Adverse Possession of Art

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ABSTRACT

Some cases and commentators have argued that the doctrine of adverse possession, which gives title to a long-term possessor of property, should not be applied to personal property, especially art. This Article concludes that it is impossible to determine whether adverse possession applies to personalty in California. It then looks at the doctrine, policy, and practicalities of the statute of limitations, laches, and adverse possession, focusing on the practical effect of the increased cost of litigation. It concludes that most objections to applying adverse possession to personalty are, in fact, objections to barring the claiming owner through the statute of limitations. As a theoretical matter, once suit is barred by the statute of limitations, the application of adverse possession is appropriate, but adverse possession seems less important to successful litigants for personal property than it does for realty because there are few effective gatekeepers for personalty.

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INTRODUCTION: ADVERSE POSSESSION OF ART IS CONTROVERSIAL

Adverse possession is the acquisition of title by using property as an owner would use it for a long period of time. Put differently, adverse possession confirms that a person who has used property for a significant period of time as the owner would use it actually *is* the owner of that property. The doctrine dates to the thirteenth century in common law,[1] and as far back as the Roman Empire for civil law, where they called it prescription.[2] Originally applied to realty, adverse possession in the United States was later extended to personal property.[3]

Adverse possession of art has become more important during the last half century. From 1917 to 1950, Nazi and Communist activities, the victorious Allies, and private persons taking advantage of wartime and postwar confusion separated an unprecedented number of art works from their owners.[4] Recent decisions have extended the scope of works considered stolen, at least in territory controlled by Nazi Germany, to include works sold under legal or perhaps economic duress.[5] Also, though no reliable statistics exist, there may have been a serious uptick in the theft of art as a criminal enterprise.[6] Claims have been made that art theft is a major source of revenue for terrorist organizations, trailing only drugs and kidnapping for ransom in magnitude.[7]

1. First, one was protected if he could prove that he had been seized since the death of Henry I (1135), then the accession of Henry II (1154), then the coronation of Richard the Lion-Hearted (1189). FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 81 (2d ed. 1899). The period was set at sixty years in 1540 and twenty years in 1623. 4 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 484–485 (3d ed. 1924); 3 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 8 (3d ed. rewritten 1923).

2. MAX RADIN, HANDBOOK OF ROMAN LAW 361 (1927).

3. RAY ANDREWS BROWN & WALTER B. RAUSHENBUSH, THE LAW OF PERSONAL PROPERTY § 4.1 (3d ed. 1975); BARLOW BURKE, PERSONAL PROPERTY IN A NUTSHELL 340, 344–346 (3d ed. 2003); Brent v. Chapman, 9 U.S. 358 (1809) (possession of a slave for five years gave the possessor the right to recover the slave from the person who bought the slave at a sheriff's sale of the property of the slave's true original owner) (Marshall, C.J.).

4. *See* LYNN H. NICHOLAS, THE RAPE OF EUROPA (1995); HECTOR FELICIANO, THE LOST MUSEUM (1994); and KONSTANTIN AKINSHA & GRIGORII KOZLOV WITH SYLVIA HOCHFIELD, BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES (1995).

5. Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008).

6. According to testimony by the president of the International Foundation for Art Research in O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

7. Matthew Bogdanos, *The Terrorist in the Art Gallery*, N.Y. TIMES (Dec. 10, 2005), https://www.nytimes.com/2005/12/10/opinion/the-terrorist-in-the-art-gallery.html [https://perma.cc/BJX8-DA7R] [https://web.archive.org/web/20220901080814/http://www.nytimes.com/2005/12/10/opinion/the-terrorist-in-the-art-gallery.html]. He also mentions extortion of local merchants as a source of terrorist funds. Though these are mostly thefts of artifacts that have not been catalogued from archaeological sites, this is often not unowned property because many countries have laws declaring that such artifacts belong to the state. For examples of such laws, *see* United States v. Schultz, 333 F.3d 393 (2d Cir. 2003) (for Egypt); Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWCA (Civ) 1374 (for Iran); and Treasure Act 1996, C 24 (England).

The increase in stolen art has intersected with a trend to extend statutes of limitations. The statutes are extended not by increasing the number of years required for their expiration (though that sometimes happens also), but by delaying the point at which the statute begins to run by adding a "discovery" requirement. Originally conceived as a way to give a tort plaintiff with a short statute of limitations a fair chance to discover his injury and bring suit, these "discovery" rules were often extended by courts or legislatures to the recovery of personal property without much thought set forth in the opinion about fundamental differences between tort and property suits.[8]

While this occurred, an entirely unrelated change has occurred in American litigation: American litigation has become enormously expensive. The expense may result in part from expanded discovery and in part from increased legal and witness fees. It is difficult to be very scientific about the likely amount of those fees because they are usually kept private between the lawyer and the client. It is possible to make some estimates based on cases where the prevailing party was entitled to recover attorneys' fees or based on public statements or rumors. In each case, I have provided both the historic cost and its equivalent in 2022 dollars.

Fees seem to depend on both subject matter and the progress of the case.

In several default judgment cases, the fees were about $5,000 (in one case $8,500 today).[9] Likewise, fees were modest—less than $40,000—for handling appeals from administrative law judges to U.S. Courts of Appeal in immigration and social security cases, in one case involving two appeals.[10]

Not all fees are so modest.

The court awarded $670,000 ($753,000 today) in legal fees and $50,000 ($56,000 today) in costs up to the end of trial in a copyright infringement case.[11] An environmental law case that went twice to the Court of Appeals awarded fees of $1 million ($1.1 million today).[12]In an environmental law case that involved an anti-SLAPP motion and two trips to the Court of Appeals (the second to remove the trial

8. *See*, *e.g.*, *O'Keeffe*, 416 A.2d. Georgia O'Keeffe sued to replevy in 1976 three of her paintings allegedly stolen from An American Place Gallery in 1946. Defendant's predecessor alleged that the works had been in his father's summer house since the early 1940s by gift or sale. As a result of that long possession, he acquired title by adverse possession. The court held that the statute of limitations for replevin did not begin to run until the owner discovered or should have discovered what she needed to know in order to sue, but only if she established that she had diligently pursued the property. The court remanded for a decision on diligence. The parties settled. Rumor has it that each took one painting and the third was sold to pay both parties' lawyers. In applying the discovery rule developed for torts to a property case, the New Jersey Supreme Court does not discuss whether different considerations might apply to property cases than to torts cases. *Id.*

9. *E.g.*, Shumaker v. Burgess Services, LLC, No. 21-cv-2291-WJM-MEH, 2022 WL 4104272 (D. Colo. Sept 8, 2022) (copyright infringement); Cap. Bonding Corp. v. Wilson, No. 00–CV–3828, 2000 WL 1201885 (E.D.Pa. Aug. 22, 2000) (confessing judgment on bail bond guarantee); Broadway Music, Inc. v. Buffalo Wing Joint & Pub, LLC, 431 F.Supp.3d 147 (W.D.N.Y. 2019) (copyright infringement).

10. *E.g.*, Mohammed v. Barr, No. 17-70686, 2019 WL 7503025 (9th Cir. Oct. 11, 2019); Wheatley v. Berryhill, No. 18-35501, 2018 WL 6579351 (9th Cir. Oct. 24, 2018).

11. VMG Salsoul, LLC v. Ciccone, No. CV-12-05967-BRO-(CWx), 2014 U.S.Dist. LEXIS 200863 (C.D. Cal. Apr. 28, 2014). The award of attorneys' fees was reversed by 824 F.3d 871 (9th Cir. 2016) on grounds that the defendant's position was reasonable.

12. Communities for a Better Env't v. Energy Res. Conservation & Dev. Comm'n, 57 Cal. App. 5th 786 (2020).

judge), the 2021 attorneys' fees were $2.25 million ($2.46 million today).[13] A trademark/copyright case with a single trip to the Court of Appeals resulted in a fee of roughly $1.6 million in 2004 ($2.5 million today).[14]

Another copyright case that produced a jury verdict but was not appealed cost $2.5 million in attorneys' fees in 2020 ($2.75 million at today's prices).[15] Yet another that was tried and had post-trial motions scored $4 million in lawyers' fees ($4.7 million today).[16]

Turning to art law cases, the *Cassirer* case was extraordinarily long and complicated, with three visits to the Court of Appeals, one to the U.S. Supreme Court, and it is not final yet. In 2015, the possessor announced that it had spent €1.3 million.[17] By 2022, the fees had mounted to €3.25 million, or $3.29 million.[18]

The champion must be the fee rumored to have been spent by the Andy Warhol Foundation for the Visual Arts. It incurred legal fees in defending a suit by filmmaker Joe Simon-Whelan alleging fraud, collusion, and manipulation of the art market amounting to $7 million (now $9.5 million). The case was filed in 2007 and settled in 2010.[19]

This was not a scientific sample, but it shows a range of legal expenses for litigation, where art recovery cases are very likely to be on the expensive side.

The result of this increased expense has been that the chattels about whose adverse possession is litigated has narrowed to chattels of great value—mostly artwork, some suggestion of jewels, wines and antiques—and one boat.[20] A survey of cases involving adverse possession of personal property prior to World War II turns up all manner of items in dispute; during the last quarter century, it has been overwhelmingly

13. Youth for Env't Just. v. City of L.A., Los Angeles Superior Ct. Case BC600373 (2021).

14. Mattel, Inc. v. Walking Mt. Prods., No. CV 99-8543 RSWL (RZx), 2004 U.S. Dist. LEXIS 12469 (C.D. Cal. June 21, 2004).

15. ABKCO Music, Inc. v. Sagan, 500 F.Supp.3d 199 (S.D. N.Y. 2020).

16. John Wiley & Sons, Inc. v. Book Dog Books, LLC, 327 F.Supp.3d (S.D.N.Y. 2018).

17. Noelia Núñez, *El Thyssen Aumenta el Número de Visitas Pero Pierde 4,5 Millones en 2014*, EL PAÍS (July 24, 2015, 13:25), https://elpais.com/cultura/2015/07/24/actualidad/1437742755_704817.html [https://perma.cc/V7Y2-WTXC] [https://web.archive.org/web/20221109160708/https://elpais.com/cultura/2015/07/24/actualidad/1437742755_704817.html].

18. Robert, *Spain Pays More Than Three Million Euros To Lawyers Not To Return Pisarro del Thyssen Steol by the Nazis*, EPRIMEFEED (Nov. 9, 2022, 22:08), https://eprimefeed.com/latest-news/spain-pays-more-than-three-million-euros-to-lawyers-not-to-return-pissarro-del-thyssen-stolen-by-the-nazis/83716 [https://perma.cc/5JKW-3YRU] [https://web.archive.org/web/20221109161143/https://eprimefeed.com/latest-news/spain-pays-more-than-three-million-euros-to-lawyers-not-to-return-pissarro-del-thyssen-stolen-by-the-nazis/83716]. The earlier figure is certainly not adjusted to 2022 dollars. It is unclear whether the later figure is adjusted to present money considering the dates each part of it were paid.

19. Judd Tully, 'It's About Setting the Record Straight': A Warhol of Disputed Authenticity and Chequered Association Heads To Auction, THE ART NEWSPAPER (Sept. 12, 2022), https://www.theartnewspaper.com/2022/09/12/a-warhol-of-disputed-authenticity-and-chequered-association-heads-to-auction [https://perma.cc/N7FP-YPYT] [https://web.archive.org/web/20221109161522/https://www.theartnewspaper.com/2022/09/12/a-warhol-of-disputed-authenticity-and-chequered-association-heads-to-auction].

20. *See* Johnson v. Gilliland, 896 S.W.2d 856 (Ark. 1995) (adverse possession of bailed boat not proven because cause of action did not accrue until bailee refused demand of medical student studying abroad because possession was permissive until then).

artwork.[21]The reason for this change in subject matter is more than just the increased cost of litigation requiring that the property have significant value. There are many classes of valuable property, such as motor vehicles, aircraft, boats, jewelry, furs, and collectibles. One would think that all would be subject to adverse possession litigation.

One suspects that motor vehicles, airplanes, and boats are seldom disputed because they share three characteristics: they are subject to systems for the registration of ownership that are widely accepted and that potential buyers normally consult; they are usually used in public, so they are readily identifiable by law enforcement or the true owner; and their values tend to decline over time, making it unprofitable to keep them out of use.

Jewelry, furs, and collectibles are not the subject of adverse possession litigation for different reasons. These items tend to be relatively fungible and less in the public eye. It is difficult for the original owner to discover who has them, and even more difficult for the owner to prove that this exemplar, among a number of similar items, belongs to her.

Despite these difficulties, no one doubted that adverse possession applied to personalty half a century ago. For example, the court in *Henderson v. First Nat'l Bank* said: "[t]here is no dispute but that title to personal property can be acquired by adverse possession . . . ."[22]

That was perhaps true in 1973. Subsequently, several courts have questioned whether the doctrine of adverse possession should apply to art. In *O'Keeffe v. Snyder*,[23] Georgia O'Keeffe sued a good-faith purchaser for the return of three paintings she had created. She alleged that the paintings had been stolen from Alfred Stieglitz's gallery, An American Place. Defendant suggested that they had been sold or gifted and pleaded expiration of the statute of limitations and acquisition of title by adverse possession. The court said in dictum that "the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute."[24] Having said that, in a passage demonstrating its confusion, the court went on to say:

> 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

21. *E.g.*, S.F. Credit Clearing House v. Wells, 196 Cal. 701 (1925) (piano and piano bench); Shelby v. Guy, 24 U.S. 361 (1826) (slave); Hicks v. Fluit, 21 Ark. 463 (1860) (horse).

22. 494 S.W.2d 452, 459 (Ark. 1973) (allowing retention of bank stock after settlement agreement provided that adverse possessor would return stock to owner).

23. 416 A.2d.

24. *Id.* at 872.

> adverse possession.[25] 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.[26]

The court then held that summary judgment had been improperly granted Ms. O'Keeffe. It remanded the case to the trial court to determine whether Ms. O'Keeffe had been diligent enough to be entitled to use the discovery rule to delay the accrual of the statute of limitations.

Shifting to the West Coast, U.S. District Judge John Walter stated in dictum as part of his choice of law analysis, "California has not extended the doctrine of adverse possession to personal property."[27] He provided no citation to support that statement. The accuracy of the statement is questionable, but the fact that he made it was significant because subsequent litigants and courts will repeat it and cite it without taking the trouble to determine whether or not it is true.

