarily will run against the owner of lost or stolen property from the time of the wrongful taking, absent fraud or concealment. Where the chattel is fraudulently concealed, the general rule is that the statute is tolled. . . .

A purchaser from a private party would be well-advised to inquire whether a work of art has been reported as lost or stolen. However, a bona fide purchaser who purchases in the ordinary course of business a painting entrusted to an art dealer should be able to acquire good title against the true owner. Under the U.C.C. entrusting possession of goods to a merchant who deals in that kind of goods gives the merchant the power to transfer all the rights of the entruster to a buyer in the ordinary course of business. In a transaction under that statute, a merchant may vest good title in the buyer as against the original owner. The interplay between the statute of limitations as modified by the discovery rule and the U.C.C. should encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's ability to recover stolen art works.

The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. . . .

By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.

Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to

prove the elements of adverse possession. Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations. . . .

Read literally, the effect of the expiration of the statute of limitations . . . is to bar an action such as replevin. The statute does not speak of divesting the original owner of title. By its terms the statute cuts off the remedy, but not the right of title. Nonetheless, the effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor. . . . Before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. The only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes. . . .

We next consider the effect of transfers of a chattel from one possessor to another during the period of limitation under the discovery rule. Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner. . . .

For the purpose of evaluating the due diligence of an owner, the dispossession of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.

We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. At common law, apart from the statute of limitations, a subsequent transfer of a converted chattel was considered to be a separate act of conversion. . . . Adoption of that alternative would tend to undermine the purpose of the statute in quieting titles and protecting against stale claims.

The majority and better view is to permit tacking, the accumulation of consecutive periods of possession by parties in privity with each other. . . .

We reverse the judgment of the Appellate Division in favor of O'Keeffe and remand the matter for trial in accordance with this opinion.

[Dissenting opinions by Justice Sullivan and Justice Handler are omitted.]

A NOTE ON GEORGIA O'KEEFFE

Georgia O'Keeffe, born on a dairy farm in 1887 in Sun Prairie, Wisconsin, grew up in the rural Midwest. After studying art under various teachers in Chicago and New York, she decided to paint shapes that, she claimed, were "in [her] head." In 1915 she sent some of her drawings — of budding and organic shapes, reflecting an intense feminine sensibility — to a friend in New York, admonishing her to show them to no one. The friend, disregarding O'Keeffe's wishes, showed them to Alfred Stieglitz, the noted New York photographer and gallery owner. Upon seeing the drawings, Stieglitz remarked, "At last, a woman on paper," and promptly displayed them in his gallery. When, shortly thereafter, O'Keeffe came to New York and learned of this, she was furious. She rushed to the gallery and demanded that her private work, shown without her permission, be taken down. Stieglitz refused. To keep her work from being seen, he told her, would be like depriving the world of a child about to be born (with Stieglitz as midwife). The drawings remained on the wall, provoking much controversy about O'Keeffe's sexual symbolism, which she denied was there.

Stieglitz, obsessed with this woman 20 years his junior, soon left his wife and daughter and moved in with her. "He photographed me until I was crazy," O'Keeffe — with a mischievous chuckle — recalled in her nineties. He photographed every square inch of O'Keeffe nude, then exhibited the pictures in a show, creating a scandal and bringing O'Keeffe instant fame.

Soon thereafter, O'Keeffe began to produce many of her spectacular flower paintings, which critics once again found full of Freudian symbolism. O'Keeffe replied to them:

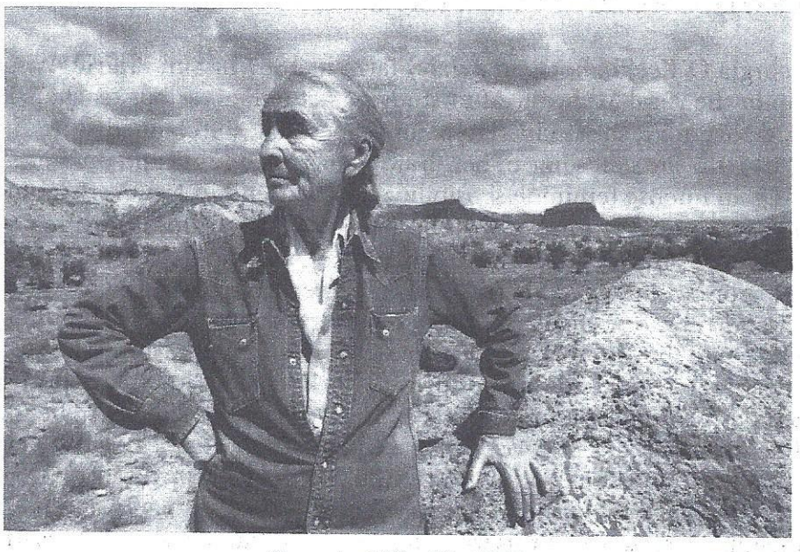
> Well — I made you take time to look at what I saw and when you took time to really notice my flower you hung all your own associations with flowers on my flower and you write about my flower as if I think and see what you think and see of the flower — and I don't.[31]

