The Adverse Possession of Personal Property

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The doctrine of adverse possession, which lay virtually dormant for many years in legal scholarship, has recently been the subject of several studies focusing primarily on the adverse possession of real property. The adverse possession of personal property, although considered in a recent article, has not been studied at length for nearly a century. Yet it has as long and honored a legal tradition as the adverse possession doctrine in the realm of real property.

This study undertakes to present a comprehensive review of the operation of statutes of limitation to bar an owner’s suit to recover personal property. The most significant issue is the determination of the conduct and circumstances necessary to permit the operation of such statutes. It is suggested here that the most important element required to establish adverse possession of personal property is the good faith and reasonable reliance of the adverse possessor. The primary focus is thus on the conduct of the possessor and not that of the owner.

This focus characterizes the prevailing formulation of the doctrine,

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4. Specifically excluded from the scope of this study is any independent consideration of the law governing the disposition of lost, misplaced and abandoned property. The doctrines of lost and abandoned property and of adverse possession are basically distinct, although the two do occasionally merge, as in cases in which a conversion of lost property has occurred, see, e.g., Dougherty v. Norlin, 147 Kan. 565, 78 P.2d 65 (1938); Bennett v. Meeker, 61 Mont. 307, 202 P. 203 (1921), or situations where the property was lost or misplaced while in the hands of a bailee. See, e.g., Waugh v. University of Hawaii, 63 Haw. 117, 131-37, 621 P.2d 957, 968-71 (1981). However, courts typically decide these cases by selecting only one set of principles, so the doctrines do not really overlap. The two branches of property law are universally accorded separate statutory treatment, with abandoned property's only nod in the direction of adverse possession consisting of a statute maintained by most jurisdictions which states that the expiration of the limitation period for recovery of the property does not prevent a presumption of abandonment nor does it negate the statutory duties of the finders of the property. See, e.g., MONT. CODE ANN. § 70-9-307 (1987).
despite some modern variations. More significantly, analysis of this formulation reveals that it is most conducive to accomplishing both the general purpose of the statute of limitations to avoid stale claims and the specific goals of the adverse possession doctrine—to encourage commercial certainty and the resulting economic productivity in the utilization of various forms of property. Finally, this scrutiny of the possessor's conduct permits adverse possession doctrine to operate on an ethical level by considering the possessor's good faith. These goals of encouraging ethical conduct and fostering commercial activity are not in conflict with each other but, rather, reinforce each other and together form the policy justifications underlying the doctrine.

I. INTRODUCTION

The doctrine of adverse possession is perhaps most familiar to students of property law in its application to real property. Adverse possession of real property, as it is classically formulated, requires the elements of adverse, hostile, open, notorious, visible, exclusive and continuous possession to exist for a statutory period before the statute of limitations will bar the owner's suit to recover the property. Although these elements are often considered distinct, the point is to require the adverse possessor to treat the property as would a true owner so as to give notice to the owner and the community of the adverse possessor's claim to the property. Although these elements are often considered distinct, the point is to require the adverse possessor to treat the property as would a true owner so as to give notice to the owner and the community of the adverse possessor's claim to the property. The true owner exercising reasonable diligence is thus informed

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5. 3 AMERICAN LAW OF PROPERTY § 15.2 (A. Casner ed. 1952). Although there has been some theoretical debate as to whether the bar of the owner's claim to recover property acted to vest title in the possessor, there is now general agreement that this is the result even in the absence of a prescriptive statute with an express provision to that effect. Id. at 760-61.

6. In the real property context, "openness" and "notoriety" function as synonyms for notice. The requirement that a possession be "open and notorious" means that the adverse claim must be accompanied by conduct which would suffice to notify a person of ordinary prudence that the land in question is held by a claimant as his or her own. Watrous v. Morrison, 33 Fla. 261, 278, 14 So. 805, 811 (1894); Wiedeman v. James E. Simon Co., 209 Neb. 189, 192-93, 307 N.W.2d 105, 107 (1981); Scott v. Hansen, 18 Utah 2d 303, 307-08, 422 P.2d 525, 528-29 (1966); Downie v. City of Renton, 167 Wash. 374, 378, 9 P.2d 372, 374 (1932). Thus, an adverse claimant's conduct is open and notorious when he or she acts with respect to the property as would a true owner in appropriating the land to the exclusion of others. Clanahan v. Morgan, 268 Ala. 71, 81, 105 So. 2d 429, 437 (1958); Felts v. Whitaker, 129 S.W.2d 682, 688 (Tex. Civ. App. 1939), aff'd, 155 S.W.2d 604 (Tex. 1941).

The possession must be sufficiently conspicuous so that both the public (variously referred to as the "community," the "neighborhood," and the "world") and the record owner are put on notice of the adverse claim. The primary reason for requiring "constructive notice to all the world," O'Banion v. Simpson, 44 Nev. 188, 204-05, 191 P. 1083, 1088 (1920), appears to be that it affords a basis for imputing knowledge of the possession to the true owner, since there can be no acquisition of title by adverse possession in the absence of such knowledge or notice, either actual or constructive, on the
that a cause of action has accrued which he or she can ignore only at the risk of losing title to the property.

A recent study of adverse possession of real property by Professor R. H. Helmholz posits that in addition to these elements, the state of mind of the adverse possessor is a relevant factor in determining the success of the adverse possessor's claim.7 In reviewing appellate decisions of adverse possession claims since 1966, Helmholz concluded that the requirement that the adverse possessor act in good faith or under "color of title" illustrates the importance of intent and ethical values, especially in recent cases. Conversely, the intentional trespasser is less likely to acquire title to the disputed property because of either specific statutory or judicial treatment.8 While conceding that use of intent is likely to increase litigation and uncertainty in the transfer of land titles, Helmholz suggests that this consideration has become an important factor in a court's determination of real property adverse possession disputes.9

In the context of personal property, the doctrine, at least superficially, seems to work in the same way. According to this formulation, the statute of limitations provides for a period of time10 during which the rightful owner of personal property can bring suit either to recover the

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8. Helmholz, Subjective Intent, supra note 7, at 332, 345. However, the knowing wrongdoer may prevail if he or she presents a particularly sympathetic character. Id. at 347-49. This thesis has been disputed by Cunningham, supra note 7, at 1-3, but apparently is accepted, at least in part, by Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 WASH. U.L.Q. 667, 685-89 (1986).

9. Helmholz, Subjective Intent, supra note 7, at 331-32. It is probably, however, no more difficult for a court to determine the possessor's good or bad faith than to determine whether the owner would have had actual or constructive notice of the possession.

10. The relevant statutes and the case law only rarely utilize the term "adverse possession" in the context of personal property. Rather, the barring of a suit to recover personal property is treated almost exclusively as simply a function of the operation of the statutes of limitation, just as would
items of property lost or stolen or to recover their value.11 After the pas-

the barring of any other type of claim such as a suit in tort or contract. For exceptions, see infra note 12.

The period of time provided in the statutes of limitation is relatively short in comparison to the time allotted for the recovery of real property. Approximately thirty percent of the states prescribe a limitations period of three years; another thirty percent prescribe a period of six years. In the remaining states, the period is two, four, or five years, with the exceptions of Rhode Island, where the limit is ten years, and Louisiana, which sets a period of ten years for possessors who have not acted in good faith.

The typical statute is an omnibus statute of limitations which describes several kinds of actions under a heading such as "Three years" or "Limitations of other actions." North Dakota's statute is representative of this type:

Actions having six-year limitations. The following actions must be commenced within six years after the claim for relief has accrued:

1. An action upon a contract, obligation, or liability, express or implied . . . .
2. An action upon a liability created by statute, other than a penalty or forfeiture, when not otherwise expressly provided.
3. An action for trespass upon real property.
4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.
5. An action for criminal conversation or for any other injury to the person or rights of another not arising upon contract, when not otherwise expressly provided.
6. An action for relief on the ground of fraud in all cases both at law and in equity, the claim for relief in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.


In a handful of states, actions arising from the detention or conversion of personal property are not specifically mentioned in the statutes of limitations that govern them. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984). The entire text of the Maryland statute is as follows: "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Only Wisconsin maintains a separate statute of limitation for actions involving the detention or conversion of personal property. WIS. STAT. ANN. § 893.35 (West 1983), § 893.51 (West 1983 & Supp. 1987). Georgia and Louisiana have prescription statutes which explicitly vest title in the adverse possessor after the expiration of the statutory period. GA. CODE ANN. § 85-1706 (Harrison Supp. 1986); LA. CIV. CODE ANN. arts. 3490, 3491 (West Supp. 1987).

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11. A long history precedes the different types of actions which could be maintained when property was taken from or possession was denied to the person who had the immediate right to possession. The action for trespass (more specifically, trespass de bonis asportatis) was used when the property was taken tortiously from the owner or the owner's bailee, agent or anyone else holding the property on behalf of the owner. Because the taker had acted tortiously, no demand was required before a suit could be maintained. The owner's remedies were, however, limited to damages; the property itself could not be recovered. The other types of actions included trover for the recovery of the value of the property against one who found lost property and converted it to his or her own use. Later the plaintiff's allegation of the loss of the property became fictitious and this form of action was used for any wrongful interference with or detention of the property when the owner was entitled to possession. See Alvord v. Davenport, 43 Vt. 30, 35 (1870). Replevin was the form of action used to recover actual possession of the property unlawfully taken when the property had been given by the owner to another as security. Because the plaintiff in a replevin action needed to have the right to immediate possession to maintain the suit, this form of action could be used only by the person who held the pledge or security and not by the owner. Finally, detinue was the action for recovery of the
sage of this time period, such statutes bar the owner's suit. The time period for the statute of limitations is counted from the time the cause of action "accrues," usually interpreted as the time when the conversion of the property occurs. The statutes generally provide no exceptions based on the rightful owner's ignorance of the true state of affairs and resulting inability, as a practical matter, to bring suit within the allotted time period. In addition, with one exception, the statutes set out no specific requirements which the adverse possessor needs to satisfy in order to begin the running of the statute of limitations against the rightful owner, although courts sometimes turn by analogy to the elements required for adverse possession of real property.\(^\text{12}\)

Even if no specific elements are expressly required, the essential property itself, as well as damages, from one who acquired it lawfully but retained it wrongfully. Originally, this form of action was used only when the owner had given possession to the defendant, as in a bailment, and the bailor refused to surrender it. Later, it came to be used whenever the owner wished to recover the property itself, rather than its value (as in an action for trespass or trover.)

These distinctions continued in at least some form throughout much of the nineteenth century in both England and the United States but lost significance as it became easier for the plaintiff to maintain more than one type of action simultaneously. Today most states still maintain separate provisions for replevin actions. Many also specifically provide for actions for conversion, and a few continue to recognize actions in detinue. However, each state applies the same period of limitation to these various actions. The cases seem to make virtually no distinction among them except to the extent that the "demand and refusal" requirement applies to possessions which were permissive in their origin, see infra notes 94-98 and accompanying text, and as New York has developed its unique interpretation of the "demand and refusal" requirement, see infra notes 40-63 and accompanying text. The trend toward merger of the common law forms of action is also reflected in the wording of the statutes of limitation themselves. Early statutes catalogued the various actions available to one seeking recovery for the wrongful possession of property. An early nineteenth century Illinois statute is typical: "[A]ll actions of trespass, quare clausum fregit, all actions of trespass, detinue, trover, and replevin, for taking away goods and chattels . . . shall be commenced within five years next after the cause of such actions shall have accrued . . . ." Ill. Rev. Laws 1833. Modern statutes are descriptive rather than enumerative. See, e.g., ILL. REV. STAT. ch. 83, para. 16 (1966) ("[A]ctions . . . to recover the possession of personal property or damages for the detention thereof . . . shall be commenced within 5 years next after the cause of action accrued."). For extensive discussion of the historical development of these forms of actions, see Ames, supra note 2, at 28-34, 316, 326-28.