Likewise, Third Circuit Court of Appeals Judge Stephanos Bibas has argued that the application of statutes of limitations to stolen art is inappropriate if the owner makes certain reports of the theft.[28] Since adverse possession is tightly tied to statutes of limitations, abolition of statutes of limitation for stolen art would necessarily mean abolition of adverse possession for stolen art.[29]

This Article asks whether it is appropriate to apply the doctrine of adverse possession to personalty, especially to chattels of great value that are not normally used in public, like artwork. It does not deal with the question of whether the copyright in the artwork follows title to the work.[30] Part I reviews California law on the question and (spoiler alert) concludes that it is quite impossible to determine whether adverse possession applies to personal property in California. Part II looks at the basic doctrines, policies, and practicalities of statutes of limitations, laches and adverse possession, and their interrelation. It points out that laches and the conversion of the accruing of the statute of limitations from a rule to a standard defer the time at which an action can be

25. It is unclear what Justice Pollock was thinking when he wrote this sentence. The discovery rule lengthens the period for expiration of the statute of limitations and therefor for achieving title by adverse possession. It does not replace adverse possession.

26. *O'Keeffe*, 416 A.2d at 873–874.

27. Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148, 1156 (C.D. Cal. 2015), *rev'd & remanded on other grounds*, 862 F.3d 951 (9th Cir. 2017).

28. Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994).

29. Johnson v. Gilliland, 896 S.W.2d 856, 858 (1995).

30. Those interested in this question might consult Robin Pogrebin, *The Genealogy of a Recluse's Legacy*, N.Y. TIMES (Feb. 7, 2022), https://www.nytimes.com/2022/02/07/arts/design/henry-darger-estate.html [https://perma.cc/7WP2-5WXN] [http://web.archive.org/web/20220903113713/https://www.nytimes.com/2022/02/07/arts/design/henry-darger-estate.html] on the strange case of Henry Darger. An attempt at analysis is made in Elyssa Westby, Note, *Henry Darger's "Realms of the Unreal"—but Who in the Realm is Kiyoko Lerner?*, 16 NW. J. TECH. & INTELL. PROP. 209 (2019), which is unfortunately marred by the author's apparent failure to realize that copyright law changed significantly in 1978, so the application of current law to someone who died in 1973 is not apposite.

dismissed, potentially resulting in significant additional costs of litigation and exposure to extortion. Part III concludes that adverse possession should grant title to the possessor of unregistrable personal property as a theoretical matter, but the absence of adverse possession would have little practical effect.

I. TITLE TO PERSONALTY BY ADVERSE POSSESSION IN CALIFORNIA

A. LEGISLATION

California law provides statutes of limitations for the replevy of personal property. That statute is three years for "[a]n action for taking, detaining, or injuring goods or chattels, including an action for the specific recovery of personal property."[31] The important question that this provision leaves unanswered is when the three-year statute begins to run. The traditional answer was that the statute of limitations began to run when the owner's cause of action accrued, which was when the possessor or his predecessor in interest gained possession.[32]

However, the next paragraph of the Code explains that "[t]he cause of action in the case of theft . . . of an article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, the aggrieved party's agent, or the law enforcement agency that originally investigated the theft."[33] This provision confirms the application of the discovery rule, holding that the statute begins to run from the time the owner discovered or should have discovered what is needed to sue. California then enacted a special rule for suits against art world professionals (museums, galleries, auctioneers, dealers) for specific recovery of works of fine art in the case of an unlawful taking or theft: six years from the actual discovery of both the whereabouts of and the claimant's interest in the work of fine art.[34] While California's special rule says it expires with the coming of 2018, it was the model for the federal Holocaust Expropriated Art Recovery

31. CAL. CIV. PROC. CODE § 338(c)(1). One might note that taking or injuring are actions that occur at a single time, whereas detaining is a continuous action of not handing over that takes places for as long as the goods are not transferred.

32. Henderson v. First Nat'l Bank of De Witt, 494 S.W. 2d 452 (Ark. 1973).

33. CAL. CIV. PROC. CODE § 338(c)(2) (West 2022).

34. CAL. CIV. PROC. CODE § 338(c)(3) (West 2022). One might wonder why there is any need to mention discovery by the owner of his right to the personalty because usually the owner knows that he is an owner. The devastation during World War II in Central and Eastern Europe was so great that it was often difficult to know who survived and who did not. An heir would not have property rights if the ancestor who owned the property were still alive. If the owner died, with so many combatants and civilians dead, it was often difficult to know who the heir, now the new owner, might be. Today, more than seventy-five years after the guns fell silent, people are reunited with relatives they had thought long dead or their descendants. *See* Herbert I. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 INT'L LAW. 195, 200–203 (2018); Lara Diamond, *Family Reunited, 75+ Years After the Holocaust*, LARA'S JEWNEALOGY (Sept. 19, 2021), https://larasgenealogy.blogspot.com/2021/09/family-reunited-75-years-after-holocaust.html [https://perma.cc/55WB-GFEA] [http://web.archive.org/web/20211022012009/https://larasgenealogy.blogspot.com/2021/09/family-reunited-75-years-after-holocaust.html] (last visited Sept. 25, 2021).

(HEAR) Act, which extends the six-year actual discovery rule for certain property taken in the Holocaust to 2026.[35] To summarize, the statute of limitations in California to recover stolen property or damages for the theft is three years from the time the owner discovers or should have discovered what is needed to sue. However, for the recovery of certain property taken in the Holocaust (but not damages for it), the statute of limitations is six years from actual discovery if the suit is filed by December 31, 2025. This legislation deals only with the statute of limitations.

Turning to California statutes bearing on adverse possession, Civil Code section 1007 states: "[o]ccupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all . . . ."[36] This seems to grant the possessor title to property once the statute of limitations expires, and does not distinguish between realty and personalty. But the following clause reads "but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to a public use by a public utility, or dedicated to or owed by the state or any public entity, shall ever ripen into any title, interest or right against the owner thereof."[37] This clause is couched entirely in items related to land. It can be argued that the preceding clause should also be so limited. It could alternatively be argued that only public land interests are not subject to adverse possession. A group of sections defines when a possessor of real estate's actions constitute sufficient possession to claim title by adverse possession.[38] Likewise, California Civil Procedure Code sections 325–330 make it clear that those sections apply only to real property. In short, only the first part of Civil Code section 1007 suggests that adverse possession might extend to personal property—thin support indeed. No Code provision prohibits adverse possession for personalty.

B. CASE LAW

1. Cases in California Courts

The bible for California law is Witkin's Summary. It states that California recognizes adverse possession of personal property, then says that *Wells*, discussed below, casts doubt on that, but provides no persuasive commentary for either position.[39]

The cases are few, and not much help.

San Francisco Credit Clearing House v. Wells[40] was an attempt by the assignee of the unpaid conditional seller of a piano and bench to replevy them from a person who had

35. Holocaust Expropriated Art Recovery Act of 2016, P.L. No. 114–308, 130 Stat. 1524 [hereinafter HEAR Act]. For a thorough discussion of the HEAR Act, see Lazerow, *supra* note 34, and Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157 (2019).

36. Cal. Civ. Code § 1007 (West 2022).

37. *Id.*

38. CAL. CIV. PROC. CODE §§ 315–328 (West 2022).

39. 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, ch. XVIII, § 133 (11th ed. 2017).

40. 239 P. 319 (Cal. 1925).

bought them at auction. The court said, "[t]he evidence in the instant case, being obviously insufficient to support a title of adverse possession or prescription, renders it unnecessary to consider the question whether or not it was the intention of the legislature, by the enactment of section 1007 of the Civil Code, that it should be applied to personal property."[41] In addition, "[a] careful examination of the decisions of this state has failed to disclose to our investigation a single case in which section 1007 of the Civil Code has been applied to the acquisition of title to personal property."[42] However, the court proceeded as though the defendant could have acquired title by adverse possession, but held that the defendant did not meet all adverse possession requirements. The defendant proved the date upon which he acquired the property, but it was less than the statute of limitations time requirement to qualify for adverse possession. He could not prove the period of time during which anyone was in possession before that. The court was clear that the original purchaser's holding was not adverse; any adversity only began when the original purchaser sold the piano and bench. That date could not be proven. The court states without giving a justification that possession was not open but was in fact concealed; that possession was not continuous; and that no taxes were paid. The court does not present the facts on which it bases these conclusions, nor does it inform the reader of the taxes that would have been due on the property.[43] The court's opinion was muddled enough on the question of tacking to induce a concurring opinion to make the point that tacking the possession of one possessor who is in privity with another possessor continues the running of the original statute of limitations.[44] While the court does not mention this as a factor in making its decision, it is worth noting that the defendant had already recouped a portion of his purchase price from his seller.[45]

First Nat'l Bank of Richmond v. Thompson[46] involved an attempt by seller on a conditional sales contract to replevy a gas shovel (which I take to be a construction style steam shovel) after the three-year statute of limitations had passed. The court held for defendant on that ground, and never mentioned the phrase "adverse possession." The defects noted in Wells were not present. The shovel was used openly, and defendant was able to prove continuous possession. The only hint of adverse possession is that the court says that the shovel was "not wrongfully detained."[47] One might interpret that as the court hinting that adverse possession had occurred because a purchaser from someone who has no title "wrongfully detains" the property, at least until the statute of limitations has expired and, in theory, thereafter, protected from replevin only by the

41. *Id.* at 322.

42. *Id.*

43. It is unclear what taxes would have been due on the piano and bench a century ago. Perhaps there was a personal property tax. CAL. CIV. PROC. CODE § 325(b) provides: "In no case shall adverse possession be considered established . . . unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party . . . paid all state, county or municipal taxes that have been levied and assessed upon the land for the period of five years . . . ."

44. *S.F. Credit Clearing House*, 196 Cal. at 322.

45. *Id.* at 320.

46. 140 P.2d 75 (1943).

47. *Id.* at 76.

statute's expiration. That is a rather thin reed upon which to build a conclusion that adverse possession applies to personalty in California.

In *Bufano v. San Francisco*,[48] the city of San Francisco claimed that it had acquired two sculptures by Beniamino Bufano from the artist as a result of adversely possessing them from 1941 to 1961. The court stated, "[w]hile we note that the application of section 1007 of the Civil Code to personal property is not as well established as the City contends . . . we need not meet this issue as there was insufficient evidence of any hostility on the part of the City."[49] It then held that the city was a bailee of the statues, so the cause of action did not accrue until the city refused to return them in 1961.[50] In short, while questioning whether adverse possession applies to personal property, the court analyzed the case as though the law of adverse possession did apply to this artwork, but found that one requirement of adverse possession did not exist, so it did not need to decide whether adverse possession applied to art.

Naftzger v. American Numismatic Soc.[51] was a case where one hoped to discover whether California applied adverse possession to personalty. Plaintiff bought rare coins belonging to the Society that had been stolen by a third party and, having received from the Society a demand letter, sought to quiet title. The trial court held that the owner was barred by the statute of limitations and quieted title in the possessor as a result of adverse possession. On appeal, it was held that the cause of action does not accrue before discovery, so the Society's claim was not barred because the statute of limitations had not expired. Thus, there was no need to discuss whether the possessor had acquired title by adverse possession.

The Society of California Pioneers sought to recover a gold cane handle that had been stolen from an exhibition.[52] The defendant bought the cane handle from a man who received it as a gift from his mother. The source of the mother's possession was unknown. The court asked whether the statute of limitations had expired, and concluded that it had not. It rejected the doctrine of tacking, dooming the defendant's defense because he owned the handle for less than three years, and its alternative holding was that the legislative change to a discovery statute, which occurred before the defendant purchased the handle, applied. As a result, it never confronted the question of whether adverse possession applies to personalty in California.

Those are all the California court cases found on the question.

2. Cases in Federal Courts Applying California Law

Federal cases applying California law are not much different.

In *G&G Prods. LLC v. Rusic*,[53] a U.S. LLC that was the successor in interest of an Italian husband sued the husband's Italian-citizen ex-wife for conversion and replevin

48. 43 Cal. Rptr. 223 (1965).
49. *Id.* at 230.
50. *Id.* at 229–230.
51. 49 Cal. Rptr. 2d 784 (1996).
52. Soc'y of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 871, 874 n. 13 (1996).
53. 902 F.3d 940 (9th Cir. 2018).

of a Basquiat painting.[54] The court upheld summary judgment for the ex-wife on grounds that the Italian statute of limitations, imported by California's borrowing statute, had expired. She apparently did not contend that she had acquired title by adverse possession, and the words do not appear in the opinion.[55]

In *Adler v. Taylor*,[56] the heirs of the pre-Holocaust owner Mauthner sued the actress Elizabeth Taylor, a 1963 auction purchaser of a Van Gogh, for replevin, constructive trust, restitution, and conversion. The court held alternatively that the discovery rule did not apply, or that Mauthner's heirs should have discovered all they needed to know (1) in 1963 when Taylor bought the painting and received wide publicity; (2) by 1970, when the Van Gogh *catalogue raisonné* was published, indicating her ownership; or (3) by 1990, when she unsuccessfully offered the painting at public auction. The 2005 suit was filed after the three-year statute of limitations expired, regardless of whether the cause of action accrued on the theft, in 1963, in 1970, or in 1990. The court does not mention the doctrine of adverse possession. The Ninth Circuit agreed, also not mentioning adverse possession.[57]

C. CALIFORNIA LAW ON ADVERSE POSSESSION OF CHATTELS

To summarize, it is impossible to say definitively whether the doctrine of adverse possession applies to personalty in California. Reading the statute literally, adverse possession applies to personalty. Reading it as a negative pregnant raises some doubts about whether that was the legislative intent. The cases, though often discussing adverse possession, do not provide a definitive answer. In most cases, the current possessor cannot establish expiration of the statute of limitations, so no holding on adverse possession is required. Where the statute of limitations had expired, the case was simply dismissed on statute of limitation grounds, again with no decision about adverse possession.

II. STATUTES OF LIMITATIONS, LACHES, AND ADVERSE POSSESSION

In advising legislators and judges about whether adverse possession should apply to personalty, it is important to have a strong grasp of the doctrines of statutes of limitations, laches, and adverse possession.