O'Keeffe, now established in the New York art world, became the embodiment of Stieglitz's belief that women could turn out art as powerful as any man's.

O'Keeffe and Stieglitz married in 1924. When, a few years later, Stieglitz entered into a liaison with a woman half O'Keeffe's age, and put her in charge of his gallery, O'Keeffe — needing space — began spending long summers in New Mexico. She found that New Mexico was where she belonged, but she could not leave Stieglitz, to whom she remained intensely devoted. She returned to New York every fall to renew her bond with him, though she never answered amiably when addressed as "Mrs. Stieglitz."

When Stieglitz died in 1946, at age 82, O'Keeffe first booted his lover out of his gallery, and then she moved to New Mexico for good. In the isolated Penitente village of Abiquiu (pop. 150), on a rise overlooking the green Chama River valley

31. Or O'Keeffe might have replied — as Freud, who loved cigars, is reputed to have said — "Sometimes a cigar is just a cigar."



Georgia O'Keeffe, 1968
© Arnold Newman/Getty Images

and barren pink and white and ochre hills beyond, she had many years before found a roofless adobe building with a door she "just had to paint" and had to own. Now, after lengthy negotiations, including long afternoon visits by the priests, O'Keeffe was able to wrest title away from the local Catholic church. O'Keeffe fixed up the adobe, fitted it with Zenlike simplicity, walled it in with a garden and orchard, and lived there, mostly alone, with some chow dogs she described as "good biters," until her death in 1986 at age 99.

After her move to Abiquiu, the abstract imagery in O'Keeffe's paintings gradually shifted to doors and patios and to the bleached mountains and blue skies of New Mexico. Although she maintained valuable ties to the New York art world, O'Keeffe cultivated a persona of a free-spirited and reclusive artist painting a vast, sere land that, to her, was not empty but full of shapes and colors and vibrant life. She used the land, captured it on her canvases, and, like the Southwest Indians before her, left it unscathed. (Is an artist the only sort of person who can capture property while leaving it for others?) In her old age, Georgia O'Keeffe became an icon of the American Southwest, celebrated by famous photographers who made the pilgrimage to Abiquiu.

Though she became what Stieglitz had envisioned — the first great American woman artist — Georgia O'Keeffe never liked to be called a *woman* artist. She thought it implied that her art was intuitive rather than intellectual and dismissed her from serious consideration. Yet she took immense satisfaction in knowing that she was one of the richest self-made women in America and in having made her fortune in a field traditionally dominated by males (unlike Elizabeth Arden and Helena Rubenstein). When O'Keeffe died she left most of her estate of $70 million (comprised largely of 400 works of art she had created)

to a handsome young man by the name of Juan Hamilton, who, when O'Keeffe was 86, knocked on her door at Abiquiu looking for work. Hamilton bore an uncanny resemblance to the youthful Stieglitz. He moved in with O'Keeffe soon after being admitted at her door, becoming her indispensable companion and, some say, lover. When her old friend of many years, the mother of Harvard's former president Derek Bok, called Hamilton a fortune hunter, O'Keeffe icily rebuffed her and cut Harvard out of her will.

O'Keeffe left her letters, and Stieglitz's, to the Beinecke Library at Yale. The outer envelope of one packet of Alfred's accusatory letters to his first wife, written shortly after he had abandoned her for Georgia, bears a note by O'Keeffe in the shaky handwriting of old age: "Art is a wicked thing. It is what we are."