\(^{12}\) The one statutory exception is Georgia. As previously noted, Georgia's prescription statute confers title upon an adverse possessor of personal property after the expiration of the limitations period. See supra note 10. However, in order to gain prescriptive title, the adverse possessor of personal property must satisfy the same elements required for the adverse possession of real property, including, inter alia, the elements of public, continuous, exclusive, uninterrupted, and peaceable possession. GA. CODE ANN. § 85-402 (Harrison Supp. 1986).

A court may also choose to rely on the analogy to adverse possession of real property rather than relying exclusively on the statute of limitation for the recovery of personal property. The court may then repeat the traditional elements required for establishing an adverse possession regardless of whether they make any sense in the personal property context. See, e.g., Commercial Union Ins. Co. v. Connolly, 183 Minn. 1, 5, 235 N.W. 634, 636 (1931); San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 705, 239 P. 319, 321 (1925) (listing the requirement of payment of taxes to establish adverse possession); Lightfoot v. Davis, 198 N.Y. 261, 267, 91 N.E. 582, 584 (1910).
question is what conduct and whose conduct will determine the accrual of the cause of action and thus trigger the running of the statute of limitations. The fundamental problem is that when dealing with personal property, unlike real property, the adverse possessor can use the property as would a true owner (that is, openly, notoriously, visibly), and yet the owner—even the diligent owner—may never in fact receive notice of the adverse claim. When the subject is real property, it may be possible to assume that the reasonably diligent owner knows where his or her property is and will be apprised reasonably quickly of the existence of an adverse claimant who is occupying and using the land. When personal property is at issue, however, this simply is not true, and thus is posed the underlying paradox that even a diligent owner may never receive notice of the adverse claim of one using his or her property as would the true owner. The question then is, as between these two conflicting innocent parties, who will prevail? Will adverse possession of personal property be permitted even when the true owner has neither actual nor constructive notice of the adverse claim? The answer to this question, based on analysis of both case law and statutes, is clearly in the affirmative.

This study will propose the hypothesis that the good faith and reasonable reliance of the adverse possessor is the most significant extra-statutory element required to establish adverse possession of personal property.13 Admittedly, despite the emphasis on the adverse claimant's conduct, in those situations where the owner has actual or constructive notice of the whereabouts of the property, the statute of limitations will start to run from the time of such notice. However, actual or even constructive notice to the true owner of the adverse claim and of the accrual of the cause of action is relevant only when the adverse possessor acts in bad faith. In such a situation, the focus shifts to the conduct of the original owner, who will prevail unless he or she has such notice and fails to pursue recovery of the property. Even without notice, however, the statute of limitations will run against the true owner as long as the adverse

13. Helmholz's study of personal property recognized the importance of the possessor's subjective intent in resolving such disputes. The primary difference between Helmholz's study and this article rests on the attempt here to develop more fully the mechanisms of the doctrine in the personal property context, particularly the "open and notorious" requirement, the deemphasis of the owner's conduct, and a principled formulation of how such disputes should be resolved. Finally, while this study agrees with Helmholz's contention that courts consider ethical and moral values, this study also suggests that a good faith standard is not in conflict with but, rather, furthers the doctrinal goals of commercial and economic efficiency. Helmholz, Wrongful Possession of Chattels: Hornbook Law and Case Law, 80 Nw. U. L. Rev. 1221, 1233-37 (1986).
possessor has acted in good faith. Thus, a right to notice is accorded to the original owner only when the possessor demonstrates bad faith and, in fact, the right to notice substitutes for the possessor’s lack of good faith.

Courts have clearly articulated a principled methodology for the resolution of personal property possession disputes. If only one party is at fault—the adverse possessor by taking in bad faith or the owner by unnecessarily delaying longer than the statutory time period after receiving notice of the location of the property—then the innocent party prevails. This result accords with Helmholz’s attempt to characterize adverse possession doctrine as operating on a moral or ethical level. At the same time, an equally significant purpose of the doctrine may be determined by analyzing those situations in which the conduct of both parties is innocent. The fact that the good faith possessor prevails over the diligent owner demonstrates that when ethical considerations are equivalent, commercial certainty becomes the decisive factor. This result does not seem intended to “punish” the original owner for failing to use the property productively or being negligent in the care of the property. Rather, the good faith possessor who relied on a good title to the property and possessed it for a sufficient period of time prevails so that both commercial activity and ethical conduct may be protected and encouraged.

This study will first examine the workings of the doctrine as traditionally formulated in the context of possessions which were nonpermis-sive in origin. Next, several variations which represent judicial attempts to limit the doctrine are considered, including the development of the “demand and refusal” requirement, the discovery exception, and the question of tacking. The study then turns to adverse possession in the context of possessions which were permissive in their origin. Finally, an analysis is presented to demonstrate, through a comparison of statutory and judicial developments, that there are three models represented in the formulation of personal property adverse possession doctrine—a libertarian, a utilitarian and an ethical model. The doctrine’s emphasis on the possessor’s conduct and relative indifference to the original owner’s situation demonstrate that libertarian concerns and fairness to the original owner are accorded the least deference. However, the other two models not only work together to accomplish the goals of commercial certainty and ethical conduct but must be viewed as equally necessary for the effec-tuation of the policy considerations underlying the doctrine.
II. POSSESSION NON-PERMISSIVE IN ITS INCEPTION

A. Traditional Formulation of Doctrine

What is here termed the "traditional" formulation of the doctrine of adverse possession as applied to personal property seems to have been accepted as the majority or even nearly universal statement of the doctrine by the middle or second half of the nineteenth century. As previously stated, the doctrine of adverse possession of personal property operates as merely one form of the statute of limitations which bars the institution of any suit after the passage of a specified time period. The central issue focusses on when this time period begins. The statutes themselves are generally not instructive on this point except to state sometimes that the time runs from the "accrual" of the cause of action. This is, however, merely a semantic reformulation since the statutes contain no definition of accrual and make no express provision for a notice requirement before accrual can occur. Courts, therefore, are still faced with determining the time of accrual.\(^\text{14}\) In the traditional formulation considered here, accrual occurs at the time of conversion of the property.\(^\text{15}\)

While the statute of limitations for the recovery of personal property generally contains no exceptions and takes no account of mitigating circumstances, the section of the statute of limitations concerning suits for fraud or mistake provides that the cause of action does not accrue until the injured party discovers or should have discovered the necessary elements of the fraud.\(^\text{16}\) In other words, the running of the statute of limita-

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\(^{14}\) Wisconsin is the only state to give a temporal context to the term "accrual" in its statutes of limitation governing actions for the wrongful possession of personal property. Wisconsin is also the only state to enact two such statutes, one pertaining to actions for the recovery of property and the other to actions for damages. Both statutes specify that a cause of action accrues at the time a wrongful taking or conversion occurs or a wrongful detention begins. Wis. Stat. Ann. § 893.35 (West 1983) ("Action to recover personal property"), § 893.51 (West Supp. 1983 & Supp. 1986) ("Action for wrongful taking of personal property"). A Committee Note appended to each statute explains that the accrual language was expanded in 1979 to "make clear that accrual . . . is not delayed until the person bringing the action learns of the wrongful taking or detention." Id., Judicial Council Committee's Note (1979). Wisconsin thus expressly rejects any application of the discovery rule in the personal property adverse possession context. See infra notes 64-78 and accompanying text for discussion of the discovery rule.

\(^{15}\) Conversion of personal property has been defined as requiring:

some exercise of the right of complete ownership and dominion over the property, to the total exclusion of the rights of the owner; or alternatively an act which destroys the property, changes its character, or in some way deprives the owner permanently or for an indefinite length of time.


\(^{16}\) Such discovery exceptions in actions for fraud seem to have originated in equity jurisdiction.
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tions in an action for fraud or mistake does not begin until the injured party knows or should have known the appropriate facts necessary to the commencement of a suit. Such provisions concerning fraud are applied in certain situations to toll the statute of limitations in favor of the rightful owner attempting to recover his or her property. Thus if the adverse possessor commits fraud, primarily defined as fraud in the concealment of the stolen or lost personal property and distinct from the fraud involved in the original theft or larceny, the concealment constitutes a separate wrong and the fraud section of the statute of limitations becomes applicable. When the fraudulent concealment exception applies, the rightful owner's ignorance of the relevant facts prevents the running of the statute of limitations. This doctrine is virtually identical in its operation to the doctrine of equitable estoppel, which prevents a wrongdoer, who induces the injured party's delay by fraud, from relying on the statute of limitations as a defense.

Accordingly, the crucial determination for a court faced with the question whether the rightful owner's suit should be barred is what conduct on the part of the adverse possessor constitutes fraudulent concealment. Obviously, the characterization of such conduct is influenced by the time period, circumstances, relative distinctiveness of the property involved, and the skill needed to find or identify the property. Some conduct which has been held to constitute concealment includes inten-

No suit was barred, either at law or in equity, until the fraud was discovered. 2 J. Story, Commentaries on Equity Jurisdiction as Administered in England and America 737-39 (1836); Lightfoot v. Davis, 198 N.Y. 261, 269-71, 91 N.E. 582, 585 (1910). 17. Christensen Grain, Inc. v. Garden City Coop., Equity Exch., 192 Kan. 785, 789, 391 P.2d 81, 84-85 (1964); Bennett v. Meeker, 61 Mont. 307, 310, 202 P. 203, 204 (1921); Varga v. Credit-Suisse, 5 A.D.2d 289, 292, 171 N.Y.S.2d 674, 677 (1958) (statutory discovery exception applies only for actions based on fraud or a fiduciary relationship). Sometimes courts rely on the express discovery exception for fraud actions to justify a refusal to imply such an exception for other provisions, reasoning that the legislature's express inclusion in one provision indicates the legislature's intention to exclude such an exception in other provisions. See, e.g., Trust Co. Bank v. Union Circulation Co., 241 Ga. 343, 344, 245 S.E.2d 297, 298 (1978) (construing statutory exception for fraud strictly and requiring that "the fraud is distinguishable from that giving rise to the cause of action").


tional misrepresentation to the owner concerning the whereabouts of the lost or stolen property, removal of the property from the jurisdiction in which the rightful owner lives or keeps the property, failure to comply with statutes intended to aid an owner in finding lost property, and changing the appearance of the property or its identification marks (such as cattle brands or motor vehicle identification numbers).

However, the most significant consideration in determining whether certain conduct constitutes concealment is the good or bad faith of the adverse possessor. A bona fide purchaser of the property, virtually by definition, utilizes or holds the property in what many courts term an "open and notorious" manner. Borrowed from the doctrine's formulation as applied to real property, the "open and notorious" requirement is the only element, in addition to fulfilling the statutory time period, which courts require of the adverse possessor of personal property. Therefore once the defendant in a suit for recovery of personal property establishes bona fide purchaser status and similar status for a sufficient number of predecessors so that their combined periods of possession exceed the statutory time period, the suit will be barred.

If the property is held by one who is a thief or one who purchased the property with actual knowledge of the theft, and therefore in bad faith (or if part of the time period to satisfy the statutory limit is made up by one who acted in bad faith), courts seem to inquire more closely into (special skill required to find "secret" motor vehicle identification number when number had been obliterated).


23. Gatlin v. Vaut, 6 Indian Terr. 254, 258, 91 S.W. 38, 39 (1905) (statute of limitations suspended for the period of time during which the stolen property was concealed by removal from the jurisdiction of the court), aff'd, 31 Okla. 394, 120 P. 273 (1911).


25. Madsen v. Madsen, 72 Utah 96, 269 P. 132, 133 (1928) (defendant branded sheep with his own mark so as to conceal plaintiff's mark).