54. One wonders at the ease with which diversity of citizenship was artificially created in this case, simply by the assignment from the Italian citizen of his causes of action to the U.S. LLC. In fact, the husband assigned his rights to his longtime attorney to satisfy a substantial debt; the attorney then formed the LLC with a longtime friend of the husband, each owning fifty percent. *Id.* at 944.

55. Those words appear twice in the opinion of the district court on remand but as part of a discussion entirely related to Italian law. G&G Prods., LLC v. Rusic, No. 2:15-cv-02796-RGK-E, 2019 U.S. Dist. LEXIS 116721, at *13, *15 (C.D. Cal. June 10, 2019).

56. No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005), *dismissed with prejudice sub nom.* Orkin v. Taylor, No. CV04-8472(RGK)(FMOx), 2005 U.S. Dist. LEXIS 43321 (C.D. Cal. Apr. 20, 2005), *aff'd sub nom.* Orkin v. Taylor, 487 F.3d 734 (9th Cir. 2007).

57. *Orkin*, 487 F.3d at 741.

A. STATUTES OF LIMITATIONS

1. Statute of Limitations Doctrine

a. Length

Unsurprisingly, statutes of limitation have a statutory base. They provide that no action shall be commenced more than a specified period after the cause of action accrues. That period for replevin of personalty varies from two to six years, depending on the jurisdiction and the date.[58] This is considerably shorter than the statute of limitations for recovery of realty, traditionally set at 21 years.

b. When the Cause of Action Accrues

However, the question of when the cause of action accrues was entirely judge-made law, though some jurisdictions now have statutes specifying the time of accrual.[59] In the case of realty, the cause of action accrues when a person enters the realty as a possessor. No such unanimity exists for personalty.

i. Traditional Rule: The Time of the Theft

One assumes, though there are few recent cases to back it up, that some jurisdictions will follow the traditional realty rule, that a cause of action exists to recover personal property when someone who lacks the right to do so takes possession of the property.[60]

The traditional rule is likely to be easy to apply. When a theft occurs, it is normally reported to the police and sometimes to an insurance company, both situations providing a written record of the theft's date.[61] As a result, whether the statute of limitations has expired will appear from the pleadings, and the question can be decided at that early and relatively inexpensive stage of the litigation. However, the traditional rule has been challenged by the demand-and-refusal rule and the discovery rule, as set forth below.

ii. New York Rule: Demand and Refusal

The largest number of art loss cases come from New York, the only state that follows the "demand-and-refusal" rule.[62] Originally designed to protect a good faith purchaser

58. Jodi Patt, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U.L. REV. 1207, 1215 n. 67 (2002); Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 121–122 n. 10 (1988). Two states provide a ten-year statute.

59. CAL. CIV. PROC. CODE § 338(c) (West 2022); HEAR Act.

60. Franklin Auto Body Co. v. Wicker, 414 N.W.2d 509, 511 (Minn. Ct. App. 1987) (statute for conversion of personalty runs from time of conversion).

61. For situations where the owner decided not to report the theft, see O'Keefe v. Snyder, 416 A.2d 862, 866–67 (N.J. 1980) and Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991).

62. *E.g.*, *id.*

by rendering him not subject to suit before the owner informed the purchaser of the owner's interest and demanded return of their property,[63] that rule holds that a cause of action does not accrue until a demand for return is made and refused. As a result, the statute of limitations has only expired in one New York suit. That suit turned on whether a party who thought negotiations were continuing had actually been refused the return of his artwork.[64]

Many states purport to apply the demand-and-refusal rule to bailments, but this should not be regarded as its general adoption for when the statute of limitations begins to run.[65] It is rather that the possessor's possession in a bailment is with the permission of the owner. A bailee's possession only becomes non-permissive when the bailment expires. Since most bailments expire only when the bailor demands return of the property, it is the refusal to return the property that gives the bailor a cause of action.[66]

The demand-and-refusal rule is usually easy to apply because both the demand and the refusal are likely to be in writing.

The question has never been raised about starting the running of the statute of limitations at the earliest time that the owner could have demanded return of his property, as has been applied in other cases where the plaintiff controls the cause of action's accrual.[67]

iii. Discovery Rules

A. Discovered or Should-Have-Discovered

Traditionally, the statute of limitations on a personal injury claim began to run from the commission of the tort. Most jurisdictions had very short statutes for personal injury or other torts, some as short as one year.[68] Often, the victim of medical malpractice—who was anaesthetized when the tort occurred—did not discover his injury until much later. Courts and legislatures sometimes extended the statute of limitations until the tort victim discovered or should have discovered the

63. Gillet v. Roberts, 57 N.Y. 28 (1874).

64. Grosz v. Museum of Mod. Art, 403 F. App'x. 575 (2d Cir. 2010).

65. *E.g.*, Redmond v. N. J. Hist. Soc'y, 28 A.2d 189 (N.J. 1942) (possession of a Gilbert Stuart portrait lent them in 1888 did not give owners a cause of action until their 1938 demand for its return was refused).

66. Niiya v. Goto, 5 Cal. Rptr. 682 (Cal. Ct. App. 1960) (suit for bailed furniture brought within the statute). The same is true when a co-tenant claims adverse possession against his co-tenants. Because the possession of the co-tenant is permissive, something more than possession is needed to make it adverse.

67. Harvard Law Review Ass'n, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1209–12 (1950).

68. *E.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-105 (1984) (West 2022) (one year); CAL. CIV. PROC. CODE § 335.1 (West 2022) (two years). Until 2003, the statute of limitations for personal injury in California was one year. 2002 Cal. Stat. Ch. 448 § 1(b)–(d).

problem.[69]This discovery rule was later extended to property torts, such as property theft, and to the recovery of the property.[70]

This discovery rule is a bit more difficult to apply. It requires putting the owner in the context of the time to determine when he should have discovered what he needed to know to sue. In most cases, the owner knows that she is the owner and that the art is gone. The owner needs to discover either the whereabouts of the art or the person who controls it. The question is what, under all the facts and circumstances, a reasonable owner would have done and what he would have discovered had he done it. Answering these questions usually requires formal discovery. Using hindsight, the possessor will imagine a vast series of actions that a reasonable owner might have taken and the discoveries that she would have made had those actions been taken. The owner will argue that none of those actions would have been taken by a reasonable owner and, had they been taken, they would have been inadequate to discover what the owner needed to know. In short, a decision must be made not on the facts, but on suppositions of what would have occurred had the facts been different.

The process of deciding that the state will use a discovery rule for statutes of limitation on recovery of personalty has been somewhat unusual. Only in New Jersey was this decided by a state court.[71] In each of the other discovery rule adoptions by court, the decision was made by a federal court hearing a diversity case. In all cases, this decision was made either because the parties stipulated that a discovery rule applied,[72] or because the jurisdiction had applied a discovery rule to the statute of limitations in tort cases involving personal injury, but not property, or both.[73] California invoked the discovery rule by statute.[74]

69. Huysman v. Kirsch, 57 P.2d 908 (Cal. 1936); *see* Walter W. Heiser, et al., Understanding Civil Procedure: The California Edition 297 (2013).

70. *E.g.*, CAL. CIV. PROC. CODE § 338(c)(3); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989).

71. *See* O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980). Examples of federal courts deciding this are *Autocephalous Greek-Orthodox Church*, 717 F. Supp. and see Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. Lexis 2096, at *28 (E.D. Pa. Feb. 23, 1995).

72. *See Erisoty*, 1995 U.S. Dist. Lexis 2096, at *28.

73. In one case, the court's discussion is limited to the following footnote:

> While the parties dispute whether Pennsylvania, District of Columbia, or Maryland law governs the instant inquiry, they concur that such determination is mooted in that each jurisdiction utilizes the discovery rule. Although the case law is not specific to stolen art replevin actions, courts in each of these forums have extended the discovery rule to a variety of tort actions.

Compare Hartnett v. Schering Corp., 2 F.3d 90, 92 (4th Cir. 1993) (noting Maryland's use of discovery rule in negligence actions), *with* Bond v. Texaco, Inc., 647 F. Supp. 1135, 1139 (D.D.C. 1986) (noting general applicability of discovery rule in District of Columbia), *and* City of Phila. v. Lead Indus. Ass'n, 994 F.2d 112, 121 (3d Cir. 1993) (same in regard to Pennsylvania). Because this case thus presents a false conflict, this court can proceed forward without embarking on a balancing of governmental interests. Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991). *See* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. Lexis 2096, at *28 n. 5 (E.D. Pa. Feb. 23, 1995). Note that none of the cases cited in this footnote are state court decisions (except perhaps the D.C. decision). All are federal court decisions sitting in diversity cases.

74. CAL. CIV. PROC. CODE § 338(c).

B. Actual Discovery Rule

Under the actual discovery rule, the cause of action accrues when the owner actually knows what is needed to bring suit to recover his property. This rule is found in the Holocaust Expropriated Art Recovery Act of 2016.[75]

Facts required to determine the date at which the owner actually discovered the loss and knew who or where to sue are peculiarly within the domain of the owner. If the case proceeds to the discovery phase, the possessor will no doubt demand the owner's e-mail, his detective's reports, and a record of his cellphone calls to try to establish when the owner actually knew what. Whether, in the real world, a fact-finder will treat an actual discovery jurisdiction differently from a discovered or should-have-discovered jurisdiction is difficult to say.

C. New Jersey Discovery Rule

The New Jersey court sets up a conditional discovery rule. It dictates that a plaintiff must show due diligence in order to be entitled to use the discovery rule.[76] It does not describe what diligence is due. In the landmark *O'Keeffe* case,[77] the owner did not notify the gallery owner, nor the police, nor an insurance company of the theft; did not tell her partner of the loss or ask him questions about it; did not confront the suspected thief; and did not notify others in the art world of the theft until a quarter century had elapsed. The court nonetheless remanded the case to determine whether she had exercised due diligence. The court did not set any threshold or safe harbor that would automatically constitute due diligence.

Thus, each case requires weighing of all the facts and circumstances. One commentator characterizes this as "a multifactor balancing of equities."[78] The *O'Keeffe* court recognizes this, expressly stating:

> 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.[79]

75. HEAR Act § 5(a). For a fuller discussion see Lazerow, *supra* note 34 and Frankel & Sharoni, *supra* note 35.

76. *O'Keeffe*, 416 A.2d at 869.

77. *Id.* at 877.

78. Bibas, *supra* note 28, at 2438.

79. *O'Keeffe*, 416 A.2d at 872.

This quotation overstates the case. If the number of years since the theft required by the statute of limitations has not expired, that is the end of the case, and no inquiry need be made into anyone's conduct. If the time from the theft has expired, the owner may claim extra time from the discovery statute but will need to prove the due diligence required by *O'Keeffe* in order to receive it. There is then the question of when the owner should have discovered what he needs to know to sue, and finally the question of whether the possessor's conduct rises to the required level of possession. But the court's note that it was moving from a relatively simple rule to a host of equitable considerations was accurate. Further, the consequences of the shift at the outset of litigation from actions of the possessor to actions of the owner to determine whether the owner is entitled to the discovery rule are a shift from a legal rule to an equitable standard that makes the litigation more difficult and costly but more individualized.

The parties in *O'Keeffe* then settled out of court.[80] One reason might be that Ms. O'Keeffe might have doubted that she could show due diligence since the theft was not reported either to the police or to an insurance company. Another reason might have been that proving that Ms. O'Keeffe exercised due diligence and when she should have discovered the location of the paintings was going to require the expense of discovery. The parties had already paid the costs of getting the case to the New Jersey Supreme Court. They might have been unwilling to expend further resources on the case.

D. Hybrid Accrual—Demand-and-Refusal or Should Discover

At least one state phrases its accrual as hybrid accrual. Here, the cause of action accrues on demand-and-refusal, or when the owner discovers or should discover, whichever is first.[81] It is not clear that this is in fact the double standard stated. It would be a rare situation indeed where the owner demands that the possessor return his property before discovering who the possessor might be. It is likely that the court is confusing the demand-and-refusal requirement for making a bailment no longer consensual with a general rule for accrual of the cause of action.

c. Tolling

The fact that the cause of action has accrued does not mean that the statute of limitations runs from that time. The running of the statute may be tolled, or suspended, for a period of time. The burden of persuasion rests with the person alleging that the statute should be tolled.[82]

80. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE AND THE LAW 577 (4th ed. 2019) (citing N.Y. TIMES, December 8, 1980, at C20).

81. Henderson v. First Nat'l Bank of Dewitt, 494 S.W.2d 452, 456 (1973) (dictum).

82. Harvard Law Review Ass'n, *supra* note 67 at 1199–1200.

i. Fraudulent Concealment

The statute of limitations does not run during periods of successful fraudulent concealment.[83] Typically, a thief conceals his misdeeds. I have not found a single case in which the statute of limitations was not tolled when the property was in the hands of the thief. For that reason, the statute of limitations only runs in favor of someone who neither participated in nor knew about the wrongdoing. That includes a good-faith purchaser.

In most cases, there is no dispute about what constitutes fraudulent concealment. A man who takes a mosaic from a church in Cyprus and stores it in his house in Germany is fraudulently concealing it.[84] Likewise where a thief stores stolen paintings in his lawyer's office loft without the lawyer's consent, and where the lawyer, upon discovering the paintings, ships them to Switzerland.[85] More questionable is where a seller delivers forged prints to a buyer and continuously reassures the buyer that the value of his prints is escalating.[86] The appraisals are designed to keep the buyer from discovering that the art is not genuine, but whether it constitutes fraudulent concealment is questionable. Other things assimilated to fraudulent concealment include taking the property out of the jurisdiction, intentionally misrepresenting the property's location, failing to comply with statutes designed to help the owner recoup his property, and changing the property's appearance or branding.[87]

While the statute is tolled during successful fraudulent concealment, it begins to run when the owner discovers what he needs to know to sue, even if the attempt at concealment continues.

ii. Out of the Jurisdiction

Likewise, a traditional rule is that the statute of limitations is tolled when neither the artwork nor its possessor is located within the jurisdiction, because no suit could be brought for lack of jurisdiction.[88] To have jurisdiction, a state normally must control

83. *Id.* at 1220–22.

84. Facts suggested by Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1392–93 (S.D. Ind. 1989), *aff'd* 917 F.2d 278 (7th Cir. 1990).