See Benita Eisler, O'Keeffe & Stieglitz, An American Romance (1991); Roxana Robinson, Georgia O'Keeffe: A Life (1989); the videocassette, Portrait of an Artist: Georgia O'Keeffe (Home Vision, originally produced for the series Women in Art, WNET-TV, New York 1977). For details about O'Keeffe's estate and its estate tax valuation, see Estate of O'Keeffe v. Commissioner, T.C. Memo 1992-210, 63 T.C. Mem. (CCH) 2699 (1992). A Georgia O'Keeffe painting sold at auction at Christie's in 2001 for $6.1 million.

NOTES AND QUESTIONS

1. Back to the case of O'Keeffe v. Snyder. The parties subsequently settled before a retrial. The paintings were divided. O'Keeffe took "Seaweed," Snyder took another painting, and the third was sold at auction at Sotheby's to pay lawyers' bills.

2. Note that the opinion in *O'Keeffe* permits tacking of periods of possession, but — it appears — only so long as the possessors are in privity with each other. See page 158. Given the focus in *O'Keeffe* on the conduct of the owner, and given that the "important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner," why is privity required?

For an analysis of O'Keeffe v. Snyder, see Paula A. Franzese, "Georgia on My Mind" — Reflections on *O'Keeffe v. Snyder*, 9 Seton Hall L. Rev. 1, 14-15 (1989).

3. At least one state, California, has adopted the discovery rule by statute. See Cal. Civ. Proc. Code §338(c) (West 2009). But New York, probably the site of most purchases of major works of art in the United States, has rejected it on the ground that it provides insufficient protection for owners of stolen artwork. See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991). The *Guggenheim* case held that the statute of limitations for replevin does not begin to run in favor of a good-faith purchaser until the true owner makes a demand for return and the good-faith purchaser refuses. Until demand is made, possession of the stolen property by a good-faith purchaser for value is not considered wrongful. The court thought it inappropriate to put a duty of reasonable diligence on the true

owner, reasoning that such an approach would encourage illicit trafficking in stolen art by putting the burden on the true owner to demonstrate that it had undertaken a reasonable search. Moreover, the court believed that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all the variables in a particular situation and not unduly burden the true owner. The better rule, the court said, is to protect true owners by requiring potential purchasers to investigate the provenance of works of art. The true owner's diligence remains relevant, however, in that unreasonable delay, if it works to the prejudice of the good-faith purchaser, might permit the latter to assert the equitable defense of laches.

See generally Patricia Youngblood Reyhan, A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art, 50 Duke L.J. 955 (2001); Ashton Hawkins, Richard A. Rothman & David B. Goldstein, A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art, 64 Fordham L. Rev. 49 (1995); Patty Gerstenblith, The Adverse Possession of Personal Property, 37 Buff. L. Rev. 119 (1988-1989).

4. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990), cert. denied, 502 U.S. 941 (1991).* In 1979, a few years after Turkish forces invaded Cyprus and established their own government on the northern part of the island, some Byzantine mosaics were stolen from the Kanakaria Greek-Orthodox church situated in the area under Turkish rule. In 1988 the mosaics resurfaced. Peg Goldberg, an art dealer in Indiana, who was unaware that the mosaics were stolen, bought them from one Aydin Dikman, a German national, for $1,080,000. Dikman took the mosaics from Munich to the Geneva airport, where they were delivered to Goldberg.

When Goldberg returned to Indiana with the mosaics, she worked up sales brochures about them and contacted other dealers to help her find a buyer. The mosaics were offered to the Getty Museum in Los Angeles. A curator there contacted Cypriot officials to see if the mosaics had been lawfully exported. Thereafter, the Republic of Cyprus and the Kanakaria Church sued Goldberg in replevin. The court awarded the mosaics to the Republic and the Church. The court held that Indiana law applied, even though the place of wrong was Switzerland, because Indiana had more significant contacts with and interest in the action than did Switzerland. Indiana follows the discovery rule applied in *O'Keeffe*. The court noted that the due diligence determination is "highly 'fact-sensitive and must be decided on a case-by-case basis.'" 917 F.2d at 289. The court concluded, after vigorous arguments to the contrary by Goldberg, that the Cypriot owners were duly diligent in notifying the art world of the theft. Therefore, the statute of limitations had not run on them.