27. The adverse claimant seems to bear the burden of proving good faith possession for the statutory period. San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 705, 239 P. 319, 321 (1926); Commercial Union Ins. Co. v. Connolly, 183 Minn. 1, 6, 235 N.W. 634, 636 (1931); Chilton v. Carpenter, 78 Okla. 210, 212, 189 P. 747, 749 (1920). However, some courts say that the owner must allege and prove the facts which constitute fraud.
the possessor’s conduct to determine whether it constituted concealment. One of the best illustrations of this “double standard” may be found in *Gatlin v. Vaut*, in which a thief stole two mules and took them from Indian Territory (which later became Oklahoma) to Texas. An individual purchased the mules in Texas in good faith and for value and later brought them back to Oklahoma. Only by tacking on the time that the mules were in the possession of the thief could the would-be adverse possessor satisfy the three-year time limit to bar the plaintiff’s suit. The court held that the statute began to run as soon as the defendant purchased the mules in Fort Worth and continued to run even while he kept them there. Thus, even though the defendant kept the property out of the jurisdiction, his action did not constitute concealment. On the other hand, the thief’s detention of the mules out of the jurisdiction did constitute concealment, and therefore the time during which the thief possessed the mules could not be tacked onto the time of the defendant’s possession.

The identical conduct constituted concealment while the property was in the hands of a thief but not while the property was in the hands of a bona fide purchaser. The court makes clear that a bona fide purchaser must commit some conscious and separate act of concealment or fraud before the running of the statute will be further delayed. Because the bona fide purchaser, by definition, is unaware of the theft of the property and has no reason to conceal it intentionally, any use of the property is considered “open and notorious,” and the statute will always start to run as soon as the property comes into the hands of a bona fide purchaser.

In delaying the running of the statute while the property is being concealed, courts sometimes invoke the justification that the purpose of the open use requirement is to give the owner notice. When allowing the statute to run, courts rely on the policy not of protecting the thief, but of punishing the owner’s negligence. However, courts also consistently and repeatedly state that mere ignorance on the part of the owner which prevents the initiation of a lawsuit will not delay the running of the statute. Rather, there must be a direct causal relationship in that the poss-

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28. The court relied on a statutory provision that if any person prevented the commencement of an action “by leaving the county, absconding or concealing himself, or any other improper act” the time limit would begin from the time the suit is no longer prevented. *Gatlin*, 6 Indian Terr. at 255-56, 91 S.W. at 39.

29. Id.


sessor's misconduct must have been intended to induce the owner's ignorance which, in turn, prevented initiation of the suit.\(^{32}\) Even illegal conduct which tends to inhibit the owner's discovery of the property, but which was not undertaken with that purpose, will not delay the statute.\(^{33}\)

It is difficult to accept, therefore, that notice to the owner is the motivation for the open and notorious requirement because, if this were so, the statute would never run until the owner had actual or constructive notice of the adverse claim. Instead, notice to the owner is a prerequisite for the running of the statute only when the possessor is the thief or one who takes with notice of a defect in the title.\(^{34}\) The initial inquiry thus focuses on the good or bad faith of the possessor. Only when the possessor demonstrates bad faith does the inquiry shift to the conduct of the owner. In such a situation the original owner will prevail unless he or she waits more than the statutory time period after knowing all the facts necessary to institute suit. Such an owner has been clearly "negligent" and has slept on his or her rights and thus has created precisely the situation which the statute was intended to avoid.\(^{35}\)

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\(^{33}\) Bennett, 61 Mont. at 311, 202 P. at 204; Williams v. Harper Bros. Auto Dealers, 276 P.2d 217, 220-21 (Okla. 1954); Dee, 3 Utah at 315, 3 P. at 390.

\(^{34}\) Comerford, 246 Ga. at 502, 271 S.E.2d at 783 (defendants' failure to inform claimant of deceased's death did not constitute actual fraud so as to delay the statute); Carr v. Barnett, 21 Ill. App. 137, 138 (1886) (failure to comply with all requirements of estray statute when such requirements did not seem significant does not constitute fraudulent concealment); Williams, 276 P.2d at 220-21 (failure to comply with motor vehicle registration statutes does not constitute concealment); Reynolds v. Bagwell, 200 Okla. 550, 551, 198 P.2d 215, 217 (1948) (dictum that significantly changing appearance of a violin, when done innocently, does not constitute concealment). Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd., 450 So.2d 1157, 1162-63 (Fla. App. 1984) (discovery rule applied in action for conversion of funds where suit was brought against the original wrongdoer). One state, Louisiana, expressly provides in its code for the disparate treatment of good and bad faith possessors. The good faith possessor of "movables" is permitted to acquire prescriptive title to the chattels in three years. One who possesses without good faith, on the other hand, must wait ten years before securing title. LA. CODE CIV. PROC. ANN. arts. 3490, 3491 (West Supp. 1987).

\(^{35}\) If a claim is easily established or the plaintiff admits that he or she had actual notice, then the statute of limitations will run to bar the claim without the court having to determine the possessor's good or bad faith. Gee v. CBS, Inc., 471 F. Supp. 600, 653-56 (E.D. Pa. 1979); Manka v. Martin Metal Mfg. Co., 153 Kan. 811, 816, 113 P.2d 1041, 1044 (1941); Torrey v. Campbell, 73 Okla. 201, 203, 175 P. 524 525 (1918); Boyd v. Knox, 273 S.W.2d 81, 83 (Tex. Civ. App. 1954);
The threshold question for a court, however, is whether the possessor has committed a separate fraud by concealing the property, and the determination of what constitutes concealment is based on the good or bad faith of the possessor. Therefore, the essential issue is posed: as between two innocent parties (that is, the diligent original owner and the bona fide purchaser), who should bear the loss?36 The answer is that as long as the possessor is innocent, then he or she prevails over the original owner. The original owner's ignorance, diligence, and actual ability to bring the necessary suit are all, in fact, irrelevant to the application of the doctrine.

In their decisions concerning this doctrine, few courts attempt to articulate the relevant policies which the doctrine is intended to further. These policies are those which predictably apply to any statute of limitations: encouragement of repose, avoidance of suits instituted after the testimony and evidence needed to establish a claim are no longer available, increased certainty of ownership, and, finally, facilitation of commercial transactions by protecting the bona fide purchaser.37 However, as was recognized at times by the courts applying it,38 this formulation represents a relatively strict or harsh application of the doctrine from the perspective of the original owner and is considerably stricter in that sense than other formulations suggested in more modern decisions. However, one may posit that this focus on the adverse possessor's intent reflects societal goals and policies which are intended to favor the good faith possessor and, at the same time, to facilitate commercial activity.

B. "Modern" Formulations

Perhaps in response to what some courts termed the harsh treat-
ment of the original owner under the "traditional" formulation of the doctrine of adverse possession as applied to personal property, courts have periodically attempted to fashion other formulations of the doctrine. These primarily modern variants focus on the conduct of the original owner rather than that of the adverse possessor, so the diligent owner prevails despite the possessor's good faith. These formulations can be grouped into three approaches involving differing applications of the "demand and refusal" rule, the discovery rule, and tacking. Their historical developments and modern formulations, as well as the policies which each attempts to foster, will be considered in turn.

1. The "Demand and Refusal" Rule

The "demand and refusal" rule has a somewhat checkered history. It is used in different contexts which must be carefully distinguished so as to determine when the rule is used correctly and when it is used incorrectly. The first use of this rule occurs in the context of possessions which are rightful in their inception. The purpose of the "demand and refusal" requirement here is to serve as one means of demonstrating the time at which a conversion occurs in order to determine when the possession becomes wrongful and therefore truly adverse to the original owner's interests. This context will be discussed more fully in a subsequent section.39

The second context in which the "demand and refusal" requirement arises is that in which the possession of property originates wrongfully but the property subsequently comes into the hands of a good faith possessor.40 The rule in this context requires that before the original owner can sue the good faith possessor, the owner must make a demand upon the possessor for the return of the property.41 The rationale underlying

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39. See infra notes 88-98 and accompanying text.
40. The question whether a demand and refusal are required before a suit can be maintained was hotly debated in the nineteenth and early twentieth century cases. See infra note 41. The disagreement centers on whether the taking of property by a good faith purchaser from one who had no right to transfer the property constitutes a conversion. If such a transfer is itself a conversion, then no demand and refusal is necessary. If the transfer is not a conversion in the absence of the taker's intent to do wrong, then the situation is comparable to one in which the owner gives the property to another, as in a bailment. In that case, a conversion occurs only when the possessor refuses the demand for return of the property or, in turn, conveys it to another. Whether the determination of when a conversion has been committed for the purpose of fixing liability should also be used to determine the running of the statute of limitations is the problem to be considered here.
41. Much of the confusion concerning the "demand and refusal" requirement stems from the historical distinctions among the different types of actions available to the owner who was deprived of his or her property. See supra note 11. Originally trover and detinue required that the owner make demand for surrender of the property before instituting a suit for recovery, at least in the absence of
this rule is that the good faith possessor has committed no intentional wrong by virtue of the innocent possession and therefore should not be liable to the original owner. Only if the possessor refuses to surrender possession is a wrong committed, and then the original owner can sue for the wrong based upon the refusal. The doctrine thus protects the innocent possessor who is unaware of injury to the original owner.

It is important to emphasize the two functions which the demand and refusal rule serves in this context. First, the rule forces the owner to make a private demand upon the possessor for the return of the property before suing to recover it. This merely encourages the parties to settle their dispute privately without utilizing the court system under the assumption that the innocent possessor, once informed of the wrong committed, will return the property. And if the possessor refuses a demand for surrender, he or she was still not liable in trespass. Barrett v. Warren, 3 Hill 348, 350-51 (N.Y. S. Ct. 1842).

Although these distinctions in forms of actions and the demand requirement continued for a longer period of time in some states, most notably New York, id. at 350-51, by the end of the nineteenth century many states regarded these suits as synonymous and permitted the owner to maintain any one of them without a prior demand. Stanley v. Gaylord, 55 Mass. (1 Cush.) 536, 546-47 (1848). Such states considered the good faith possessor to have committed a conversion against the owner even though innocent of any intentional wrong. Such good faith possessors were liable for all civil remedies available to the original owner but were still protected from criminal liability, at least without a demand and refusal. Harpending v. Meyer, 55 Cal. 555 (1880); Galvin v. Bacon, 11 Me. (Fairf.) 28, 30-31 (1833); Stanley, 55 Mass. (1 Cush.) at 550-51; Trudo v. Anderson, 10 Mich. 358, (1862); Hyde v. Noble, 13 N.H. 494 (1843); Velzian v. Lewis, 15 Or. 539, 16 P. 631, 634-35 (1888) (and cases cited therein); Wells v. Ragland, 31 Tenn. (1 Swan) 501 (1852); Crampton v. Valido Marble Co., 60 Vt. 291, 302, 15 A. 153, 158-59 (1888). Even after the good faith possessor refused a demand for surrender, he or she was still not liable in trespass. Barrett v. Warren, 3 Hill 348, 350-51 (N.Y. S. Ct. 1842).

Some other clear evidence of a conversion by the possessor or of the futility of the demand. See Wood v. McDonald, 66 Cal. 546, 547-48, 6 P. 452, 453 (1885); Mattingly v. Mattingly, 150 Md. 671, 674-75, 133 A. 625, 626 (1926); Kenrick v. Rogers, 26 Minn. 344, 344, 4 N.W. 46, 46 (1850); Springer v. Groom, 9 Sad 123, 12 A. 446, 448 (Pa. 1888); Alvord v. Davenport, 43 Vt. 30, 34-35 (1870); Crampton v. Valido Marble Co., 60 Vt. 291, 302, 15 A. 153, 158-59 (1888). Even after the good faith possessor refused a demand for surrender, he or she was still not liable in trespass. Barrett v. Warren, 3 Hill 348, 350-51 (N.Y. S. Ct. 1842).

Those states which were considered in the nineteenth century to require a demand and refusal before the maintenance of such an action on the theory that no conversion was committed included New York: Barrett, 3 Hill at 348; Connecticut: Parker v. Middlebrook, 24 Conn. 207, 210 (1855); Indiana: Wood v. Cohen & Another, 6 Ind. 455 (1855), and Kansas: Daniel v. McLucas, 8 Kan. App. 299, 55 P. 680, 680 (1899), overruled, Christensen Grain, Inc. v. Garden City Coop., Equity Exch., 192 Kan. 785, 790, 391 P.2d 81, 86 (1964). The extent to which any jurisdictions continue this rule, with the exception of New York, is debatable. Even these states seem to dispense with the requirement when a demand would prove futile.