85. Facts suggested by U.S. v. Mardirosian, 602 F.3d 1 (1st Cir. 2010) and Bakwin v. Mardirosian, 6 N.E.3d 1078 (2014).

86. Balog v. Center Art Gallery-Hawaii, Inc., 745 F. Supp. 1556 (D. Haw. 1990) (alternate holding). Rosen v. Spanierman, 894 F.2d 28 (2d Cir. 1990), did not seriously discuss the argument that periodic appraisals constituted fraudulent concealment. These sorts of cases might better toll the statute on grounds of estoppel. John P. Dawson, *Estoppel and Statutes of Limitation*, 34 MICH. L. REV. 1 (1935).

87. The doctrine of fraudulent concealment is detailed in Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 126–29 (1988). For an earlier version, see John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 897–901 (1933). *See also* Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 788 (1996) (fraudulent concealment when thief substitutes look-alike coins for genuine ones) (dicta).

88. Harvard Law Review Ass'n, *supra* note 67 at 1224–28; *see* Schneider v. Schneider, 187 P.2d 459, 460 (1947) (cumulative duration of business trips and a honeymoon out of the state were added to the four-year statute of limitations).

either the person with custody of the item in question (personal jurisdiction), or the item itself (in rem jurisdiction).[89] In the U.S., the jurisdiction is normally regarded as the state, rather than a locality within it. One commentator reported that he could find no case after 1918 that tolled the statute of limitations because the goods were outside the jurisdiction except cases of fraudulent concealment.[90] Our search, thirty years later, had the same result.

iii. Estoppel and Waiver

If a defendant makes a representation that induces the plaintiff to forbear bringing suit, the defendant may be estopped from invoking the statute of limitations.[91] Likewise, a defendant is free to waive the right to assert the statute of limitations. While waiver and estoppel do not truly toll the statute of limitations, they have the same effect.

2. Statute of Limitations Policies

a. Evidentiary

One policy reflected by statutes of limitations is that proof is less available or less reliable as time passes.

A clear example of this is *O'Keeffe v. Snyder*.[92] Had the case gone to trial (which it did not because the parties settled), one question that was disputed was whether the paintings had been stolen, sold, or gifted. There was apparently no written evidence on that question, and its resolution was within the memories of two people—the gallery owner, Alfred Stieglitz, and the possessor's predecessor, Dr. Frank. Neither could testify in the case in 1980, as Stieglitz died in 1946, and Frank expired in 1948.

A second evidentiary problem is that even in people without cognitive impairment, memories fade. The likelihood of being able to present an accurate account of an event diminishes as time passes.

In a case where there is insufficient proof of a crucial element, the person with the burden of proof loses.[93] While it is often the plaintiff who loses at an earlier point in the litigation if the statute of limitations has been invoked, that is not always the case. Sometimes the defendant has the burden of proof, as with affirmative defenses, such as expiration of the statute of limitations.[94]

89. *See* Heiser, et al., *supra* note 69, at 33–35, 38–81; Kevin M. Clermont, Civil Procedure 164–180 (9th ed. 2012).

90. Bibas, *supra* note 28, at 2443 n. 35. We likewise could find no case during that period holding that the statute of limitations was not tolled because the goods were outside the jurisdiction. The 1918 case was Torrey v. Campbell, 175 P. 524 (1918), where the discussion was dictum, as the heifer in question was never removed from the court's jurisdiction.

91. Harvard Law Review Ass'n, *supra* note 67, at 1222–24.

92. O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

93. Heiser, et al., *supra* note 69, at 579–584.

94. *Id.* at 297–99.

b. Seriousness

The seriousness theory speaks to the pursuit of a serious claim that is not normally delayed. A claim not brought is likely evidence that the person who could have brought it either does not believe that the claim is valid[95] or, for some other reason, thinks it more prudent not to press the claim.[96] The longer the delay in filing suit, the less likely that the suit will be meritorious.[97]

There is another possibility. Few lawyers work for free and lawsuit-related expenses need to be paid currently. In the U.S., that problem is partially alleviated because many lawyers are willing to bring meritorious cases on a contingent-fee basis. Each lawyer makes an individualized decision about whether she is willing to take the case on a contingent fee. Few lawyers will do so if the potential recovery will be too small. For that reason, a case might not be brought within the statute of limitations because the likely recovery will be too small to induce a lawyer to take it.[98]

c. Economic Efficiency

Much as we might like to ignore this fact, litigation is not free. It involves significant expense that someone must bear. In a case where each party pays a lawyer, the parties bear the cost. Where a party is represented on a contingent fee arrangement, the cost is borne by the party if he wins, and by the lawyer if he loses. In addition to attorneys' fees, there are other costs of litigation.

Costs mount as litigation progresses, but they do not increase evenly. While each case is different, it is a fair generalization that the costs of getting through the pleading and answer stage are relatively small, the costs of discovery are large, the costs of going to trial are huge, and the cost of an appeal is small.[99] To be more precise, a survey of experienced counsel reveals that in property cases, the participation of paralegals and junior attorneys is much greater at the initial stages of a litigation than it is at the negotiation, pre-trial and trial stages; that the number of hours spent moving through discovery is about double the number spent getting to discovery; that the settlement phase absorbs roughly the same number of hours as pre-discovery; and that somewhat

95. Plaintiff's ancestors, who were in a better position to know the facts of the case and knew that defendant's predecessor had the artwork, did not attempt to recover it. Bakalar v. Vavra, 819 F.Supp.2d 293, 305 (S.D.N.Y. 2011), *aff'd per curiam* 11-4042-cv, 2012 U.S. App. Lexis 21042 (2d Cir. Oct. 11, 2012).

96. *See* U.S. v. Portrait of Wally, 99 Civ. 9940 (MBM), 2002 U.S. Dist. LEXIS 6445, at *11 (S.D.N.Y. Apr. 12, 2002) (owner did not reclaim work because trying to re-establish as contemporary art dealer in Vienna); *see also* von Saher v. Norton Simon Museum of Art, 897 F.3d 1141, 1143, 1145 (9th Cir. 2018) (owner advised by counsel waived the right to claim painting taken in Holocaust during Dutch restitution proceedings).

97. Harvard Law Review Ass'n, *supra* note 67.

98. *See* Songbyrd Inc. v. Est. of Grossman, 206 F.3d 172 (2d Cir. 2000) (song writer did not sue for copyright infringement until song became successful, by which time both principals had died).

99. Assuming that the same attorney who tried the case handles the appeal. Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, CT. STAT. PROJECT (Jan. 2013), https://www.srln.org/system/files/attachments/CSPH_online2.pdf [https://perma.cc/WX3M-9L53] [https://web.archive.org/web/20221010202526/https://www.srln.org/system/files/attachments/CSPH_online2.pdf].

over half the attorney time and a bit under half the paralegal time is spent on pre-trial and trial.[100] What this means is that the attorney and paralegal costs of dismissing a suit on the pleadings will be about twenty-five percent of the cost of settling the case before serious trial preparation has begun.[101]

Lawyers for both sides know about the cost of litigation. They also know that because costs increase and settlement provides certainty, most cases settle before trial. In deciding the price of a settlement, both parties are likely to consider the likely recovery in case of success, the likelihood of success, and the cost of continuing the litigation.

In other words, every potential lawsuit contains the possibility of extortion. A plaintiff can try to calculate the defendant's cost of defending and offer to settle for a lesser amount. A plaintiff whose complaint can pass the pleading stage into the discovery stage can demand a larger amount in settlement because the defendant is confronted with increased litigation expenses.

Since the statute of limitations will often permit a suit to be dismissed at the pleading stage, that makes the statute of limitations a powerful engine of economic efficiency in litigation.[102]

d. Policy Summary

In short, the evidentiary and seriousness policies go to the question of the time after which a court probably can no longer fairly and effectively make a decision.[103] The economic efficiency policy is designed to conserve the resources of the court and the parties, and to deter opportunism.[104] The earlier the court can decide whether a case will go forward, the better both policies are served. Richard Epstein suggests that the law and economics rationale for adverse possession is to set the statute at the point where the likelihood that a combination of the cost of litigation and the cost of making incorrect decisions outweigh the value of security of title as represented by the principle

100. *Id.* The article does not break out when the fees of expert witnesses are incurred. Some are presumably incurred in discovery, some in pre-trial and some in trial.

101. *Id.*

102. In most cases, expiration of the statute of limitations will be apparent in the plaintiff's complaint, and the defendant will challenge the suit in the answer. While the defendant carries the burden of proof on expiration of the statute of limitations, the plaintiff has the burden of showing that exceptions that would toll the statute apply. Harvard Law Review Ass'n, *supra* note 67, at 1198–99.

103. *Id.* at 1260.

104. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2016), suggests that this is a peculiar concern of equity. It is a concern of both law and equity, but the flexibility of equity doctrines makes equity much more effective at squelching opportunism in individual cases. That same individualization makes it a less effective system for curtailing opportunism. There is a particularly good discussion of the economics of the rule-standard tradeoff (which he calls mechanical-judgmental) at Thomas W. Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 NW. U. L. REV. 1122, 1137–45 (1985).

of first in time, first in right.[105] The longer one possesses art, the higher the cost of proving ownership, and the more likely that the determination will be erroneous.[106]

e. The Bibas Reform Proposal

A generation ago, now-Judge Bibas proposed a major reform in the statute of limitations for stolen art.[107] This proposal has been nowhere enacted but deserves more attention than it has received. Bibas recognized the indeterminacy of the discovery rule and the equivalent indeterminacy of the application of the doctrine of laches, the surrogate for the statute of limitations in New York's demand-and-refusal jurisdiction.

His first proposal is that jurisdictions not use the discovery rule to determine when a cause of action accrues.

His second proposal is that there should be no statute of limitations for the recovery of stolen art if the owner within a reasonable time of the theft reports it to the local police and registers it with an international registry of stolen art.

Bibas' justification is that these two reforms will restore certainty of application to this area of the law. The second proposal will reform the art world by placing the risk of failure to fully inquire about the provenance of works on the buyer if the seller has enabled the buyer to effectively do so. It is, in essence, an attempt to internalize the cost of not properly researching title before purchasing by placing the risk on the buyer if the owner of stolen property has enabled the buyer to discover that fact before purchasing.

Abandoning the discovery rule for the recovery of artwork could be done judicially except in those jurisdictions where it has been mandated by the legislature.[108] Removing the statute of limitations, especially a conditional removal, is so unusual that it should be done only by the legislature.

A great advantage of the Bibas proposal to abandon the discovery rule and conditionally remove the statute of limitations is that it would restore certainty to the question of whether the statute of limitations has expired, and it would be economically efficient by permitting dismissal of many cases at the pleading stage.

It is true that under current rules, buyers are not given overwhelming incentives to assure that they are not buying stolen art. However, it is unclear whether the Bibas

105. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 669–677 (1986).

106. In O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980), possession was for more than thirty years, and the only people who could testify about whether the art was sold, gifted, or stolen were dead. In Bakalar v. Vavra, 550 F. Supp. 2d 548 (S.D.N.Y. 2008), the claimant (and their ancestors) had not possessed the art for seventy years. The people who could testify about how the art came into the hands of Mathilde Lukacs were both dead.

107. Bibas, *supra* note 28.

108. *E.g.*, CAL. CIV. PROC. CODE § 338(c1); Holocaust Expropriated Art Recovery Act, Pub. L. No. 114–308, 130 Stat. 1528.

proposal would change those incentives.[109] There are many aspects of art law and the art world that the proposal ignores.

The proposal points out that most art is bought through art professionals. Those professionals will be liable to their customers if they sell their customers stolen art.[110] This ignores the fact that most auction houses limit their liability in their catalogues[111] and the fact that the statute of limitations for breach of warranty in the sale of goods under the Uniform Commercial Code is four years from the date of delivery.[112] Unless the lack of title is discovered quickly, the good-faith purchaser has no remedy against the merchant who sold the artwork.[113]

Still, if it were possible to warn all the world that a work of art had been stolen by notifying the local police and an international registry, it might be worthwhile. Unfortunately, it is not possible. The local police are likely to be local. Local control has led to a large number of police and sheriff departments in the U.S., estimated by some as around 18,000.[114] It is unknown how many local police departments share their stolen art information with the FBI stolen art database.

International databases seem more promising until one carefully examines their operation. There is not one international registry, but a number of them. Most are reserved for use by law enforcement, so they cannot be searched at the request of a potential buyer.[115] The FBI's database can be searched by anyone.[116] There are two

109. Nearly every stolen art decision recites that the rule of law it propounds will reduce art theft and/or induce buyers to only buy art to which their seller has good title. *E.g.*, Menzel v. List, 246 N.E.2d 742, 745 (1969).

110. Bibas, *supra* note 28, at 2463.

111. *E.g.*, Greenwood v. Koven, 880 F. Supp. 186, 192–193 (S.D.N.Y. 1995) (auction house conditions of sale modified agency loyalty requirements).

112. U.C.C. § 2-725. The same four-year statute applies to international sales under the U.N. Convention on the Limitation Period in the International Sale of Goods art. 8, June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3, effective for the U.S. in 1994.

113. Sometimes the merchant cannot assert the statute of limitations. That was the case when the possessor lost in Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds* 279 N.Y.S.2d 608 (1967), *modification reversed* 246 N.E.2d 742 (1969). The court adequately explains why List could not assert the statute of limitations in Menzel's replevin action, but fails to explain why the Perls gallery, which had sold Albert List the painting six years previously, could not assert the statute of limitations in List's third-party breach of warranty claim. The Appellate Division explains that the reason the statute of limitations has not run is that this is a warranty of quiet possession that is a future covenant not breached until possession is disturbed. The statute of limitations also created a major loss for the gallerist Richard Feigen, who refunded a client's full purchase price for what turned out to be a forged Max Ernst and then discovered that he could not obtain a refund of the $216,000 sales tax paid on the sale transaction from New York state because the statute of limitations for refunds had expired. In re Richard L. Feigen & Co., Inc., N.Y. Div. of Tax Appeals Determination 824996 of July 10, 2014.

114. *Police Departments in the US: Explained*, USA FACTS (Aug. 13, 2020, 2:15 PM), https://usafacts.org/articles/police-departments-explained [https://perma.cc/CG6Z-7U4Z] [https://web.archive.org/web/20221010213801/https://usafacts.org/articles/police-departments-explained].