5. *Purchasing from a thief: conflicting views.* In the United States (and adverse possession aside), a purchaser cannot obtain good title from a thief — a point implicit in the first sentence of subsection (1) of Uniform Commercial Code §2-403, set out in footnote 30 on page 153. Notice, however, that a purchaser might be able to obtain good title from other sorts of scoundrels, as the court in

O'Keeffe suggests on pages 153-155. If Frank had a "voidable title" for one of the reasons suggested in subsections (a) through (d) of the Code provision (for example, paying for the paintings by a check that bounced), then Frank could convey good title to Snyder if Snyder was "a good faith purchaser for value," meaning, essentially, a buyer not on notice that matters are amiss. If O'Keeffe had entrusted the paintings to Stieglitz's gallery for appraisal but not for sale, Stieglitz — being "a merchant who deals in goods of that kind" — could transfer a good title to a good-faith buyer in the ordinary course of business. See U.C.C. §2-403(2).

Some countries in Europe and elsewhere follow similar rules, but not all of them do. Several recognize the doctrine of market overt, according to which a bona fide purchaser may acquire good title from a thief if the sale in question takes place in an open market. Opportunities for the laundering of stolen objects arise as a result. The problem has not gone unnoticed in the art world (nor, we presume, the underworld). See, e.g., Note, International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?, 13 Loy. L.A. Intl. & Comp. L.J. 427 (1990).

Whom should the law protect in instances like those discussed, the innocent owner or the innocent bona fide purchaser? What interests are in conflict? Does reflection on the voidable-title and entrusting exceptions contained in Uniform Commercial Code §2-403 suggest a way to resolve the conflict? See Robert Cooter & Thomas Ulen, Law and Economics 159-161 (5th ed. 2008); John F. Dolan, The U.C.C. Framework: Conveyancing Principles and Property Interests, 59 B.U. L. Rev. 811, 813-815 (1979).

NOTE: THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OF 1990

Return for a moment to the events with which this book began, the so-called discovery of America. Native Americans were dispossessed of more than a homeland as a consequence of European settlement; over the years they have also lost human remains, funerary objects, sacred objects, and other items of enormous importance to their culture. Many of these are now in museums, and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), codified at 25 U.S.C.A. §§3001-3013, seeks to repatriate them — send them back to their erstwhile custodians.

The act requires museums to inventory their Native American sacred objects and objects of cultural patrimony and return them, upon request, to a "direct lineal descendant of an individual who owned the sacred object" or to an Indian tribe that "can show that the object was owned or controlled by the tribe." The museum must return the object unless it can prove that it has "a right of possession" to the object. "Right of possession" is defined to mean "possession obtained

with the voluntary consent of an individual or group that had authority of alienation." In short, the burden is on the museum to show that the object was obtained with the consent of the earlier Native American owners or possessors.

Of course, as you have learned, a person can obtain title to objects — even stolen objects — through the law of adverse possession. But title by adverse possession does not give the possessor a "right of possession" under the Repatriation Act. What, then, is the impact of the Repatriation Act on the law of adverse possession of chattels? Should Native American cultural objects be exempt from the law of adverse possession (like government land, dead bodies, and cemeteries)? Should the disability exemptions be extended to Native Americans? Has the government "taken" property, for which it must pay, when it orders property acquired by adverse possession to be returned to the original owner?[32] (See Chapter 12, discussing the government's right of eminent domain.) These are fascinating questions, going to the power of government to move property from one person or group to another. For a discussion of the Repatriation Act, written before it became law but attentive to the then-proposed legislation, see Thomas H. Boyd, Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation, 55 Mo. L. Rev. 883 (1990). For commentary on the Repatriation Act as finally enacted, see the articles in Symposium, The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation, 24 Ariz. St. L.J. xi-562 (1992).

For discussion of how the law of finders and statutes such as NAGPRA protect, or do not protect, archeological and cultural property, see Patty Gerstenblith, Identity and Cultural Property: The Protection of Cultural Property in the United States, 75 B.U. L. Rev. 559 (1995). And for comments situated in a context that views cultural property, particularly with respect to American Indians, in terms of indigenous group identity and stewardship, see Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, In Defense of Property, 118 Yale L.J. 1022 (2009).

C. *Acquisition by Gift*

To complete our study of possession, we turn to gifts of personal property, where possession plays a very important role. The law has long required that, to make a

32. The definition of "right of possession" in the act provides that "right of possession" means acquired with consent of the Native Americans, "unless the phrase so defined would . . . result in a Fifth Amendment taking by the United States." This language was inserted to meet the concerns of the Justice Department about the possibility that the act effected a governmental taking of property of museums. If the act is judicially declared by the U.S. Claims Court to effect a taking, then the right of possession is to be as provided under the applicable state property law.