Barrett, 3 Hill at 351. Conversely, the plaintiff need not make a demand upon a knowing wrongdoer in order to commence a suit. See Chemical Bank v. Society Brand Indus., Inc., 624 F. Supp. 979, 982-83 (S.D.N.Y. 1985); Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102, 105-06, 156 N.E. 629, 630 (1927). See also Senfield v. Bank of Nova Scotia Trust Co. (Cayman) Ltd., 450 So.2d 1157, 1161 (Fla. App. 1984) (demand is only necessary to prove the fact of a conversion, not as a prerequisite to initiate a suit; conversely, a cause of action for replevin accrues only upon a refusal to return the property).
mitted, will voluntarily surrender the property.\textsuperscript{43}

The second, and perhaps more important, function of the rule is to immunize the good faith possessor from civil and criminal liability for the wrongful taking (as distinct from liability for the value) of the owner's property until he or she has been made aware of the injury.\textsuperscript{44} This immunization is particularly important in the criminal context because criminal liability is not imposed unless the wrongdoer intended to commit the wrong. In the context of civil liability, the rule still requires the innocent possessor to return the property but provides protection from damages for the (wrongful) detention of the property or for loss of the property during the period in which the possessor is unaware of the wrongful nature of the detention.\textsuperscript{45}

Despite the requirement's clear functions, a thread of cases applies the "demand and refusal" rule, arguably incorrectly, to protect the original owner in the context of the statute of limitations even at the expense of the good faith possessor. The best example of such use to protect the original owner is found in the decision Menzel v. List.\textsuperscript{46} This case involved the possession of a Chagall painting which had been taken from the original owner by the Nazis in 1941. The original owner, Mrs. Menzel, ultimately discovered the painting in the possession of an admittedly good faith purchaser, Albert List, in 1962. She then demanded its return, he refused, and she sued to recover the painting. As a defense, List asserted that the statute of limitations ran either from the time that the painting was taken from the Menzels in 1941 or from the time that List purchased the painting in good faith from a reputable art dealer in 1955. The New York court rejected this defense, cursorily stating that an action for replevin or conversion "against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defend-
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ant's refusal to convey the chattel upon demand."47 Menzel's cause of action therefore accrued in 1962, and she instituted suit well within the statutory period of limitations. The court thus erred in using the "demand and refusal" requirement not as a shield from unnecessary litigation for the good faith purchaser, but as a formula for determining accrual of the cause of action, which triggers the running of the statute of limitations.

The court in Menzel cited only two cases as precedent for its application of the "demand and refusal" requirement.48 Neither case involved the statute of limitations, and both were based on New York's rule that the receipt of stolen property by a good faith transferee does not constitute a conversion.49 The Menzel court interpreted this rule to mean that the statute of limitations does not run against the true owner for recovery of the property until the possessor commits a conversion, evidenced by the refusal to surrender upon the true owner's demand. This interpretation is perhaps understandable if one focuses only on the formulaic wording of the rules, but it is clearly incorrect if one remembers the context and particularly the purpose of the "demand and refusal" requirement.

There is some authority, although meager and not cited in Menzel, for the Menzel court's "demand and refusal" requirement in the context of the statute of limitations. One of these decisions is another New York case, Duryea v. Andrews.50 In Duryea, a horse was stolen from the plaintiff in 1873, but the plaintiff did not learn its whereabouts until 1889, at which time he made demand for its return and then promptly sued. The court, without citing any precedent, held that the statute of limitations did not begin to run until the demand was made and that "[t]he horse having been stolen, its possession until such demand was, in contemplation of law, in the plaintiff, as he was its legal owner."51 The court seems

47. 49 Misc. 2d 300, 304-05, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966).
48. The earlier of these two decisions, Gillet v. Roberts, 57 N.Y. 28 (1874), concerned a suit for damages for conversion of timber which had been stolen from the plaintiff's land. When the plaintiff asked the defendant to surrender the lumber purchased by the latter in good faith, the defendant agreed to do so. However, the plaintiff failed to take it into his possession and instead sought damages for the conversion. The court held that where the defendant is a good faith purchaser of stolen property, he is not liable to the true owner until he is informed of the defect in ownership and given the opportunity to return the property. Id. at 33-34. In Cohen v. Keizer, 246 A.D. 277, 285 N.Y.S. 488 (1936), the plaintiff's suit was dismissed (without prejudice) because the plaintiff had failed to make a demand upon the defendant whose possession was lawful and not tortious in its origin. Id. at 278, 285 N.Y.S. at 489.
49. See supra note 40.
51. Id. at 43.
to have treated the defendant like a bailee who holds on behalf of the true owner, at least until a demand and refusal. On the other hand, the court never mentioned whether the possessor acted in good or bad faith.

A Kansas decision, Daniel v. McLucas,\(^{52}\) also held that an owner must make demand for return of the property before the statute of limitations will start running against the owner's cause of action, even though the possessor is a bona fide purchaser. The court contrasted the bona fide purchaser with the thief who is liable without any such demand, but it did not clarify whether it meant liability for return of the property or liability for damages for the wrongful detention of the property. The court in Daniel cited several decisions with holdings contrary to this rule, and only two decisions which adopted this rule.\(^{53}\) Daniel itself was subsequently overruled, and the notion that the statute of limitations does not run until after a demand is made was expressly rejected.\(^{54}\)

The Menzel court's application of the demand requirement to the statute of limitations has been followed in two subsequent decisions by the Second Circuit,\(^{55}\) largely ignored in other New York decisions,\(^{56}\) and


\(^{53}\) Daniel cites Duryea, supra notes 50-51 and accompanying text, and an Indiana decision, Wood v. Cohen & Another, 6 Ind. 364 (1855), which, like the cases relied on in Menzel, does not involve the statute of limitations. The issue in Wood was whether two defendants (one of whom was the alleged thief of a horse and the other the bona fide purchaser of the horse) have identical potential liability in the suit so as to prevent one from testifying on behalf of the other. The court held that because the bona fide purchaser would not be liable without a demand, and the thief would be liable even without a demand, their interests were not synonymous. Id. at 365. While this decision indicates that Indiana follows the New York interpretation that the bona fide purchaser does not commit a conversion until refusing a demand for the surrender of the property, it does not mean that Indiana would necessarily apply this rule in the context of the statute of limitations.

\(^{54}\) In Christensen Grain, Inc. v. Garden City Coop., Equity Exch., 192 Kan. 785, 391 P.2d 81 (1964), the Kansas Supreme Court held that although a demand was necessary before a suit could be instituted, this "does not create an exception to, nor does it avoid the force and effect of, the clear and unequivocal provisions [of the statute of limitations]." Id. at 789-90, 391 P.2d at 85. Thus, although a demand is necessary to protect the bona fide purchaser, it does not delay the running of the statute of limitations against the owner until demand can be made after discovery of the necessary facts.

\(^{55}\) The first case, Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982), involved the disposition of two unsigned Duerer paintings which apparently had been stolen from a castle located in what is now East Germany by American soldiers at the close of World War II. Id. at 1152. Elicofon purchased the paintings in 1946 for $450 from an unidentified serviceman who "appeared" at his home. Id. at 1156. Of relevance here is Elicofon's claim that the suit by the East German government to recover the paintings was barred by New York's statute of limitations. Id. at 1160-64. Following Menzel, the Second Circuit concluded that the statute of limitations did not run until Elicofon refused the demand for return of the paintings in 1966 rather than, as Elicofon claimed, in 1946 when he purchased the paintings. Id. See also Note, Kunstsammlungen zu Weimar
criticized in commentaries. In following Menzel, the Second Circuit relied not on the wisdom of the decision, itself, but on its belief that Menzel was still good New York law which it was bound to follow.

The Second Circuit, in a more recent decision, DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), cert. denied, 108 S. Ct. 2823 (1988), held that New York's "demand and refusal" rule incorporates the requirement that the true owner exercise reasonable diligence in locating the stolen property. Id. at 108-10. The plaintiff's claim to recover a Monet painting which had disappeared during World War II was thus barred because she had failed to search diligently for the painting during the intervening time period. Id. at 110-12. The extent to which the engrafting of a due diligence requirement undermines the "demand and refusal" rule as applied in Menzel remains to be seen in future decisions.

A third case, which is as yet undecided, involves an attempt by the Turkish government to regain a collection of antiquities now held by the Metropolitan Museum of Art. Turkey v. Metropolitan Museum of Art, No. 87 Civ. 3750 (VLB) (S.D.N.Y. 1987). The Metropolitan has made a motion for summary judgment arguing both that Turkey had delayed more than three years in bringing suit following the Metropolitan's refusal of the demand for return of the antiquities in the early 1970s and, following the DeWeerth decision, that Turkey had failed to exercise due diligence in pursuing its claim. Turkey Sues the Met to Regain Antiquities, N.Y. Times, June 2, 1987, at C13, col. 3; Glueck, Met Files Motion to Retain Artifacts, N.Y. Times, July 21, 1987, at C13, col. 1; Turks Answer the Met in Suit over Artifacts, N.Y. Times, Dec. 24, 1987, at C9, col. 3; personal communication from Harry I. Rand, attorney representing the Turkish government (Feb. 28, 1989).

See, e.g., Stroganoff-Scherbatov v. Weldon, 420 F. Supp. 18, 22 & n.5 (S.D.N.Y. 1976) (decision based on Act of State Doctrine but in dictum court also stated that claim would be barred because plaintiff's predecessor knew whereabouts of property and right to make demand was complete in 1931); Al-Roc Products Corp. v. Union Dime Savings Bank, 74 A.D.2d 834, 834, 425 N.Y.S.2d 525, 526 (1980) (where demand is prerequisite to instituting suit, statute of limitations runs from time when the right to make the demand is complete); Smith v. Driscoll, 69 A.D. 2d 857, 857, 415 N.Y.S.2d 455, 457 (1979) (suit for conversion of property barred despite apparent failure to make demand); Federal Ins. Co. v. Fries, 78 Misc. 2d 805, 810, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974) (suit for conversion barred because statute runs from time plaintiff was entitled to make the demand, despite plaintiff's ignorance which prevented it from instituting suit sooner). It should be noted that none of these cases provides a significantly similar factual situation to that presented in either Menzel or Elicofon.

Elicofon argued that Menzel was no longer the law in New York by referring to those cases which seemed to criticize or ignore Menzel. See supra note 56. The Second Circuit concluded that none of these cases actually overruled Menzel. Nevertheless, the Elicofon court impliedly criticized the case by conceding that New York law might treat the bad faith possessor more favorably than the good faith possessor. Elicofon, 678 F.2d at 1162. It seems clear that the court wanted to delay the running of the statute of limitations not until a demand was made, but rather until the plaintiff became aware of the facts necessary to institute a suit. Id. at 1163-64. Reliance on a discovery rule would delay the running of the statute so as to accomplish this goal and, at the same time, resolve
The Menzel court’s application has been criticized on the ground that the delay in running the statute of limitations penalizes the good faith possessor while protecting the original thief or one who took in bad faith. In fact, because in most situations the true owner makes demand and institutes suit promptly after learning the identity of the possessor, the practical result is that the good faith purchaser will almost never be able to acquire title to personal property through running of the statute of limitations. On the other hand, the thief whose identity remains undetermined through the difficulty of defining “open and notorious” possession of personal property. See infra notes 64-78 and accompanying text. Elcofon, 678 F.2d at 1164, n.25. The Second Circuit in DeWeerth essentially accomplished this by including a due diligence requirement. DeWeerth, 836 F.2d at 108-10.