115. The London Stolen Art Database is maintained by the Metropolitan Police Department (Scotland Yard).

116. *National Stolen Art File*, FBI, https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file [https://perma.cc/Q7EW-HX5P] [https://web.archive.org/web/20221010214629/https://www.fbi.gov/investigate/violent-crime/art-theft/national-stolen-art-file] (last visited Oct. 10, 2022). The same was true of the Italian Carabinieri Database—as can be seen in an archived version of the database

databases where a buyer can order a search. The first database claims to be the largest and has a checkered history. It operates a registry where one can order a search, and it also undertakes the recovery of stolen art on a contingency basis. It derives considerably more revenue from recovering a stolen artwork than from searching for that work in its registry, and there is an allegation that it provided a false negative search report that led to its recovery of the work from a good faith purchaser.[117] It is a private, profit-making enterprise.[118] However, it has never made a profit. [119]The second is too new to know much about it.[120] Neither's list of stolen artworks is comprehensive.[121]

Approached from the viewpoint of the buyer, finding assurance that the work one wants to purchase has not been stolen is often impossible. Provenance is easily faked and is usually so indefinite that no serious investor would consider buying based on the provenance provided. Constructing your own provenance would be both expensive and time-consuming. It would also likely be fruitless, as the work is likely to be sold to someone else before the provenance is complete.[122]

Nor is removing the statute of limitations entirely practical. The evidentiary rational of the statute remains. It may be easy to prove that the person who claims to be the owner once owned the artwork, but difficult to prove, as the years roll by, that the work was stolen rather than gifted or sold.[123] The Schiele may have been one of the 417

captured by the Wayback Machine at https://web.archive.org/web/20110831092958/http://tpcweb.carabinieri.it/tpc_sito_pub/simplecerca.jsp (last visited Nov. 17, 2021)—but it is no longer searchable by the public. One needs to apply for permission to use the Interpol database. Presumably, once granted, you can search it yourself. *Application form to access INTERPOL's Works of Art Database*, INTERPOL, https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database/Application-form-to-access-INTERPOL-s-Works-of-Art-Database [https://perma.cc/QRR9-HDNA] [https://web.archive.org/web/20221010221317/https://www.interpol.int/en/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database/Application-form-to-access-INTERPOL-s-Works-of-Art-Database] (last visited Oct. 10, 2022).

117. E-mail from Julian Radcliffe, Chairman, The Art Loss Register, to the author (May 9, 2008) (on file with author); *Optical Due Diligence: Art Loss Register Claims To Vet Ancient Art. Does It?*, CHASING APHRODITE (Aug. 1, 2013), https://chasingaphrodite.com/2013/08/01/optical-due-diligence-art-loss-register-claims-to-vet-ancient-art-does-it [https://perma.cc/QU49-LKBQ] [https://web.archive.org/save/https://chasingaphrodite.com/2013/08/01/optical-due-diligence-art-loss-register-claims-to-vet-ancient-art-does-it].

118. London-based Art Loss Registry: *The Art Loss Register: Search*, ART LOSS, https://www.artloss.com/search [https://perma.cc/ZGP5-GMZ9] [https://web.archive.org/web/20221010221836/https://www.artloss.com/search] (last visited Oct. 10, 2022).

119. CHASING APHRODITE, *supra* note 117.

120. ARTIVE, www.artive.org [https://perma.cc/P8F7-Z3QN] [https://web.archive.org/web/20221010222444/https://www.artive.org] (last visited Oct. 10, 2022).

121. For a more complete discussion, *see* Lazerow, *supra* note 34 at 213–15.

122. This sometimes leads the prospective purchaser to disregard the excellent advice given him by his lawyer. *E.g.*, Lindholm v. Brant, 925 A.2d 1048 (2007) (counsel advised buyer to secure either an invoice from known owner showing sale to the seller or a representation that seller was authorized to convey clear title, but buyer purchased without securing either). For a more complete discussion, *see* Lazerow, *supra* note 34 at 203–212.

123. Even with renowned works of art where there was considerable evidence about the transfer, disagreements continue 200 years later about whether they were stolen or sold. Two recent news articles involve the Parthenon marbles—*Greece Agrees Parthenon Marbles Feud Should Not Strain Ties: UK*, ARTDAILY, https://artdaily.cc/news/141231/Greece-agrees-Parthenon-Marbles-feud-should-not-strain-ties—

artworks Mrs. Grünbaum shipped out of Vienna in 1938, but it could not be proven because both the shipper and the recipient were dead, and no written inventory of the shipment survived.[124]

However, legislatures might well consider whether prompt reporting of the theft should extend the statute of limitations, especially in jurisdictions where the statute is exceptionally short.

3. Statute of Limitations Practicalities

The practicality of statutes of limitations is that their requirements are usually easy to both plead and prove, permitting a suit to be dismissed at the pleadings stage. Three items need to be established for the application of the statute of limitations: the date on which the cause of action accrued, the length of the applicable statute of limitations, and the date on which the lawsuit was filed.[125] The latter two questions can usually be decided on the pleadings. The suit filing date is usually obvious from the clerk's date stamp, and the applicable statute of limitations is a question of law. The date on which the cause of action accrued is readily ascertainable in a traditional jurisdiction or in a demand-and-refusal jurisdiction. In any of the various discovery jurisdictions, determining when the cause of action accrued will probably require discovery. That discovery might be limited to only the questions required to determine when the cause of action accrued, or it might be that discovery is a unitary process requiring that all discovery necessary to resolve the litigation be conducted before moving to the next stage of litigation. In either case, the decision on whether the suit is barred by the statute of limitations will be delayed, resulting in greater expense to the parties.

Expiration of the statute of limitations in theory does not extinguish claimant's right. It simply cuts off claimant's remedy. As a result, if claimant peacefully acquires possession of the property in question, expiration of the statute of limitations does not require that he relinquish that property, because he has a right to it, in some jurisdictions.[126] Others take a stronger view and require consensual acquisition.[127] One

UK#.YZW2yGDMJ5U [https://perma.cc/9HZQ-ABAS] [https://web.archive.org/web/20221010224821/https://artdaily.cc/news/141231/Greece-agrees-Parthenon-Marbles-feud-should-not-strain-ties—UK] (last visited Oct. 10, 2022)—and the Tipu Sultan tiger's head (1799)—Gareth Harris, *UK Puts Temporary Export Ban on Tipu Sultan Tiger's Head—but Commentators Claim it Was Looted in the 18th Century*, THE ART NEWSPAPER (Nov. 16, 2021), https://www.theartnewspaper.com/2021/11/16/uk-puts-temporary-export-ban-on-finial-from-the-throne-of-tipu-sultanbut-commentators-claim-it-was-looted-in-the-18th-century [https://perma.cc/KK4J-5SKF] [https://web.archive.org/web/20221010225302/https://www.theartnewspaper.com/2021/11/16/uk-puts-temporary-export-ban-on-finial-from-the-throne-of-tipu-sultanbut-commentators-claim-it-was-looted-in-the-18th-century].

124. Bakalar v. Vavra, 619 F.3d 136, 151 (2d Cir. 2010).

125. Technical requirements for initiating a cause of action, and the ability to amend the complaint after the statute of limitations has expired, are discussed at Harvard Law Review Ass'n, *supra* note 67, at 1237–44.

126. Davis v. Savage, 168 P.2d 851 (1946); Priester v. Milleman, 55 A.2d 540 (1947) (statute on the debt or for replevin had expired, but covenant in conditional sale contract permitted self-help on default).

127. Chapin v. Freeland, 8 N.E. 128 (1886) (Holmes, J.) (alleged converter can replevy from true owner who obtained possession after barred by statute of limitations).

might note that the number of instances in which someone can lawfully exercise self-help has declined over the years. Likewise, expiration of the statute of limitations on a debt does not prevent the disappointed claimant from offsetting the debt.[128]

In short, expiration of the statute of limitations leaves the possessor with the undisputed right to retain the property against the owner because of that expiration, as well as against the rest of the world because of prior possession. However, the possessor does not have title to the property by virtue of the statute of limitations.

B. LACHES

Laches is a doctrine that originated in the equity courts.[129] The difference between statutes of limitation and laches amply illustrates the traditional difference between law and equity. Law operates best with clear rules that are easy to apply. Equity operates by considering and weighing all the circumstances of the case.

Laches is designed to assure that litigation is not unfairly maintained, but its parameters are different from the statute of limitations' parameters. There is no fixed time within which the litigation must be brought. It is thus more difficult and more expensive to apply.

An initial problem to confront is the role of laches in a situation where most states have merged their law and equity courts and procedure.[130] In some jurisdictions, laches only applies to causes of action that were originally equitable.[131] This general principle has bled a bit: causes of action originally cognizable in law that carry equity-like remedies have had laches applied to them.[132] This includes mandamus and replevin because in both cases the court is asked to order defendant to do something, just as it does when it issues an injunction or orders specific performance.

Suits for stolen art always request replevin. The reason for this is simple: the measure of damages for a successful conversion suit is the fair market value of the property at the time and place taken. With replevin, the property itself is returned to the owner. The last half century has seen the value of most artwork escalate vertiginously, so the claimant wants the art back, or its current fair market value, rather than its market value at some time in the past, because that is the greater value.[133] They

128. Harvard Law Review Ass'n, *supra* note 67, at 1245–46.

129. 1 DAN B. DOBBS, LAW OF REMEDIES 103 (2d ed. 1993).

130. A brief history of Chancery and the merger of law and equity can be found in Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 537–540 (2016).

131. *Id.* at 548*;* Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014).

132. *E.g.*, Bakalar v. Vavra, 819 F.Supp.2d 293 (S.D.N.Y. 2011), *aff'd per curiam* 11-4042-cv, 2012 U.S. App. Lexis 21042 (2d Cir. Oct. 11, 2012); *contra* DAVID D. SIEGEL, NEW YORK PRACTICE 383 (5th ed. 2010).

133. Turning artwork into money, which most successful claimants must do in order to pay their lawyers, has a cost. The standard seller's commission charged by major auction houses is twenty percent of the hammer price. The buyer also pays a fee equal to twenty percent of the hammer price. Whether one can cut a better deal may depend on the market, the desirability of the work, and whether the seller is likely to be a repeat player. When Peter Brant sent Jeff Koons' *Balloon Dog (Orange)* to auction in 2013, Christie's waived the seller's commission in its entirety, and gave Brant a large share of the buyers' fee. Sale price: $58.4 million. Graham Bowley, *The (Auction) House Doesn't Always Win*, N.Y. TIMES (Jan. 15, 2014), https://www.nytimes.com/2014/01/16/arts/design/christies-and-sothebys-woo-big-sellers-with-a-cut.html [https://perma.cc/

sometimes call for a constructive trust, an equitable remedy, but that is seldom granted when replevin is available.[134]

In short, a claimant who is requesting the return of his art may need to overcome the statute of limitations and, if successful at that, may need to overcome laches.

1. Laches Doctrine

In order to invoke laches, a defendant must prove two elements. The classic statement is that a plaintiff must have unduly delayed bringing action, and that delay must have resulted in detriment to the defendant.[135]

a. Undue Delay

The cases are unclear about how much delay is undue. Courts do not look to the length of the statute of limitations for guidance on this question. Indeed, since the merger of law and equity, the doctrine of laches is invoked when the statute of limitations has not yet run. A clear example of undue delay might be found in *Solomon R. Guggenheim Foundation v. Lubell*.[136] The museum knew that the Chagall gouache in question was missing by at least 1970. The museum decided not to report the loss to the police, the insurance company, or the art community, and deaccessioned it. It learned that the Lubells had the Chagall in 1985. After rejecting the Lubells' statute of limitations defense, the court remanded the case to determine whether the Guggenheim was barred by laches, and made it clear that all the facts and circumstances were to be considered in determining whether laches applied:

> [A]lthough appellant's statute of limitations argument fails, her contention that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense. The conduct of both the appellant and the museum will be relevant to any consideration of this defense at the trial level, and as the Appellate Division noted, prejudice will also need to be shown . . . . On the limited record before us there is no indication that the equities favor either party. Mr. and Mrs. Lubell investigated the provenance of the gouache before the purchase by contacting the artist and his son-in-law directly. The Lubells displayed the painting in their home for more than 20 years with no reason to suspect that it was not legally theirs. These facts will

KFE2-MSES] [https://web.archive.org/web/20220924010943/https:/www.nytimes.com/2014/01/16/arts/design/christies-and-sothebys-woo-big-sellers-with-a-cut.html].

134. DOBBS, *supra* note 129, at 935.

135. *Id.* at 103.

136. 569 N.E.2d 426 (1991).

> doubtless have some impact on the final decision regarding appellant's laches defense.[137]

This makes it clear that for laches it is not the time at which the plaintiff actually discovered what was necessary to sue but the time at which, in the exercise of reasonable diligence, the plaintiff would have discovered the needed facts.[138]

It is also clear that a defendant need only prove that the owner should have been aware of his claim. The owner need not know the identity of the possessor in order for the period of delay to begin.[139]

Lubell did not decide how long a delay is too long, and the parties settled instead of litigating the laches question.[140]

While most courts do not discuss principles for deciding how much delay is undue, some delay may be reasonable. Delay may be reasonable if one must wait to file suit for the expiration of an administrative claim. It may be justified where necessary to prepare a complicated claim, or to determine whether the injury is serious enough to warrant litigation.[141]

It is not only the plaintiff whose delay may be important. If the plaintiff's ancestor had the cause of action, that ancestor's delay may bar the plaintiff. In one case, the heirs sued to replevy a Schiele drawing.[142] Their parents knew that the owner and his wife had been killed in World War II and that the drawing was in the wife's sister's possession. Their parents did not sue or claim the gouache. The court held that bringing the action half a century later was undue delay.[143]

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137. *Id.* at 431.

138. Harvard Law Review Ass'n, *supra* note 67, at 1184.

139. Republic of Turk. v. Christie's, 17-cv-3086 (AJN), 2021 U.S.Dist. LEXIS 169215, at *27–31 (S.D.N.Y. Sept. 7, 2021) (dicta).