Reliance on Menzel and the demand and refusal rule to delay the running of the statute of limitations was, in fact, entirely unnecessary in Elcofon because the plaintiff, which was concededly a branch of the East German government, could not institute suit until the United States recognized its government in 1974. The disability caused by this non-recognition thus tolled the statute of limitations. Elcofon, 678 F.2d at 1164-65. Even if the non-recognition toll did not exist, however, the case could have been resolved in a more principled manner (except that the federal court was bound to follow New York law) by focusing on the conduct of the defendant to determine whether he was in fact a bona fide purchaser of the Duerer paintings.

The Menzel decision itself offers an alternative basis for the same result in that case. A Military Government Order, dated November 10, 1947, stated that “[p]rovisions of law for the protection of purchasers in good faith which would defeat restitution [of property confiscated by the Nazis] shall be disregarded.” Law No. 59, U.S. Military Government for Germany (Nov. 10, 1947), quoted in Menzel, 49 Misc. 2d at 134-15, 267 N.Y.S.2d at 819. Following World War II every attempt was made to restore such property to the original owners and, in situations where the owners or their heirs could not be found, the property was to be distributed through the auspices of the Jewish Survivors’ Restitution Organization. Pursuant to military government law, the statute of limitations was required to give way to other considerations under the extraordinary circumstances created by World War II. 59. Elcofon, 678 F.2d at 1163-64 & n.23.

60. The “demand and refusal” requirement actually places the good and bad faith possessors on an equal footing: neither will succeed unless the true owner, after learning the whereabouts of the stolen property, delays longer than the statutory time period before acting. In fact, if the Menzel case were applied literally, the owner would lose only if he or she waits longer than the statutory time period between making a demand and instituting a suit. According to the Second Circuit in Elcofon if the demand requirement is substantive, the statute of limitations runs only from the time of the demand. Section 206(a) of the N.Y.C.P.L.R. states that the statute of limitations runs “from the time when the right to make the demand is complete. . . .” Id. at 1161 & n.20. Elcofon, however, holds that the statute applies only when the demand is procedural and interprets Menzel as stating that an owner’s demand on a bona fide purchaser is substantive. Id. at 1161-62. This result, however, seems unlikely, and it is worth noting that none of the cases cited by Elcofon for the proposition that the demand in cases of conversion is substantive hold that the demand starts the statute of limitations for actions for conversion against a good faith purchaser. See, e.g., MacDonell v. Buffalo Loan, Trust & Safe Deposit Co., 193 N.Y. 92, 94-96, 85 N.E. 801, 803 (1908) (cause of action for conversion runs from time of transfer, not from time of demand); Ganley v. Troy City Nat’l Bank, 98 N.Y. 487, 493-95 (1885) (in suit against a bailee court held that action for conversion ran from time of conversion and was barred, but action for breach of bailment contract ran from time of demand); Frigi-Griffin, Inc. v. Leeds, 52 A.D.2d 805, 806, 383 N.Y.S.2d 339, 341 (1976) (cause of action for breach of contract accrues when demand for performance is refused); Rossi v. Oristian, 50 A.D.2d
known for a sufficient time can acquire title in this way.\footnote{61}

A second criticism of this application of the "demand and refusal" requirement is that it subverts the rationale for the existence of the rule. The "demand and refusal" requirement was created to protect the good faith possessor by providing insulation from a suit for damages; it was not created to punish the good faith possessor (or protect the true owner) by delaying, perhaps indefinitely, the running of the statute of limitations.\footnote{62} Consequently, several jurisdictions have rejected the use of the

\footnote{44, 47, 376 N.Y.S.2d 295, 297-98 (1975) (cause of action for breach of option contract accrues when demand is made for performance and defendant refuses); In re Brady's Will, 286 A.D. 672, 674, 146 N.Y.S.2d 136, 138 (1955) (cause of action in suit against individual acting as bailee with whom property was left when owner died accrues upon demand for return of the property).

Other courts have held that the demand must be made within the statutory time period after the owner discovers the location of the property and is capable of making a demand. State \textit{ex rel.} Brooks v. Overland Beverage Co., 69 Idaho 126, 129, 203 P.2d 1009, 1011 (1949) (plaintiff who is capable of making demand must do so and cannot delay the statute of limitations by failing to make the demand); Jones v. Jacobson, 45 Wash. 2d 265, 270-71, 273 P.2d 979, 981-82 (1954) (when demand is necessary to run the statute of limitations, the claimant cannot delay the demand and thereby delay the statute of limitations); Edison Oyster Co. v. Pioneer Oyster Co., 22 Wash. 2d 616, 626, 157 P.2d 302, 307 (1945) (when owner knew whereabouts of property and could have sought replevin but delayed in making demand, cause of action accrued when the plaintiff could have perfected the right to sue).

61. The bad faith possessor rarely benefits from the statute of limitations bar because the "open and notorious" requirement is rarely satisfied under such circumstances. \textit{See supra} notes 16-35 and accompanying text. Nevertheless, in decisions in which the converter's conduct satisfies the requirements for running of the statute of limitations, the result will be that the defendant who does not merit protection of the "demand and refusal" rule will be insulated from suit by the statute of limitations. \textit{See, e.g.}, O'Connell v. Chicago Park Dist., 376 Ill. 550, 558-59, 34 N.E.2d 836, 841 (1941) (when possession is tortious at the outset, the statute of limitations starts to run immediately and a subsequent demand does not start it running again); Varga v. Credit-Suisse, 5 A.D.2d 289, 293, 171 N.Y.S.2d 674, 678 (1958) (cause of action for breach of contract or conversion accrues against the wrongdoer when the breach or conversion occurs at which time the statute of limitations begins to run). In addition, a possessor who affirmatively prevents the injured party from learning the facts necessary to bring suit may be subject to the fraudulent concealment exception, \textit{see supra} notes 16-20 and accompanying text, or may be estopped to rely upon the statute of limitations as a defense. \textit{See} \textit{Elicoefon}, 678 F.2d at 1163-64 and n.23 ("familiar principles of equitable estoppel will prevent a wrongdoer from asserting the statute of limitations defense and thereby 'take refuge behind the shield of his own wrong'"); General Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 127-28, 219 N.E.2d 169, 170-71, 272 N.Y.S.2d 337, 339 (1966) (when a wrongdoer conceals the injury by affirmative fraudulent conduct which causes the plaintiff to delay in instituting suit the defendant is estopped to rely upon the affirmative defense of the statute of limitations).

62. Even in New York, courts have recognized that the sole purpose of the demand requirement is to protect the good faith possessor. \textit{Elicoefon}, 678 F.2d at 1163 n.24; Gillet v. Roberts, 57 N.Y. 28, 34 (1874); Barrett v. Warren, 3 Hill 348, 357-60 (N.Y. Sup. Ct. 1842). In Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102, 105-06, 156 N.E. 629, 630 (1927), the court characterized the demand requirement as "no more than a mere technical obstruction except for the reason which is said to underlie" and claimed that other jurisdictions regarded the rule "as unduly technical." In referring to a statute required demand in suits against the city of New York, the New York Court of Appeals held that when the purpose of the demand is to allow claims to be settled in order to save
requirement in the context of the statute of limitations because it would result in an illogical and unjustified twist in the law.63

Thirdly, and most significantly, the Menzel application is criticized because it shifts the focus of scrutiny from the conduct of the possessor to that of the true owner. In order for the statute to run, the original owner must have actual knowledge of the location and identity of the possessor and must undertake affirmative steps to recover the property. The good faith of the possessor seems irrelevant to the outcome. All of the goals furthered by the statute of limitations are thus defeated. The owner's negligence is punished in only the most egregious circumstances. More significantly, the good faith possessor cannot ascertain whether his or her title is safe from attack, no matter how long the property has been held. As a corollary, personal property cannot be conveyed with certainty regardless of the length of time for which a clear chain of title can be established. Thus, although the demand and refusal requirement served a legitimate purpose in its origin, it was largely a result of the historical development and categorization of different forms of actions. Even as it was continued in New York to insulate the good faith possessor from damages, its use was justified. However, as a virtually fossilized incarnation of a technicality, it should not be allowed to subvert the purpose of the statute of limitations. The extreme consequences of this formulation are mitigated to some extent by a second modern variant of adverse possession doctrine, the discovery rule, which is discussed in the next section.

the defendant unnecessary costs and expenses in litigation, the claimant cannot use the requirement to evade the statute of limitations and thereby delay the suit indefinitely. Dickinson v. The Mayor of New York, 92 N.Y. 584, 590 (1883).

63. In Harpending v. Meyer, 55 Cal. 555, 561 (1880), the California court rejected the demand requirement because the operation of a rule which exempts a bona fide purchaser from being sued until after demand is made, is, in all the cases to which it has been applied, favorable to the bona fide purchaser, and it is claimed to have been devised for his protection. If applied to this case [to toll the statute of limitations], its operation is exactly the reverse of that. Although the court also discussed the inequity of allowing the statute to run immediately against the thief or bad faith possessor, the court relied primarily on the failure of the demand requirement, in this context, to protect the good faith possessor. Application of the demand requirement to delay the running of the statute of limitations has also been expressly rejected in Christensen Grain v. Garden City Coop., Equity Exch., 192 Kan. 785, 789-90, 391 P.2d 81, 85 (1964); Shelby v. Shaner, 28 Okla. 605, 605-06, 115 P. 785, 785-86 (1911); Luter v. Hutchinson, 30 Tex. Civ. App. 511, 512, 70 S.W. 1013, 1014 (1902) (although the court here was also critical of the plaintiff's failure to demonstrate diligence).
2. The Discovery Rule

According to the traditional formulation of adverse possession doctrine, in the absence of bad faith on the part of the possessor, it is generally irrelevant whether the true owner had knowledge of the facts necessary to the initiation of a suit to recover the lost or stolen property. Only when the possessor engages in fraudulent concealment is the running of the statute delayed until the owner learns the relevant facts.64

A different concept of the discovery rule was articulated by the New Jersey Supreme Court in O'Keeffe v. Snyder.65 The plaintiff, Georgia O'Keeffe, alleged that three of her paintings had been stolen from her husband's studio in 1946. She did not learn the paintings' whereabouts until 1976 when she discovered them in the gallery of one of the defendants, Snyder, who had purchased them (evidently in good faith) from another defendant, Frank. Upon her demand for the paintings' return, Snyder refused, and O'Keeffe instituted suit for replevin.66 The trial court granted summary judgment for the defendants on the grounds that O'Keeffe's suit was barred by New Jersey's six-year statute of limitations. The appellate court reversed because it concluded that the defendants had not established the required elements of adverse possession, in particular the open and notorious requirement.67

The New Jersey Supreme Court rejected the application of the doctrine of adverse possession to personal property,68 although it accepted that the statute of limitations can bar a suit by the original owner to

64. See supra notes 16-35 and accompanying text.
67. 170 N.J. Super. at 92, 405 A.2d at 848, 83 N.J. at 483, 416 A.2d at 865.
68. The O'Keeffe decision is novel in part because the New Jersey Supreme Court viewed the discovery rule as supplanting traditional adverse possession doctrine and in part because the court examined the relevant policy considerations more thoroughly than any court before or since. For discussion of the O'Keeffe case, particularly in the context of development of the discovery rule, see Franzese, "Georgia on My Mind"—Reflections on O'Keeffe v. Snyder, 19 SETON HALL L. REV. 1 (1989). However, the O'Keeffe court's application of the discovery rule to a replevin action was not entirely unprecedented. Utah and Nevada have had statutory discovery exceptions for livestock throughout this century. See, e.g., UTAH CODE ANN. § 78-12-26(2) (1987) ("In all cases where the subject of the action is a domestic animal usually included in the term 'livestock,' which at the time of its loss has a recorded mark or brand, if the animal strayed or was stolen from the true owner without the owner's fault, the cause does not accrue until the owner has actual knowledge of such facts as would put a reasonable man upon inquiry as to the possession of the animal by the defendant."). In addition, both Ohio and Wyoming have statutes predating O'Keeffe which provide that a cause of action for the wrongful taking of personal property does not accrue until the wrongdoer is discovered. OHIO REV. CODE ANN. § 2305.09 (Anderson 1981); WYO. STAT. § 1-3-106 (1977).
regain possession. The court believed that these approaches were distinguishable because of the focus of adverse possession doctrine on the character of the adverse possessor's possession and, in particular, because of the difficulty of establishing exactly what constitutes open and notorious possession of personal property. The O'Keeffe court thus ignored the traditional formulation of open and notorious possession as an indicator of the possessor's good faith and turned to the formula's meaning in the real property context, where it signifies possession which would put the reasonably diligent owner on notice of the cause of action. Because open and notorious possession of personal property (that is, use of property as the true owner would use it) will not necessarily give even the diligent true owner notice of the necessary facts, the O'Keeffe court rejected this element as the relevant standard. In addition, the O'Keeffe court emphasized the burden which open and notorious possession puts on the possessor, particularly, for example, the possessor of art works.

69. O'Keeffe, 83 N.J. at 499, 416 A.2d at 873.

70. The O'Keeffe decision discussed at some length, and overruled as they applied to adverse possession of personal property, two earlier New Jersey decisions. One, Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq. 464, 28 A.2d 189 (1942), involved a bailment and therefore will be considered infra, note 97 and accompanying text. The second decision, Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (1959), involved the theft of seven negotiable bonds which were sent by an anonymous friend to two of the defendants. The recipients then pledged the bonds as security for a loan from a credit company after telling the president of the company how the bonds had come into their possession. After the borrowers defaulted on the loan, the company president bought the bonds from the credit company and subsequently sold them to his son. The court concluded that the statute of limitations would run from the time the bonds were pledged to the credit company because this constituted a use of the bonds which was "as open and notorious as the nature of the property would permit . . . ." Id. at 355, 153 A.2d at 357. The difficulty with this decision is that the court, which reversed a grant of summary judgment for the defendants on the question of whether they qualified as holders in due course, was less concerned with the good faith of the credit company president when it considered the adverse possession issue. The O'Keeffe court may have been bothered by the reliance placed in Lesnevich on the "open and notorious" rubric borrowed from real property doctrine, where it serves the purpose of giving the owner notice, but was arguably misapplied in Lesnevich. O'Keeffe, 83 N.J. at 495-96, 416 A.2d at 871-72. Instead of returning to the standard of good faith, however, the O'Keeffe court rejected the entire doctrine and engrafted the discovery rule, which in the context of personal property is necessary if one wants to give notice to the true owner. This result was eloquently advocated by the dissent in Chapin v. Freeland which argued that before the owner's title could be terminated the possessor must satisfy a notice requirement (in addition to a good faith standard)through "open and notorious" possession. Chapin v. Freeland, 142 Mass. 383, 388-94, 8 N.E. 128, 131-34 (1886) (Field, J., dissenting).

71. O'Keeffe, 83 N.J. at 496, 416 A.2d at 871. The California legislature also seems particularly sensitive to the burden which the open and notorious requirement imposes on the possessor of art works. In 1982, it added the following discovery provision to its statute of limitations governing actions for the recovery of personal property:

The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts
Having rejected adverse possession doctrine, the *O'Keeffe* court turned to the statute of limitations and its underlying policies but concluded that these policies must sometimes give way to other considerations. It then referred to the formulation of a discovery rule which has been judicially grafted onto various provisions of the statute of limitations. Many of the cases in which this rule was first developed involved medical malpractice and, later, negligence. The application of the rule allowed the accrual of the cause of action, and thus the running of the statute of limitations, to be delayed until the reasonably diligent plaintiff discovers or should have discovered the facts necessary to institute suit. In applying the discovery rule to the *O'Keeffe* facts, the court held that the inquiry should focus, perhaps exclusively, on the conduct of the true

of the art or artifact by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft. CAL. CIV. PROC. CODE § 338 (West Supp. 1988).

In response to the reformulations of adverse possession doctrine used in the *Menzel*, *Elicofohn* and *O'Keeffe* decisions, specific legislation aimed at the art market has also been proposed to limit the ability of the owner to recover stolen or illegally exported items of cultural property. Proposed federal legislation, designed to implement the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, would in fact severely hamper attempts by foreign governments to recover cultural property from American institutions and private collectors if certain minimal requirements of display are met. In addition, such suits would be barred after the property has reposed in the United States for ten years, even without public display, unless the foreign government can establish the possessor's actual knowledge of the property's questionable background. Such modification of existing statutes of limitation would not only undermine attempts by foreign governments to reclaim their cultural heritage but would also significantly alter traditional understanding of the operation of statutes of limitation. For text and critique of the proposed legislation, see Nafziger, *Repose Legislation: A Threat to the Protection of the World's Cultural Heritage*, 17 CAL. W. INT'L L.J. 250 (1987). Comparable legislation was passed by the New York State legislature but subsequently vetoed by Governor Cuomo. *Art-Ownership Bill Vetoed by Governor*, N.Y. Times, July 26, 1986, at C14, col. 3. The concerns raised by both the proponents and opponents of such repose legislation would probably best be served by a melding of the good faith standard used in the traditional understanding of personal property adverse possession doctrine with the specialized provisions of the UNESCO Convention.


73. *Id.* at 492, 416 A.2d at 869-70.

74. The broadened scope of the discovery rule was applied for plaintiffs who developed diseases over a long period of time and where "the wrong alleged is inherently impossible to ascertain at the time committed until the resulting injury becomes manifest." Clark v. United States, 481 F. Supp. 1086, 1094 (S.D.N.Y. 1979) (citing *Urie v. Thompson*, 337 U.S. 163, 170 (1949)). Clark distinguished between injuries which were themselves inherently incapable of discovery until after the passage of time (such as illness, medical malpractice and some types of negligence) and those which, whether or not the plaintiff actually knew of them, "were knowable as a matter of human experience." Clark, 481 F. Supp. at 1095. See also *DeHart v. First Fidelity Bank*, 67 Bankr. 740, 743-45 (D.N.J. 1986) (cases cited and discussed therein); *Nolan v. Johns Manville Asbestos*, 85 Ill. 2d 161, 171, 421 N.E.2d 864, 868 (1981) (illness caused by exposure to asbestos); *Weaver v. Witt*, 561 S.W.2d 792, 793-94 (Tex.1977)(medical malpractice); *Hays v. Hays*, 488 S.W.2d 412 (Tex. 1972) (medical malpractice).
owner, rather than on the conduct of the possessor. The true owner would bear the burden of proving reasonable diligence in searching for her stolen paintings, and the statute of limitations would be delayed indefinitely as long as she could prove such diligence.\textsuperscript{75} This formulation shifts the burden of proof from the possessor (who had to show "open and notorious" possession) to the true owner and, in the process, virtually eliminates any application of the statute of limitations.\textsuperscript{76}

The \textit{O'Keeffe} holding significantly undermines the policy of the statute of limitations. It would never be within the capabilities of a would-be good faith possessor to ascertain whether the true owner (whose existence is entirely unsuspected) is demonstrating due diligence in attempting to find lost or stolen property. It is, accordingly, impossible for the good faith possessor, even after long periods of time, to rest secure in the knowledge that his or her property cannot be recovered by a wronged prior owner.

Most significantly, the \textit{O'Keeffe} court failed to appreciate that most of the cases which adopt the discovery rule, especially the negligence and medical malpractice cases, involve the injured party and an alleged wrongdoer. In the adverse possession context, the good faith standard already deals with the wrongdoer by tolling the statute of limitations in favor of the owner at least until discovery of the necessary facts. The innocent possessor, however, should be treated differently. The innocent possessor has not committed an intentional wrong and is entirely unaware of any reason to preserve the documentation necessary to prove good title to the property.\textsuperscript{77}

\textsuperscript{75} \textit{O'Keeffe}, 83 N.J. at 499, 416 A.2d at 873.

\textsuperscript{76} The \textit{O'Keeffe} decision's formulation of a discovery rule was followed in a subsequent case which held that under New Jersey's discovery rule the statute of limitations for recovery of converted negotiable instruments belonging to a debtor-company runs only from the time that the bankruptcy-trustee should have discovered the conversion. \textit{DeHart v. First Fidelity Bank}, 67 Bankr. 740 (D.N.J. 1986). The court emphasized that this decision was contrary to those of other jurisdictions concerning negotiable instruments under the Uniform Commercial Code which furthered the interest in the finality of commercial transactions "'essential to the free negotiability of instruments on which commercial welfare so heavily depends.'" \textit{Id.} at 745 (quoting \textit{Fuscellaro v. Industrial Nat'l Corp.} 117 R.I. 558, 563, 368 A.2d 1227, 1231 (1977)). Nevertheless, the court in \textit{DeHart} declined to follow the decisions of other jurisdictions because of the expanded scope of the discovery rule defined in \textit{O'Keeffe}.

\textsuperscript{77} The \textit{O'Keeffe} case, for example, presents complicated facts because Frank received the paintings from his father who, he claimed, had been given the paintings as a gift by O'Keeffe's husband, Stieglitz. The fact that both Frank's father and Stieglitz were dead and it would therefore be virtually impossible to establish the veracity of Frank's claim illustrates why the statute of limitations exists to bar stale claims. The truth was never determined because O'Keeffe and Snyder ultimately agreed to share the paintings. Franzese, \textit{supra} note 68, at 13 n.103.
The discovery rule, although less rigid than the "demand and refusal" requirement enunciated in Menzel, still suffers from the same disadvantages. By focusing inquiry on the owner rather than on the conduct and good faith of the possessor, the discovery rule renders the statute of limitations virtually meaningless and causes significant adverse consequences for parties attempting to deal honestly and in good faith with personal property.\(^7\)

3. **Tacking**

The ability of a possessor to add his or her time of possession to that

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78. O’Keeffe appears not to have triggered much of a trend among legislators or jurists to reexamine the traditional formulation of wrongful possession doctrine. Only California appears to have revised its law in specific response to the O’Keeffe decision. See supra note 71. The more pronounced trend is toward the inclusion of a discovery provision in statutes of limitation governing actions for injury to personal property. See KAN. STAT. ANN. § 60-513 (b) (1983); N.H. REV. STAT. ANN. § 508:4 (Supp. 1987); N.C. GEN. STAT. § 1-52 (1983). This development appears to be a logical one, since property injury actions more closely resemble the medical malpractice and personal injury cases in which the discovery rule has been applied most broadly than do actions for the recovery of personal property. Specifically, property injury and personal injury actions are similar in that the fact of injury may go undetected for a relatively long period of time. In actions for the recovery of personal property, at least in the context of nonpermissive possessions, it is generally the identity of the possessor, rather than the injury itself, that calls for discovery.

In addition to DeHart, 67 Bankr. 740 (D.N.J. 1986), the O’Keeffe discovery rule was cited in three subsequent decisions. In Desiderio v. D’Ambrosio, 190 N.J. Super. 424, 463 A.2d 986 (1983), the court held that a bailor with a contract of bailment for an indefinite term had to make demand upon the bailee for return of the property within a reasonable period of time. This time period is to be determined by the due diligence of the bailor which is defined, not in the O’Keeffe sense by the conduct of the bailor, but rather by reference to the period of time given in the statute of limitations for commencing an action on the contract. Id. at 430-31, 463 A.2d at 988. Once this time period is exceeded, the bailor can no longer demand or institute suit for return of the property and the bailee is justified in disposing of it. Id. at 432, 463 A.2d at 990.

Mucha v. King, 792 F.2d 602 (7th Cir. 1986), also involved a bailment for an indefinite term of a painting by the artist to a dealer who was to attempt to sell the painting on the artist’s behalf. The defendant, who argued that the dealer had converted the painting and that the statute of limitations had run so as to bar a suit for recovery of the painting by the artist’s son, conceded that the discovery rule would apply, so this was not actually an issue on appeal. Nevertheless, the Seventh Circuit, referring to O’Keeffe, commented that although Illinois courts had injected a discovery exception into other provisions of the statute of limitations, it might not have done so in this case “if problems of proof created by the passage of time outweigh the hardship to a plaintiff who could not as a practical matter have sued any earlier than he did.” Id. at 611. The subject of adverse possession arising from a bailment will be considered subsequently. See infra notes 88-110 and accompanying text.