140. It is not surprising that the parties settled. They had already financed litigation all the way to the New York Court of Appeals. The museum was faced with the unpleasant prospect of trying to prove that it did not unreasonably delay in suing, while Ms. Lubell wondered how she would prove that the delay had worsened her position. The value of the Chagall gouache was estimated at $200,000, but the fact that it spent most of its museum time in storage was a clear indication that it was not a central part of the Guggenheim collection. Like most settlements, this one was confidential. Rumor has it that Ms. Lubell kept the Chagall, while making a payment to the Guggenheim, and the gallery that had sold the work to the Lubells helped with the payment, which according to one source was $212,000. Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM. L. REV. 49, 59 n. 56 (1995).

141. Evergreen Safety Council v. RSA Network, Inc., 697 F.3d 1221, 1227 (9th Cir. 2012) (plaintiff's delay of a dozen years in opening defendant's letter revealing copyright infringement was not reasonable).

142. Bakalar v. Vavra, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd per curiam* 11-4042-cv, 2012 U.S. App. Lexis 21042 (2d Cir. Oct. 11, 2012). In this case the heirs were the grandnephew of the owner's brother and the grandson of the owner's wife's sister. Neither of them was a blood relative of the owner. It is difficult to see how they could both be the heirs under Austrian law, but the identity of the heirs was determined by an Austrian court and could not be challenged in the New York proceeding.

143. *Id.* There was no discussion in this case about the fact that laches was being asserted by the plaintiff against the defendant, an unusual situation. The case also represents a strange choice on the part of the plaintiff's counsel to sue in New York instead of waiting for the owner's heirs to sue in Bakalar's home state, Massachusetts. By suing in New York, he faced two doctrinal challenges. One was the demand-and-refusal rule for accrual of the statute of limitations, which would doom an adverse possession argument. The second

In reality, in most cases what constitutes undue delay is determined by the second laches requirement: an adverse change in circumstances for the defendant. There must clearly be a delay from the time the plaintiff discovered or should have discovered his cause of action, but what seems to make the delay undue is the harm the defendant suffered.

b. Detriment

While some cases discuss the possibility that delay alone may be sufficient to find laches,[144] that is certainly not the doctrine. Laches requires that the delay has resulted in detriment to the defendant.[145]

The most common change in circumstances is evidentiary prejudice such as the death or unavailability of a crucial witness or the destruction of records.[146] In *O'Keeffe v. Snyder*,[147] the crucial substantive question would have been whether the paintings were sold, gifted, or stolen. The two witnesses who could have spoken to that question both died before the suit was brought. In *Bakalar v. Vavra*,[148] the crucial substantive question was whether the Schiele drawing was one of more than 400 artworks shipped out of Vienna by Elisabeth Grünbaum, the owner's wife, and her sister, or whether it was confiscated by the Nazis. The wife's sister, Mathilde Lukacs-Herzl, was the only surviving person who knew whether the Schiele drawing was in the shipment. She sold the drawing in 1956, but her testimony was unavailable because she died in 1979.[149]

The other form of detriment is sometimes called expectation-based prejudice,[150] but I prefer reliance-based detriment, because its essence is that the defendant changed position in reliance on not being sued.

was New York precedent that once the owner showed the slightest evidence that the work might have been stolen, the burden of proof shifted to the possessor to prove that it was not stolen. Had the litigation taken place in Bakalar's home jurisdiction of Massachusetts, it is doubtful that either of those doctrines would have applied. Presumably, the suit was brought in New York because that was the only place in which jurisdiction over defendants could have been obtained, and the plaintiff wanted a quick disposition so that he could sell the drawing. Of course, the great advantage of hindsight is that it can always pretend to see 20-20 because it knows what the outcome was.

144. Obert v. Obert, 12 N.J. Eq. 423, 428–429 (1858) (twenty-two-year delay not unreasonable when plaintiff was incapacitated during first portion of it). I have found no case actually finding laches where defendant suffered no detriment.

145. DOBBS, *supra* note 129, at 103–05.

146. Evergreen Safety Council v. RSA Network, Inc., 697 F.3d 1221 (9th Cir. 2012) (death of one witness, unavailability of others, and destruction of business records after a bankruptcy); Republic of Turk. v. Christie's, Inc., No. 17-cv-3086 (AJN), 2021 U.S. Dist. LEXIS 169215, at *33–34 (S.D.N.Y. Sept. 7, 2021) (death of three potential witnesses and disappearance of documents).

147. 416 A.2d 862 (N.J. 1980).

148. 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 11-4042-cv, 2012 U.S. App. LEXIS 21042 (2d Cir. Oct. 11, 2012) (per curiam).

149. *Accord* Garcia v. Garcia, 808 P.2d 31 (N.M. 1991) (filing of quiet title action delayed 13 years until after death of person who arranged unrecorded sale-leaseback of the realty); Stone v. Williams, 873 F.2d 620 (2d Cir. 1989) (dictum).

150. N.K. Collins, LLC v. William Grant & Sons, Inc., 472 F. Supp. 3d 806 (D. Haw. 2020).

Significant injury might include purchasing the artwork if the plaintiff could have brought suit against defendant's predecessor in interest.[151] It would also include expenditure of substantial sums in reliance on ownership, such as for conservation or restoration.[152] Whether it would include the ordinary expenses of ownership, such as insurance premiums, or special security devices required for insurance coverage, is unknown. One might also argue that an exceptionally volatile market causing the possessor to lose other investment opportunities would be a sufficient detriment.[153]

Significant injury might include the expiration of contractual indemnities.[154] Those indemnities might result from express guarantees, or warranties implied by law. For example, U.C.C. section 2–312 provides a warranty of title, but the statute of limitations is four years.[155] If the buyer does not discover his lack of title before the expiration of four years from the date of the sale, that warranty cannot be enforced.

In one case, detriment was found where the defendant profitably licensed the contested property—copyright renewals—but might have made different arrangements had he known that he would be required to share the proceeds.[156] Such a result is to be criticized, especially where the defendant presents no solid proof of alternative uses considered or the fact that defendant chose one investment over another because he thought he was the sole owner. That situation should not be regarded as a detriment but should more appropriately be discussed under the rubric of other equitable considerations.

The same applies to the argument that an owner should not be allowed to say nothing while another invests time and money in developing a commercial opportunity, then swoops in claiming the profits.[157]

151. Republic of Turk. v. Christie's, Inc., No. 17-cv-3086 (AJN), 2021 U.S. Dist. LEXIS 169215, at *35 (S.D.N.Y. Sept. 7, 2021).

152. *See e.g.*, Deborah Vankin, *'Blue Boy Revisited: The Huntington is Saving Its 18th-century Masterpiece—and You Get To Watch*, L.A. TIMES (Sept. 14, 2018, 3:00 AM), https://www.latimes.com/entertainment/arts/la-ca-cm-project-blue-boy-20180914-story.html [https://perma.cc/JZM7-EY24] [https://web.archive.org/web/20221114071403/https://www.latimes.com/entertainment/arts/la-ca-cm-project-blue-boy-20180914-story.html]. *Project Blue Boy*, THE HUNTINGTON, https://huntington.org/exhibition/project-blue-boy [https://perma.cc/2HBE-RAB4] [https://web.archive.org/web/20221109202304/https://huntington.org/exhibition/project-blue-boy] (last visited Nov. 9, 2022) sets forth the restoration schedule of the Thomas Gainsborough painting *The Blue Boy*, and indicates that the restoration was funded by the Bank of America Art Conservation Project, the Getty Foundation, Friends of Heritage Preservation, and Haag-Streit USA. The length and complexity of the restoration, together with the fact that it required four foundations to fund it, indicates its high cost.

153. Hammond v. Wallace, 24 P. 837 (Cal. 1890) (two-year delay in rescinding auction sale where value of land changed rapidly).

154. N.K. Collins, LLC v. William Grant & Sons, Inc., 472 F. Supp. 3d 806 (D. Haw. 2020).

155. U.C.C. § 2-725. If the sale is international, the statute is likewise four years from performance under the U.N. Convention on the Limitation Period in the International Sale of Goods arts. 8, 10(2), June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3.

156. Stone v. Williams, 873 F.2d 620 (2d Cir. 1989), vacated and remanded on other grounds 891 F.2d 491 (2d Cir. 1989).

157. *E.g.*, Songbyrd, Inc. v. Est. of Grossman, 206 F.3d 172 (2d Cir. 2000) (song writer did not sue for copyright infringement until song became successful, by which time both principals had died); Haas v. Leo Feist, Inc., 234 F. 105, 108 (S.D.N.Y. 1916) (accounting ordered for profits from a song, but only until plaintiff learned of the copyright infringement).

It has been suggested that the appropriate remedy for reliance-based detriment is not to dismiss the case, but to require a plaintiff, if successful, to reimburse the defendant for his reliance-based expenditures (presumably plus interest from the date made and a reasonable profit given the circumstances).[158] This suggestion has not been incorporated into the laches decisions.

c. Other Equitable Considerations

In addition, whether a court will find that laches exists seems to be influenced by other equitable considerations. Later cases attribute to Learned Hand a holding that the defendant's exploitation of property in a business where plaintiff did not take the risk of loss is a detriment sufficient to invoke laches,[159] but Hand instead posed that as a separate equitable requirement:

> It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other's money; he cannot lose, and he may win.[160]

In effect, Hand substitutes other equitable considerations for the requirement of detriment in determining whether a plaintiff will be barred by laches. The fact that whether a case will be dismissed for laches is subject to all equitable principles requires a very full exposure of all the facts surrounding the case. Exposing them to the court is neither quick nor inexpensive.

As detailed in the quotes above from *Lubell* and *Feist*, laches requires a consideration of all the facts and circumstances of the case in addition to delay and detriment.[161] In a case involving Grünbaum art that took the same path as the Schiele in *Bakalar*, a New York court refused to apply laches because the defendant knew about the *Bakalar* case.[162] Knowing all those facts, the defendant should have been aware that buying the artwork would expose him to suit. The court found that it would therefore be

158. 1 DAN B. DOBBS, LAW OF REMEDIES § 2.4(4) (3d ed. 2018) (commenting on Kamberos v. GTE Automatic Elec., Inc., 454 U.S. 1060 (1981) (White, J., dissenting from denial of certiorari from Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598 (7th Cir. 1979) (plaintiff in sex discrimination case was barred from collecting back pay from the time she could have requested EEOC permission to sue until the time she did, but not barred from other remedies)).

159. *E.g.*, *Stone*, 873 F.2d.

160. Haas v. Leo Feist, Inc., 234 F. 105, 108 (S.D.N.Y. 1916). This is not mere history. It is reaffirmed in Seven Arts Filmed Ent., Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1255 (9th Cir. 2013), on statute of limitations grounds.

161. Garcia v. Garcia, 1991-NMSC-023, P.2d 31, 39.

162. Reif v. Nagy, 106 N.Y.S.3d 5 (App. Div. 1st Dept. 2019).

inequitable to apply laches, even though laches was applied in a case identical on all facts except knowledge at purchase.[163]

The result is that the parties need to engage in extensive and costly discovery in many cases before the court can decide whether to dismiss the case on laches grounds.

2. Laches Theory

The purpose of the doctrine of laches is to prevent unfair lawsuits. It differs from the statute of limitations in that the latter presumes that after a pre-set period of time, the suit is unfair. Laches requires an actual showing of unfairness by asking that both the detriment to defendant be proven and the unreasonable delay in bringing the action be proven. The addition of other equitable considerations emphasizes this.

In addition to involving all the facts and circumstances, laches calls for a balancing act. "Where there is no excuse for delay . . . defendants need show little prejudice; a weak excuse for delay may . . . suffice to defeat a laches defense if no prejudice has been shown."[164]

3. Laches Practicalities

The defense of laches cannot be decided on the pleadings. In some cases, it will be clear from the pleadings that there has been significant delay in bringing suit since the plaintiff discovered the cause of action, and that the defendant has suffered detriment as a result. Even in those cases, because all factors must be examined to determine whether dismissal for laches is equitable, discovery will be required. This postpones the decision and raises the cost of the litigation.

Where one of the elements is doubtful, such as the time of discovering the cause of action or whether the detriment is sufficient to invoke equitable powers, the delay and additional expense are even clearer.

C. ADVERSE POSSESSION

The doctrine of adverse possession (or "acquisitive prescription" in civil law jurisdictions) holds that a person in possession for the requisite time is the owner of the property. No action need be taken (other than the possession) for the possessor to be the titleholder. The happening of the physical requirements results in the possessor's title without either paperwork or court decree. [165]

163. *Id.* The real loser in this case was the insurance company that had insured the title for Nagy.

164. *Stone*, 873 F.2d. at 625 (illegitimate daughter waited eleven years to claim her father's copyright renewal rights; six years were justified and five unjustified).

165. Henderson v. First Nat'l Bank, 494 S.W.2d 452 (Ark. 1973). However, the wise adverse possessor will seek a court judgment because insurers and lenders are unlikely to be satisfied with a title that is not reduced to a paper record.

1. Adverse Possession Doctrine

One significant difference between statutes of limitation and laches, on the one hand, and adverse possession on the other, is that adverse possession makes the possessor a titleholder, while statutes of limitation and laches only cut off the former owner's right to recover the property without giving the possessor title. As will be seen, the adverse possession doctrine's requirements and policy focus exclusively on the possessor,[166] with the exception of statutes that toll the running of the period for adverse possession because the owner was unable to assert that ownership due to minority, imprisonment, or lack of mental capacity.[167]

It thus becomes evident that disposing of a case on statute of limitations grounds where it is not a discovery jurisdiction can be done at an earlier time in the litigation than in a discovery jurisdiction, thereby saving costs for the court and both parties.

The reader should bear in mind that there are variances in adverse possession doctrine and results based on different state statutes and common law interpretations. There are also cases the results of which even within the same state cannot honestly be reconciled. The following presents the preponderant view.

a. Possession Required

To achieve adverse possession, the possessor must exercise the possession that a true owner would. A true owner would use the property in a way that was appropriate to the property. A true owner would use it openly, without the permission of anyone else, and his possession would not be interrupted.

i. Possession Appropriate To the Property

The possession of the true owner must be possession, and it must be possession that is appropriate to the property. Most of the cases that have arisen challenging the nature of possession have involved realty, but it is easy to see how they apply to personalty.

Possession is required to distinguish a possessor from a trespasser. A trespasser never acquires title by adverse possession.

166. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF EQUITY PLEADING 139 (2d ed. 1883).

167. A typical statute was Ohio Rev. Code Ann. § 2305.04:

> An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind, or imprisoned, such person, after the expiration of twenty-one years from the time the cause of action accrues, may bring such action within ten years after such disability is removed.