Finally, Johnson v. Schneider, 212 N.J. Super. 442, 515 A.2d 293 (1986), referred to O’Keeffe only for the proposition that passage of the statutory time period vests title in the adverse possessor. Paradoxically, the court stated that the plaintiff’s failure to discover the seizure of his revolver would not delay the running of the statute of limitations. However, it is difficult to determine from the recitation of facts whether the plaintiff in fact did not know of the seizure. Id. at 446-47, 515 A.2d at 296.
of a prior possessor so that the total comprises the time period required for the running of the statute of limitations is known as "tacking" and is applied in the doctrine of adverse possession of real property. Its analogous application to the adverse possession of personal property has been largely accepted by the courts, although it has also been the topic of some scholarly debate.79

Although tacking is almost universally accepted for adverse possession of real property, this has not been the case for personal property. Several nineteenth century decisions refer to the inability of a possessor of personal property to tack on the time of prior possessors to meet the statutory time requirement. In most of these cases, however, the court based the result on some other principle, most frequently the failure of the prior possessors to hold the property in an open and notorious manner.80 In other decisions, the length of the defendant's own possession was sufficient to bar the suit even though the court seemed to disapprove of the application of tacking.81 Conversely, if a prior possessor held the property for longer than the statutory period, then a subsequent transferee could acquire good title immediately under a shelter doctrine, and the court did not need to consider the question of tacking.82 The shelter doctrine relies on the principle that the passing of the statutory period not only bars a suit to recover the property but acts affirmatively to vest title in the possessor.83

The refusal to permit tacking is based on two rationales. The first is that each transfer of the property by one without title constitutes a separate conversion, and thus the statute should begin to run anew upon each

79. See Ames, supra note 2, at 323-26.
80. For example, in Gatlin v. Vaut, 6 Indian Terr. 254, 259, 91 S.W. 38, 40 (1905), the defendants, who qualified as good faith possessors, could not tack on the time that the property was in the hands of the thief only because the thief, by removing the property from the jurisdiction, had not triggered the running of the statute of limitations.
81. Harpending v. Meyer, 55 Cal. 555, 560 (1880) (each transfer by one who does not have right to transfer constitutes a new conversion and the statute of limitations runs from that time); Wells v. Ragland, 31 Tenn. (1 Swan 400) 501, 505-06 (1852) (same). Tacking was, however, expressly approved in other nineteenth century decisions, such as Gaillard v. Hudson, 81 Ga. 738, 739, 8 S.E. 534, 534 (1889) and Dragoo v. Cooper, 72 Ky. (9 Bush) 629, 631-32 (1873).
82. Shelby v. Guy, 24 U.S. (11 Wheat.) 361, 372 (1826) (vendor with good title must be able to convey such to a vendee); Chapin v. Freeland, 142 Mass. 383, 387, 8 N.E. 128, 130 (1886) ("We regard a purchaser from one against whom the remedy is already barred as entitled to stand in as good a position as his vendor.").
transfer. In only one decision does a court explicitly adopt this reasoning, and even there the court could have relied on the defendant's inability to demonstrate either good faith or open and notorious possession on the part of his predecessors.\(^4\) Similar sentiments were echoed in vigorous dissents to at least two other noteworthy opinions, O'Connell v. Chicago Park District and the O'Keeffe decision,\(^5\) both of which explicitly adopt tacking in the holdings of the majority opinions.

The second criticism of tacking is based on the difficulty which the owner of personal property (as opposed to an owner of real property) has in locating stolen or lost property and therefore in ascertaining the facts necessary to bring a suit.\(^6\) It is interesting to note that those who favor tacking also look to the conduct of the owner but conclude that his or her "negligence" is the same regardless of the fortuity of whether there has been a transfer of the property.\(^7\)

Thus both the proponents and the opponents of tacking seem to em-

\(^4\) In San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 705, 239 P. 319, 321-22 (1925), the defendant had purchased a piano at auction apparently in good faith but held it for less than the statutory three years before suit was instituted. The piano had in fact been converted more than five years before, but the defendant could not establish that the prior possessors had held the piano openly and notoriously during the time between conversion and his own purchase of the piano. The court therefore could have held for the plaintiff without relying on its rejection of tacking.

\(^5\) O'Connell v. Chicago Park Dist., 376 Ill. 550, 567, 34 N.E.2d 836, 844 (1941) (Farthing, J., dissenting); O'Keeffe v. Snyder, 83 N.J. 478, 511-14, 416 A.2d 862, 879-82 (1980) (Handler, J., dissenting). The O'Keeffe dissent relies on this reasoning although it also considers extensively the principle that one without good title to property cannot convey good title even to a good faith purchaser. The dissent in O'Connell stated that if the statute of limitations runs against the right of action, then it should run anew upon each transfer. On the other hand, if the statute runs against the holder of the right then it would make sense to permit tacking. 376 Ill. at 567, 34 N.E.2d at 844 (Farthing, J., dissenting). The majority, nonetheless, contended that the statute runs against the cause of action. Id. at 559-60, 34 N.E.2d at 841. The dissent in Chapin v. Freeland also seems to reject tacking, 142 Mass. at 391, 8 N.E. at 132 (Field, J., dissenting). The majority, however, did not expressly adopt it and relied instead on the shelter doctrine. Id. at 387, 8 N.E. at 130 (Holmes, J.).

\(^6\) In San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 707-08, 239 P. 319, 322 (1925), the court explained its refusal to permit tacking on this basis:

This construction . . . would afford some protection to persons as to their ownership of personal property which is of an ambulatory and movable character, and easy of concealment. Less baneful consequences would probably flow from a rule that would require a fixedness or stability of possession before an owner of property, without fault on his part, could be deprived of its use and enjoyment than that which would follow the confusion of "tacking" the possession of many holders of various durations, residing in various neighborhoods and with the situation further embarrassed by the difficulties of identification.

\(^7\) The majority in O'Connell referred to the fact that the "laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons." 376 Ill. at 559-60, 34 N.E.2d at 841; see also Ames, supra note 2, at 323.
phasize the condition of the original owner. The proponents rely on the negligence of the owner, which does not change regardless of how many possessors hold the property. The opponents focus on the conduct of the possessors in engaging in subsequent transfers but, in fact, justify their position by evoking sympathy for the owner, who, even if diligent, still may not locate his or her property within the statutory time period.

While tacking should be and generally is permitted, the justification that the true owner’s negligence (or laches) continues rests on faulty logic because unless one applies a discovery rule, the owner’s conduct never becomes the focus of attention until after he or she has discovered the whereabouts of the property. On the other hand, the refusal to permit tacking is itself unjustified because it furthers none of the policies which are the goals of the statute of limitations or the adverse possession doctrine. The failure to tack relates neither to the possessor’s good or bad faith, nor to the true owner’s diligence or lack thereof in discovering the property, nor even to the question of productive use of the property. Prohibition of tacking does not guarantee that the owner will be informed of the whereabouts of the property. If this were the goal, then it would be more efficient to adopt a discovery rule as suggested in O’Keeffe. A mere fortuity of how often the property is transferred would determine how long the cause of action survives and might inhibit productive use of the property by discouraging potential purchasers from buying property because in so doing the period of the statute of limitations would begin anew.

III. Possession Permissive in Its Inception

There are many types of possessions of personal property by nonowners which originate with the permission of the owner but which, through some act of the possessor, become unlawful. Examples include bailments, trusts, cotenancies, and pledges of property as security. By definition, as long as such possessions are permissive and not contrary to the interests of the owner, they do not take on a character of adverseness or hostility. Therefore, no matter how long the possession continues, it can never ripen into title in the possessor. If, however, the possessor acts contrary to the interests of the owner, then the possession may be said to be “adverse” to the owner. A cause of action then accrues, and if

the owner fails to act within the period of the statute of limitations, a suit for recovery of the property will be barred. Once again, the underlying determination concerns the type of conduct which causes accrual of a cause of action, triggering the running of the statute of limitations. Even more significant is the question of whose conduct—the owner’s or the claimant’s—will receive the focus of scrutiny in determining the running of the statute.

In order to answer this question, a distinction must be made between two different situations: (1) those in which the owner attempts to regain the property or its value from the original possessor, who was given the property by the owner, and (2) those in which the owner seeks to recover from a transferee who received the property in good faith from the original possessor and who is ignorant of the true owner’s interest. If the property is still in the possession of the original possessor, the owner is considered justified in assuming that the possession is permissive, and not adverse, and that no action is necessary to protect his or her rights. Furthermore, courts sometimes state that the law will presume a lawful possession. Therefore the burden of proof is on the claimant to show that the possession was unlawful or adverse to the owner’s interest. Thus, even if the original possessor acts contrary to the owner’s interest as, for example, by commingling funds, conveying the property to another, failing to return the property upon request, or a husband’s retaining his wife’s property after abandoning her, the statute of limitations still will not run.

The considerable protection given the owner when seeking recovery from the original bailee or other wrongdoer is illustrated by the various mechanisms judicially grafted onto the adverse possession doctrine to avoid the effect of the statute of limitations. One such mechanism is the “demand and refusal” requirement, which is used to determine when the cause of action accrues, primarily in the case of bailments for an indefinite term. The bailee may argue, sometimes successfully, that the mere

passage of time bars the owner’s suit to recover the bailed property, even though the bailee may never have asserted an adverse claim or made the owner aware of such an adverse claim.\textsuperscript{95} Courts will imply a reasonable time for the duration of the bailment; a reasonable time is determined by reference to the parties’ expectations. If the court finds that the parties did not intend a bailment of long duration, then it may determine that the statutory time period for recovery of personal property is reasonable.\textsuperscript{96} In such situations, the original bailee acquires title against the true owner, even without communication of an adverse claim.

In the more common scenario, however, the court determines that the parties intended a bailment of long duration. The owner must then demand the return of the property, and the possessor must refuse before the owner is required to take action. Thus the owner must have actual knowledge of the possessor’s conversion before the statute will run. Simple negligence or inattentiveness on the part of the owner, when not accompanied by actual notice of the adverse claim, does not start the statute.\textsuperscript{97}

This point is further illustrated by the definition of “refusal” often adopted by the courts. A mere refusal to return the owner’s property is not necessarily the equivalent of an assertion of an adverse claim. If the possessor refuses to surrender the property but gives any indication of an intention to do so at a later time, or if the possessor in some other way continues to acknowledge the owner’s rights, then the refusal is not considered notice of an adverse claim, and the statute of limitations does not run.\textsuperscript{98}

\textsuperscript{95} See, e.g., Houser v. Ohio Historical Soc’y, 62 Ohio St. 2d 77, 80-81, 403 N.E.2d 965, 967-68 (1980).

\textsuperscript{96} See, e.g., Campbell v. Whoriskey, 170 Mass. 63, 67, 48 N.E. 1070, 1072 (1898); Desiderio v. D’Ambrosio, 190 N.J. Super. 424, 428, 463 A.2d 986, 987-88 (1983) (discussed supra note 78); Houser, 62 Ohio St. at 81, 403 N.E.2d at 968. A loan of money for an indefinite period which is payable on demand may be considered to be due at once and the statute of limitations runs from the date of the loan. See Schupp v. Taendler, 154 F.2d 849, 850 (D.C. Cir. 1946).