In one example, a person enclosed the neck of a peninsula suitable for grazing cattle and grazed cattle on it. The court held that the person was a possessor, not a trespasser, because he intended to and actually did control the land as an owner would.[168]

Another case involved land that was useful for mining sand and gravel. The plaintiff argued that the defendant was not a possessor because he did not live on the land, place a structure on it, or enclose it. He did extract sand, prevent others from doing so, and pay taxes on the land. The court held that he was a possessor.[169]

ii. Open Possession[170]

A true owner normally possesses property openly—an owner has no reason to use property secretly. It is here that the possession of personalty differs from the possession of realty, and where the requirement of openness conflicts with the requirement of using property as a true owner would.

Real property is always used openly. Its location is known, and its use is easy to determine by visiting the property. Personalty is portable. Its location at any time is not necessarily known. Nonetheless, traditional personal property, such as wagons, horses, oxen, and boats, were used in a manner that would come to public attention.

Art, jewels, wine, and antiques are different. Their normal use is often private, within the owner's house. Their normal use would seldom come to the public's attention.

There are exceptions. If the possessor is a museum, art or antiques will normally be shown to the public from time to time. Today, such items might be listed permanently on the museum's website.[171]

Jewelry is often worn in public. Wearing jewelry frequently in public is open use of the property. Wine, on the other hand, is normally consumed in private, and such use would not be open. It might become an open use if the wine is raffled off to support a charity, especially if it generates news stories.[172]

Much art is used openly; some is not. Art may be lent to museums or galleries for exhibition. Art displayed to the public is an open use because the public is invited to view it, either for free or with an admission charge. When art is sold, especially high-value art, it is usually sold at public auction. This brings it to the attention of those who frequent art auctions. The sale does not normally identify either the old or new owner,

168. Brumagim v. Bradshaw, 39 Cal. 24 (1870). That land is now the Potrero in San Francisco.

169. Lessee of Ewing v. Burnet, 36 U.S. 41 (1837).

170. Statements of the rule usually require that the possession be "open, notorious, continuous and hostile." It is not clear that notorious adds anything to the requirement that the possession be open. No case has been found holding that a possession was open, but not notorious, or notorious, but not open. DALE A. WHITMAN ET AL., LAW OF PROPERTY 749 (4th ed. 2019).

171. *E.g.*, *Collection*, TIMKEN MUSEUM OF ART, https://timkenmuseum.org/collection [https://perma.cc/D4N8-E2LQ] [https://web.archive.org/web/20221109205216/https://www.timkenmuseum.org/collection] (last visited Nov. 9, 2022).

172. *See, e.g.*, *Nonprofit Raffles*, OAG.CA.GOV, https://oag.ca.gov/charities/raffles [https://perma.cc/5ZAA-L9HQ] (last visited Nov. 9, 2022).

as ownership is not normally disclosed to the public.[173] However, a sale makes an *in rem* suit possible. It is also possible to use legal process to compel the auction house, or displaying museum or gallery, to disclose what it knows about ownership.[174] Such a sale is an open use. On the other hand, showing art in your home to a small number of dinner guests may not qualify as open use, as the community is unlikely to equate showing the art with owning it.

There are cases that discuss the open possession requirement being designed to put the owner on notice,[175] but the real reason for the open requirement is that the community should realize the claim of title. [176]

iii. Without the Owner's Permission

If the possessor is holding the property with the owner's permission, the possessor never acquires title. This requirement is sometimes referred to as hostility, but that is misleading. The possessor's intention is quite irrelevant. A person who would apologize and move had he known that he was on another's land still gains title by adverse possession. Neither a bailee nor a tenant is an adverse possessor because they both hold the property with the owner's permission.[177] Likewise, co-tenants are not adverse possessors because they have the right to occupy the entire property. The bailee, co-tenant, or tenant must terminate the relationship either by denying the owner's rights or excluding the owner in order to become an adverse possessor.

iv. Uninterrupted

The possession must be uninterrupted. Possession is interrupted by the possession of the true owner,[178] by the unchallenged possession of a third party, or by the possessor abandoning his possession. Possession by the true owner requires a restart of the statute of limitations. Possession by a third party might or might not be inconsistent with the possessor acting like an owner. An owner would normally take action to

173. For a discussion of secrecy in the art world, see Lazerow, *supra* note 34 at 203–13 (2018) and HERBERT I. LAZEROW, MASTERING ART LAW 254–55, 260 (2d ed. 2020). N.Y. GEN. OBLIG. LAW § 5-701(a)(6) (McKinney 2022) requires disclosure of "the name of the person on whose account the sale was made." It was argued in William J. Jenack Est. Appraisers and Auctioneers, Inc. v. Rabizadeh, N.E.3d 576, 982 (N.Y. 2013) that this required the auction house to name the beneficial owner of the work sold, but the Court of Appeals held that it sufficed to name his agent, the auction house.

174. FED. R. CIV. P. 26(b)(1); Hicks v. Leslie Feely Fine Art, LLC, No. 20 CIV. 1991 (ER), 2021 WL 3617208 (S.D.N.Y. Aug. 13, 2021) (name of purchaser was relevant to plaintiff's suit and not protected by confidentiality).

175. *E.g.*, Reeves v. Porta, 144 P.2d 493, 496 (Or. 1944) (occasional pasturing of cattle in a brushy wilderness area is not open).

176. Merrill, *supra* note 104, at 1141–42.

177. Redmond v. N.J. Historical Soc'y, 28 A.2d 189, 194 (1942) (Society did not adversely possess a Gilbert Stuart portrait loaned to it for more than fifty years).

178. Mendonca v. Cities Serv. Oil Co., 237 N.E.2d 16 (Mass. 1968) (use of disputed land by owner's contractor for three-to-four weeks for storage of materials during construction without objection by plaintiff interrupted plaintiff's adverse possession).

recapture possession, so an attempt to do so would not destroy the continuity required to have uninterrupted possession. Where the possessor seems to abandon possession, the question would be whether the possessor's absence is inconsistent with a presumption of ownership. True owners do not remain on their property perpetually. Vacation absences and periods away while attending law school probably do not interrupt adverse possession. It depends on the facts and circumstances, such as the uses to which the property is suited and the reasons for the absence of the adverse possessor.

It is sometimes stated that the possession must be exclusive, but it is possible for several persons to possess the land at the same time by agreement. When there are so many possessors as to constitute public possession and the purported adverse possessor does nothing to discourage the general public, this does not amount to uninterrupted possession because an owner would not tolerate public use of his land.[179]

b. Ancillary Doctrines to Adverse Possession

Two important doctrines travel with adverse possession: tacking and relation back. Tacking relates to establishing adverse possession when there are multiple actors on one side; relation back goes to the consequences of finding adverse possession.

i. Tacking

It sometimes occurs that no one individual maintains possession for the full length of the statute of limitations, but several individuals, if their possessions were added together, would qualify. If the parties have a relationship to each other, such as ancestor and heir or grantor and grantee, the possessions of the parties are said to be tacked together to create a length of possession sufficient to have adverse possession.[180]

Where the ownership of the property changes hands after the adverse possessor enters, no such doctrine is necessary, as successive owners are always in privity with each other.

ii. Relation Back

When a person acquires title by adverse possession, the law considers that person to have always been the owner of the property. This is a logical assumption because it would be irrational to bar the former owner from recovering the property, but to permit the former owner to sue for trespass or for mesne profits or, in the case of personalty, conversion. This is driven by the underlying policy of confirming title to conform to possession, on the view that the adverse possessor always was the titleholder from the moment he went into possession.[181]

179. State v. Brooks, 166 S.E.2d 70, 74–75 (N.C. 1969).

180. This was the case in Lessee of Ewing v. Burnet, 36 U.S. 41 (1837).

181. HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 59 (6th ed. 2005); *e.g.*, Counce v. Yount-Lee Oil Co., 87 F.2d 572 (5th Cir. 1937) (owners who lost property by adverse possession may not recover the value of oil taken during defendant's possession within the statute of

While some view the doctrine of relation back as stripping the original owner of all rights related to the property, it is preferable to think of it as confirming the adverse possessor's title. This problem usually arises with realty, where every earning of mesne profits is deemed to be a separate cause of action. Absent the doctrine of relation back, if the statute of limitations were six years for mesne profits, the adverse possessor, now the title holder, would be liable to the former owner for profits earned during the last six years.[182] While there is no reason why this problem should not also occur with personalty, and suits to replevy personal property often contain a count for conversion, judgments where the claim of adverse possession fails do not usually contain damages for conversion or mesne profits.[183]

While the adverse possessor's title relates back to the start of possession, it is not a title derivative of the true owner. There is no fiction of a conveyance from the owner of record to the adverse possessor. The adverse possessor obtains a new title that has no predecessors.

2. Adverse Possession Policies

A number of policies have been assigned to the doctrine of adverse possession. Some of them do underlie the doctrine. Others should not be viewed as policies justifying the doctrine, but rather as the unintended results of it—collateral damage.

a. Quiet Title in the Owner

The first glimmering of adverse possession in the common law world occurs in feudal times. In 1085, William the Conqueror sent out royal commissioners to survey the wealth of the English lands he had conquered in 1066. Domesday Book provided a record of the reputed ownership of land as of 1086. Domesday Book was not an ownership document. It was tinged with avarice, rather than altruism, as it was designed to show William sources of wealth that he could tax. But it provided evidence of the (sometimes disputed) state of the title in 1086.[184]

At that time, a freehold interest in land could only be transferred by the current owner and the prospective owner going on the land and going through a ceremony where one transferred a twig or a clod of earth to the other that was symbolic of the transfer of the land.[185] The wise potential transferee brought a couple of witnesses with

limitations for mesne profits); Schmidt v. Marschel, 2 N.W.2d 121 (Minn. 1942) (person who acquires title by adverse possession has title to land built up by accretion or reliction during the period of possession).

182. 1 A. JAMES CASNER, AM. L. PROP. § 15.14 (1952).

183. Henderson v. First Nat'l Bank, 494 S.W.2d 452 (Ark. 1973) (person who acquired bank stock by adverse possession was the owner from the time possession began and was entitled to dividends from the stock from the time of first possession). There is not much discussion of mesne profits in art cases, probably because most art possessors do not derive any revenue from their possession.

184. Frederick William Maitland, Domesday Book and Beyond (1897); Adolphus Ballard, The Domesday Inquest (2d ed. 1923); 2 William Holdsworth, A History of English Law 155–65 (4th ed. 1936).

185. POLLOCK, *supra* note 1, at 82–83; CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 212–213 (4th ed. 2005).

him who could testify that the ceremony properly took place. At the time, so few people could read or write that anyone possessing that ability was entitled to benefit of clergy. Nonetheless, some grantees hired scribes to prepare charters of feoffment that certified the completion of the title transferring ceremony. Note that it was not the charter of feoffment that transferred the property; the charter of feoffment was only evidence that the transfer had taken place.[186] By the 13th century, charters of feoffment had become common.

Written evidence is certainly a useful thing, but the maxim *litera scripta manet* is not always accurate.[187] There was no government or religious institution that would preserve this evidence, and had there been such a repository, the incidence of fire in churches and stately manors would not have provided reassurance.[188] So the charter of feoffment, if it was ever prepared, was given to the grantee. But the grantee's house was likewise not immune to fire, and the heirs of most grantees, who could read no better than the grantees themselves, were likely to attach little importance to keeping track of this easily damaged piece of parchment.[189]

As the time from 1086 grew longer than the normal life of man, a person had no living witnesses who could prove that he had received a transfer of the land because all the witnesses to the ceremony had died. Often, a charter of feoffment could not be produced. Parliament came to the rescue by declaring that anyone who could prove that he or his ancestors had been seized of the land, first since the death of Henry I (1135), then from the accession of Henry II (1154), then from the coronation of Richard I (1189) could not be legally removed from the land.[190] As time passed, fewer and fewer people could prove seizin since 1189, so sixty years was tried in 1540, until a period of twenty years was established in 1623.[191]

The initial purpose of adverse possession was to secure the title of the owner of land even though that owner might be unable to prove that title.[192]It assumes that the person in longtime possession is the owner but cannot prove it.[193] It protects the owner

186. 1 A. JAMES CASNER, *supra* note 182, at 13, 22; DAVID A. THOMAS, THOMPSON ON REAL PROPERTY 189–94 (2d ed. 2009).

187. The full Latin proverb is *vox audita perit, litera scripta manet*: "The heard voice perishes, the written word endures."

188. Destruction by fire was a serious problem in medieval times because both heating and cooking required open flames. One partial solution, available to the extremely wealthy, was to locate the kitchen in a separate building where a fire in the kitchen would not consume the entire building. The most famous of these is the octagonal kitchen at the Abbey of Fontrevaud (dedicated 1119), with its five fireplaces and twenty chimneys. MICHELIN GREEN GUIDE, CHÂTEAUX OF THE LOIRE 67 (1974).

189. *Id.*

190. Pollock, *supra* note 1, at 81; Herbert Thorndike Tiffany, The Law of Real Property Abridged 470–72 (3d ed. 1970); William E. Burby, Handbook of the Law of Real Property 268 (3d ed. 1965).

191. 3 A. JAMES CASNER, AM. L. PROP. 755–756, 759 (1952); Statute of Monopolies 1623, 21 Jac. 1, c. 16. The preamble specifically states that it is for "quieting men's estates." 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 484–485 (1925).

192. John Lovett, Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881–1986), 5 TEX. A&M L. REV. 1, 12 (2017).

193. 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 79 (1925); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135–36 (1918). The purpose is "to extinguish otherwise valid rights by dint of the mere passage of time, regardless of the underlying merits of the claim." It prevents stale claims,

against bogus documents and bogus claims of transfer. It is not that the claimant is being penalized for negligent or intentional delay in asserting his rights; it is rather that the delay is so long that, as an evidentiary matter,[194] it is doubtful that the claimant has any rights to assert. The same purpose of securing title and preventing fraud was then applied to personal property.[195]

b. Confirm Expectations

Humans operate in a context. Part of that context provides rules relating to stability and change. Property rules contribute to that context. If I own Blackacre, I have a strong expectation of being able to maintain its stability of condition and use, as well as a major voice in dictating the changes that will occur to it.[196] Property law says my control over neighboring Chartreuseacre is considerably less. My ability to provoke change in Chartreuseacre is almost non-existent, and my ability to enforce stability, while greater, is still quite minimal.[197] Nonetheless, it is a natural human expectation, even in the face of these ground rules, to believe that the status quo will continue. The more one uses a property, and the longer one uses that property, the more one psychologically expects to be able to do so.

In short, conforming ownership and long-term possession facilitates transactions, especially economic transactions.[198]

Holmes put it this way: "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."[199]

c. Conform Ownership to Appearance

It is useful to the community to know who owns property. Adverse possession is a doctrine that identifies the long-term possessor of property with ownership. This assures the community members that they can deal with the long-term possessor as an owner, whether they are potential lessees, mortgagees, or purchasers. This

promotes stability, and grants repose in commercial transactions. Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM. L. REV. 49, 60 (1995).

194. Merrill, *supra* note 104, at 1128–30 (1985) (pointing out that the lost evidence rationale, while less pressing today for realty, is just as important for personal property because of a general lack of institutions for memorializing title to personalty, and that failure to extinguish old claims imposes a cost on transactions).

195. R.H. Helmholtz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. L. REV. 1221, 1235–36 (1986).

196. My control is not absolute. Health and safety laws restrict me, my use must conform to zoning rules, and anything constructed must abide by the building code.

197. I am largely confined to a persuasive role at any land use control meeting.

198. Lovett, *supra*, note 192, at 10.

199. Holmes, *supra* note 166, at 477.

consideration became more important as land and art became more items of commerce and less the family homestead or heirlooms.[200]

d. Settle Boundary Disputes

While of no interest for personal property, adverse possession of realty has an important role in settling boundary disputes between adjacent neighbors.[201]

e. Not Designed to Reward Development

When adverse possession confirms title in a long-time possessor over an absentee, development may be rewarded. Absentees make no improvements to property. Long-term possessors may likewise make no improvements, but they are more likely to do so than are absentees. This is not a purpose of adverse possession. Rather it is usually a by-product.[202] Classic adverse possession cases usually involved development, such as the extraction of sand or gravel[203] or the construction of a building.[204]

Whether development is a good thing is debatable. It was clearly perceived as beneficial through most of the twentieth century, though questioned by both environmentalists and preservationists toward its end. [205]

This consideration seems to have little bite in art or other personal property controversies. Whatever else one might say about art, one seldom wishes it "developed." In terms of capacity for public good, what development might be to land, exhibition is to art because it provides education and public entertainment.

f. Not Designed To Penalize the Negligent Owner

It is sometimes stated that the purpose of adverse possession is to penalize the negligent owner—it is not.[206] That may be a consequence, but the doctrine focuses on the adverse possessor, his actions, and interactions. There is no intent to penalize an owner. The negligent owner is not penalized when no one is in possession.

In fact, there is only one part of the adverse possession doctrine that even considers the person not in possession who claims to be the owner. Statutes generally provide a limited delay in the running of the period for adverse possession when the claimant, at the time the adverse possessor takes possession, is a minor, of unsound mind, or

200. Merrill, *supra* note 104, at 1132.

201. In California, where adverse possession requires the payment of taxes, the doctrine of agreed boundaries has been evolved to provide this function. Averill O Mix, *Payment of Taxes as a Condition of Title by Adverse Possession*, 9 SANTA CLARA L. Rev. 244, 255 (1969).

202. Lovett, *supra*, note 192, at 62.

203. Ewing's Lessee v. Burnet, 36 U.S. 41 (1837).

204. Raab v. Casper, 51 Cal. App. 3d 866 (1975).

205. *E.g.*, John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994).

206. 3 A. JAMES CASNER, *supra* note 191, at 759.

imprisoned.[207] The cases refusing adverse possession for the long occupation of underground caves or mines do not do so out of concern for the person claiming ownership but rather because the occupations were insufficiently open to provide the surrounding community with notice.[208]

3. Adverse Possession Practicalities

Adverse possession is a complete remedy; it gives title to the adverse possessor. It cuts off all lawsuits against him with regard to the property's ownership, relating back to his taking possession.[209] This is more useful than simply winning a lawsuit due to expiration of the statute of limitations or laches. Looking backward, the adverse possessor is not liable for trespass, conversion, or mesne profits. Looking forward, the adverse possessor now has a title good against all the world and can freely alienate the property without fear of having the conveyance annulled. In Hohfeldian terms, there is no right without a corresponding duty.[210] One writer has phrased it, "The law does not recognize a title which it will not protect."[211]

If the property is to be sold, there is normally a warranty of title. This is true under the UCC[212] for domestic sales and the UN Convention on the International Sale of Goods[213] for certain international sales.[214] Real estate is normally sold with a warranty of title, among other warranties. A person who has succeeded at adverse possession can give those warranties without fear of liability; a person who holds the property as a result of invoking the statute of limitations or laches cannot. Yet what are the

207. *E.g.*, Ohio Rev. Code Ann. § 2305.04:

> An action to recover the title to or possession of real property shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of minority, of unsound mind, or imprisoned, such person, after the expiration of twenty-one years from the time the cause of action accrues, may bring such action within ten years after such disability is removed.

208. *E.g.*, Marengo Cave Co. v. Ross, 10 N.E.2d 917 (Ind. 1937), holding modified by Fraley v. Minger, 829 N.E.2d 476 (Ind. 2005) (fact that a cave for which admission was charged to the public including landowner extended under owner's land was insufficiently obvious). The case sets forth the proposition that the possession must be obvious both to the general community and to a diligent owner or his agent who visits the site.

209. Assuming that the owner against whom the adverse possessor acts has full title, not just the right to present possession.

210. REST. PROP. § 1 (1936).

211. 3 A. JAMES CASNER, *supra* note 191, at 760.

212. U.C.C. § 2–312.

213. U.N. Convention on the Limitation Period in the International Sale of Goods art. 41, June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3.

214. Arts. 1–4, 6, and 10, and the U.S. reservation to art. 1(1)(b) limit the sales to which the United Nations Convention on Contracts for the International Sale of Goods applies. U.N. Convention on the Limitation Period in the International Sale of Goods arts. 1–4, 6, 10, June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3.

purchaser's damages? Neither the old owner nor anyone else can take the property from him. It may be a technical breach, but not an actionable one.

A second problem is that some insurance policies require that the insured be the owner of the property. If that is the case, the insurance company will not pay when there is a loss if the insured's possession results from the statute of limitations or laches, but it will pay if it results from adverse possession.[215]

III. CONCLUSION: SHOULD ADVERSE POSSESSION APPLY TO ART?

To recap, both the statute of limitations and laches have the result of terminating the litigation before trial. The statute of limitations usually ends the lawsuit at the pleading stage if there is certainty about when the statute begins to run, thereby reducing the opportunity for litigation extortion. Laches seldom terminates the litigation before discovery because it requires extensive fact determinations.

The statute of limitations and adverse possession permit disposition of the litigation at the pleading stage because the facts on which those decisions are made are usually easy to determine from the pleadings. This is a significant advantage because fewer resources are wasted on fruitless litigation, there is less opportunity for a plaintiff to extort a settlement from defendant, and the matter is settled more quickly.

This is most true where the statute of limitations accrues on the occurrence of the wrong or after the owner's demand has been refused. It is less true where the statute of limitations accrues on discovery, whether actual or imputed, because the time of discovery is a fact-intensive inquiry that pushes the litigation through the discovery phase.

Neither the statute of limitations nor the doctrine of laches gives the defendant what we think he should want: title to the property. Only adverse possession provides title.

That being the case, we are confronted with the curious fact that defendants in art cases often do not seek to invoke adverse possession when they could.[216] Why not? Also, the possessors of art who have prevailed in laches cases do not appear to have any difficulty selling that art at public auction. Why?

With real estate, it is easy to explain why the doctrine of adverse possession is important. One reason is that mesne profits can be significant. In a typical case, there will be a long statute of limitations for recovery of the property that accrues at the moment of entry and a relatively shorter statute of limitations for mesne profits that accrues repetitively, as the profits are earned. If the statute of limitations for mesne profits is six years, the possessor would normally be liable to the true owner for the last

215. Because one is dealing with an institution, the insurance company may demand a court judgment certifying title. The reason is that the insurance company, having paid you for the loss, is subrogated to your rights in the property.

216. *E.g.*, G & G Prods. LLC v. Rusic, 902 F.3d 940 (9th Cir. 2018); Adler v. Taylor, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005), *dismissed with prejudice sub nom.* Orkin v. Taylor, NO. CV04-8472(RGK)(FMOx), 2005 U.S. Dist. LEXIS 43321 (C.D. Cal. Apr. 20, 2005), *aff'd sub nom.* Orkin v. Taylor, 487 F.3d 734 (9th Cir. 2007); Grosz v. Museum of Mod. Art, 403 F. App'x 575 (2d Cir. 2010).

six years of mesne profits. To avoid that liability, it is important for the possessor to seek the shelter of adverse possession's doctrine of relation back.

A second reason for seeking adverse possession with realty is that there are perceived gatekeepers for realty. Gatekeepers come in many disguises. The possessor who wishes to take money out of his realty may face a potential mortgagee who will not make the loan unless the possessor has title. If the possessor decides to sell the realty, he may find few buyers unless he is willing to give a warranty deed, which asserts that he has title.[217] Giving a quitclaim deed in an area where warranty deeds are the norm is bound to raise problems. In many jurisdictions, it is common for the escrow agreement to provide for the purchase of title insurance. It is doubtful that title insurance would be available without a court's declaration that the possessor has title by adverse possession.

There seem to be few gatekeepers in the art world. Most art owners do not use their art as security for loans.[218] In theory, art sellers are subject to the same gatekeeping provisions as are the sellers of realty—they give a warranty of title. What is missing with art are the gatekeepers. For instance, after Mr. Bakalar prevailed on laches grounds, he sent his Schiele gouache to be auctioned at Sotheby's. It should have been clear to everyone that Bakalar did not have title, but that did not prevent Sotheby's from offering the work, or a winning bid of $1,325,000, including buyer's premium, on November 4, 2014.[219] The catalogue description said that the gouache was sold "as is," which probably refers to its condition rather than the state of its title.[220] On the question of title, the catalogue says, "At one time it was claimed that the present work was looted from Fritz Grünbaum or his widow Elizabeth Grünbaum-Herzl after the *Anschluß* in 1938; however, the New York trial court found that the drawing had never been looted by the Nazis and in a decision affirmed by the appellate court, confirmed the current ownership of the drawing."[221] This is a child's garden of inaccuracies and half-truths. The trial court did indeed find that the plaintiffs had not proven that the gouache had been stolen,[222] but that finding was reversed on appeal because of the New York law presumption that even the slightest evidence of theft put the burden on the possessor to prove that the work had not been stolen. The trial court eventually

217. The normal California version is a grant deed, which does not assert all six of the warranties (three present and three future) given in the traditional warranty deed. The grantor only asserts that he has not conveyed an interest in the property to any third party, and that the grantor has not placed any encumbrances on the property. Cal. Civ. Code § 1113 (West 2007). A person whose possession of the property is confirmed by expiration of the statute of limitations or the doctrine of laches can give those two warranties.

218. An exception to the general rule that artwork is not used as security for loans is detailed in Wildenstein & Co. v. Wallis, 756 F.Supp. 158 (S.D.N.Y. 1991), *rev'd*, 983 F.2d 1047 (2d Cir. 1992). The wife of a movie director needed money and decided that the best way to get it was to take a loan on the security of paintings. In order to prevent her husband from discovering that the paintings were missing, she hired an artist to make copies of them, while the originals disappeared into the vaults of the lenders.

219. Sotheby's Impressionist & Modern Art Evening Sale 4 November 2014 New York Catalogue 264–66, 266 (2014).

220. *Id.* at 304 (2014).

221. *Id.* at 303.

222. To be technical, it was not a "New York trial court," but the federal district court for the Southern District of New York. Bakalar v. Vavra, 550 F. Supp. 2d 548 (S.D.N.Y. 2008).

dismissed the action on grounds of laches, but it was not asked to and did not confirm "the current ownership" of the gouache.[223]

Inaccuracies in the title description aside, it is clear that no one was worried about the fact that the seller unnamed by Sotheby's (as is the tradition of auction houses) did not have title. Perhaps they were relying on the expiration of the four-year statute of limitations of the UCC, where the cause of action accrues at the moment of sale, before the purchaser discovered the lack of title.[224] Perhaps they were relying on the purchaser's inability to prove damages because no one could take the gouache from him as a matter of right.

If the purchaser had any difficulty in insuring the gouache, news of that difficulty has not reached this author's ears.

In conclusion, as a theoretical matter, it makes great sense to apply the doctrine of adverse possession to situations where the original owner cannot recover personal property because of the expiration of the statute of limitations. That would permit the art owner to warrant the title when the work is sold and would facilitate borrowing against the work. As a practical matter, it does not seem to make much difference whether adverse possession applies or not. What is important? The statute of limitations and the doctrine of laches. All that seems to matter to the possessor is being free of the claimant's lawsuit. The possessors cannot be unaware of the possibility of claiming title by adverse possession. The fact that they often do not include such a request indicates that it is unimportant to them.

223. Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010); Bakalar v. Vavra, 819 F.Supp.2d 293 (S.D.N.Y. 2011), *aff'd per curiam* 11-4042-cv, 2012 U.S. App. Lexis 21042 (2d Cir. Oct. 11, 2012).

224. N.Y. U.C.C. Law § 2–725 (Consol. 2014). The statute of limitations will be the same if the purchaser is a businessperson with his place of business in another contracting state. U.N. Convention on the Limitation Period in the International Sale of Goods arts. 8, 10(2), June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3. The U.S. ratification was effective in 1994; by 2016, thirty states had ratified the convention. Auction houses do not commonly reveal the name of either the buyer or the seller, so it is impossible to know the country in which the buyer has his place of business. If the gouache was purchased for personal, family or household use, it is not subject to this limitation provision "unless the seller . . . neither knew nor ought to have known that the goods were bought for any such use[.]" U.N. Convention on the Limitation Period in the International Sale of Goods art. 4(a), June 14, 1974, 13 I.L.M. 952, 1511 U.N.T.S. 3. Since the seller does not know the identity of an auction buyer, he could not know the use to which the buyer was going to put the work.