\textsuperscript{98} Blount v. Beall, 95 Ga. 182, 190-91, 22 S.E. 52, 55 (1894). In such cases, it seems that the possessor’s acknowledgment of the owner’s rights acts either as a denial of hostility or as an inducement for the owner to rely on the fact that the possessor will not attempt to claim title to the property. See also Irvine v. Gradoville, 221 F.2d 544, 547 (D.C. Cir. 1955) (statement that bailee could not “at present” repay money held to indicate intent to repay in the future and therefore not a
Finally, some courts have avoided the statute of limitations by giving the owner an election of remedies. While conceding that an attempt to recover the property on a tort theory of conversion is barred by the statute of limitations, courts may permit the owner to sue for the value of the property on the theory of a contract of bailment, either express or implied. The statute of limitations for a conversion starts to run at the time the bailee wrongfully conveys the property to a third party; the breach of contract or trust, however, occurs only when the possessor refuses to comply with the request for return of the property. The efficacy of this remedy is clearly limited by its nature to the original bailee, thus illustrating the continuing liability imposed on the original wrongdoer and the concomitant protection given the good faith transferee.

Only two circumstances will lead to the barring of the owner's suit against the original possessor. One of these occurs when the owner fails to pursue his or her claim within the statutory time period after receiving actual notice of the adverse claim. Proof of such notice is generally established by the owner's own testimony or an admission of knowledge of the adverse claim. On the other hand, the owner's failure to realize the adverse claim coupled with his or her denial of actual knowledge will refusal). In Barry v. Donnelly, 781 F.2d 1040, 1042-43 (4th Cir. 1986), the court expressly relied on an equitable estoppel theory and remanded to the district court to determine whether the possessor had reaffirmed a promise to return a painting to the owner and, if so, whether the owner had reasonably relied on the reaffirmation in delaying the institution of a suit. The court stressed that the possessor could be estopped to rely on the statute of limitations on account of her conduct even though such conduct did not constitute fraud.


100. When there is no prior relationship between the owner and the original wrongful possessor (as in a theft) then there is nothing from which a court may imply a bailment, trust or agency duty owed by the possessor to the owner.

101. Henderson v. First Nat'l Bank of Dewitt, 254 Ark. 427, 436, 494 S.W.2d 452, 457 (1973); Buhman v. Oltrogge, 229 Iowa 449, 451-52, 294 N.W. 788, 789 (1940); Durst v. Durst, 225 Md. 175, 180-81, 169 A.2d 755, 757-58 (1961); Sporn v. MCA Records, 58 N.Y.2d 482, 486, 448 N.E.2d 1324, 1325-26 (1983); Hoffman v. Wall, 602 S.W.2d 324, 327 (Tex. Civ. App. 1980), error refused, Dec. 10, 1980. One disturbing case, Jackson v. American Credit Bureau, Inc., 23 Ariz. App. 199, 531 P.2d 932 (Ct. App. 1975), does not clearly fit this model. In this case, the plaintiff, who had had a long dispute with Sears, Roebuck & Co. and had kept a file documenting the dispute, turned the file over to the county attorney who was considering a grand jury investigation of Sears. The file was stolen from the county attorney's office, but when the plaintiff ultimately sued Sears for return of the file the suit was barred by the statute of limitations. The court refused to apply a discovery exception despite the plaintiff's claimed ignorance since the defendants, although acting in bad faith, engaged in no fraud beyond that involved in the original theft. Id. at 203, 531 P.2d at 935. The only possible explanation, although not stated by the court, is that the plaintiff delayed beyond the statutory period after being told the thief's identity by an informant.
prevent the statute from running. The second circumstance occurs when the possessor’s conduct is based on an innocent mistake. The possessor’s innocence may be established by the possessor’s considerable detrimental reliance based on an honest belief in his or her ownership of the property, which may be proven, for example, by the expenditure of money. While such reliance must presumably be reasonable, a court may use it as a substitute for proof of the underlying claim that the possessor did in fact own the property in dispute.

The possessor’s innocence may also be established by proof of the original owner’s negligence in permitting a situation to persist which confuses either the “bailee” or certainly a potential purchaser from the bailee as to the proper ownership of the property involved. The court infers that in such circumstances the bailee was acting with the rightful owner’s permission, or the rightful owner was acting so negligently in the care of the property that the statute should run from the inception of the “bailment.” A possessor who thinks he or she is acting rightfully, either with the true owner’s permission or with an innocently mistaken understanding of the property’s true ownership, has nothing to hide and therefore, like the bona fide purchaser, uses or holds the property in an “open and notorious” fashion. If the true owner does not rectify the situation or reclaim the property within the statutory period, then the suit will again be barred.


103. Isham v. Cudlip, 33 Ill. App. 2d 254, 257-59, 179 N.E.2d 25, 27-28 (1962) (possessor of house paid taxes and insurance and made improvements thinking house was a gift); Wilcox v. St. Mary’s Univ. of San Antonio, 497 S.W.2d 782, 784 (Tex. Civ. App. 1973) (university spent $40,000 to house and care for documents which it thought was a gift).

104. In both Isham and Wilcox, the possessors thought the property was a gift and that they therefore owned the property outright. The court used the statute of limitations to bar the owner’s attempt to regain the property so that it would not have to reach the underlying issue of whether a gift was, in fact, made.

105. See, e.g., Davidson v. Davidson, 68 Idaho 58, 63, 188 P.2d 329, 332-33 (1947) (plaintiff let defendant keep cattle and even helped defendant brand cattle with his brand, so the statute ran from time of defendant’s possession); Adams v. Coon, 36 Okla. 644, 645-46, 129 P. 851, 852 (1913) (owner permitted her horse to be branded with her father-in-law’s brand and to run with his stock; however, horse was also in possession of bona fide purchasers for longer than statutory period).

106. One such set of cases involves mistaken delivery of property, as in Federal Insurance Co. v. Fries, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (Civ. Ct. 1974). Here, when a bank (itself presumably a bailee but treated for these purposes like the owner) mistakenly delivered some estate jewellery to the defendant, the suit was barred even though the bank sued shortly after discovery of its mistake.

107. Davidson, 68 Idaho at 63-64, 188 P.2d at 332. The court here even explicitly rejected the plaintiff’s attempt to rely on an implied contract of bailment and waiver of the conversion tort. The plaintiff’s negligence in knowingly permitting the defendant to act as the owner allowed the court to avoid the question of who the actual owner was.
The practical result of this approach is that the original possessor who converts another's property will rarely prevail by setting up the statute of limitations as a defense. Such a claimant has probably acted in bad faith and, at the least, with knowledge of the owner's superior claim to the property. This result accords with the hypothesis suggested earlier that the possessor's conduct is the focus of scrutiny and determines whether the owner's knowledge and negligence will be considered. If the possessor acts in bad faith, then the owner's suit is not barred unless the owner has knowledge of the relevant facts. It is, however, difficult to tell in the case of permissive possession whether this result is based on scrutiny of the possessor's conduct or on the owner's justified expectation that the possession would remain permissive until expressly informed otherwise.

One must turn, therefore, to another fact pattern in order to test whether the hypothesis, devised in the context of nonpermissive possessions, is applicable to those possessions which are permissive in origin. Suits in which the owner attempts to recover the property from a good faith possessor, rather than from the original (bad faith) possessor, present the relevant scenario. The sale or other transfer of the property from the original possessor to a third party clearly constitutes a conversion of the property and is an act as hostile to the owner's interest as can be imagined. However, in many such situations the owner may not have knowledge of the transfer.

This scenario presents, once again, the opposition of two innocent parties. The hypothesis is tested by examining whether the owner or the good faith possessor prevails, which depends on whether the possessor's conduct or the owner's knowledge and negligence are the focus of the inquiry. If the transfer is considered to trigger the running of the statute, even in the absence of the owner's knowledge, then it would seem that the good faith of the transferee is the determining factor in the analysis. If, on the other hand, the owner's ignorance of the transfer prevents the running of the statute, it is clear that, at least in the case of originally permissive possessions, it is the knowledge and reasonable expectations of the owner (and thus the owner's conduct or situation) which are the


109. While the latter interpretation is possible, examination of some of the situations in which the possessor's conduct did not constitute a conversion makes one suspect that the possessor who becomes a converter (that is, acts in bad faith) will virtually never prevail. See supra notes 89-93.
focus of attention, and not the good or bad faith of the would-be adverse possessor.

There are relatively few reported cases by which to test this hypothesis. Yet those which address this issue seem to treat all bona fide purchasers in the same manner, whether the purchase was made from one whose possession was originally permissive or from one whose possession was tortious in origin. Thus the statute of limitations runs from the time of the conveyance to the bona fide purchaser, and if the latter possesses the property for the statutory period, the owner's suit is barred. This result makes intuitive sense because the bona fide possessor in both situations, by definition, believes that the transferor's chain of title is good and therefore has no reason to make distinctions in the origin of the transferor's possession. In addition, it is clearly beyond the bona fide purchaser's ability to ascertain such distinctions in the transferor's chain of title.

This result thus accords with the proposition that the purpose of the doctrine of adverse possession of personal property is not only to eliminate stale claims, with their evidentiary difficulties, but, perhaps more significantly, to promote certainty and ease of transfer in commercial contexts.

110. First Nat. Bank of Richmond v. Thompson, 60 Cal. App. 2d 78, 140 P.2d 75 (1943); Harpending v. Meyer, 55 Cal. 555 (1880); Gaillard v. Hudson, 81 Ga. 738, 8 S.E. 534 (1889); Chapin v. Freeland, 142 Mass. 383, 8 N.E. 128 (1886); Rattrie v. Sanders, 6 Md. 279, 2 H. & J. 327 (1806); Merrill v. Bullard, 59 Vt. 389, 8 A. 157 (1887). These cases rely upon the rationale that even a transfer to a good faith purchaser by one who has no right to transfer constitutes a conversion so that the statute of limitations begins to run immediately. See supra notes 40-41 and accompanying text. If, however, the owner sues the original possessor who conveys the property wrongfully, the statute of limitations does not start to run unless the owner has knowledge of the conveyance. See supra notes 26-35. It is thus the good or bad faith of the possessor which seems to determine whether actual notice of the conversion to the owner is required before the statute will run. If the possessor holds the property for less than the statutory period, even if in good faith, then he or she will not prevail. San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 706-07, 239 P. 319, 321 (1925). In Sporn v. MCA Records, 58 N.Y.2d 482, 448 N.E.2d 1324 (1983), the court held that the statute of limitations for conversion of a master recording ran from the time of the wrongful transfer of the recording. From the discussion, it is unclear whether the court relied on the good faith of the transferee or on the failure to act by the plaintiff's predecessor, who was aware the transfer had occurred.

111. A question may be posed whether the possessor merely has to possess in good faith or whether the possessor must attain purchaser status as well. In Taylor v. Wilkins, 22 Ga. App. 723, 97 S.E. 101 (1918), for which there is only a syllabus, the court held that if the transferee receives the property as a gift from the bailee, the transferee cannot establish title by prescription unless the owner had notice of the transfer. The transferee's good or bad faith was not mentioned. If there were a purchase requirement, then the possessor must not only act in good faith but must show reliance on the apparently valid title of the transferor. However, such reliance could presumably be demonstrated in several ways and should perhaps be construed broadly so as not to undermine the operation of the doctrine excessively. See supra notes 103-04.
In attempting to derive a policy-based analysis of the doctrine of adverse possession of personal property, one again may turn for analogy to the realm of real property. The adverse possession doctrine as applied to real property is variously considered to serve one or more of three functions: to reduce the risks of property transfers, to avoid stale claims (the generalized purpose of all statutes of limitations), and to increase the productive use of land, either by rewarding the use and reliance of the possessor and/or "punishing" the negligence of the owner. Recent studies have adopted different methodologies and economic models in order to determine the underlying economic and political policy justifications for the doctrine and to devise a statutory system which best effectuates these policies.

Several of these studies have concentrated on the limitation statutes themselves and have hypothesized a correlation between these purposes, primarily the objective of reducing the risks of property transfers, and the requirements set out by each state for establishing adverse possession. The authors of one such study argue that when the states originally set the lengths of their limitation periods, they took into account a fundamental efficiency trade-off. The first efficiency consideration is reducing uncertainty of title in property transfers. The authors posit that uncertainty results primarily from mistakes in the use and transfer of property and thus do not give much weight to the "deliberate trespasser" situation. Shorter limitation periods facilitate adverse possession and thus reduce uncertainty. While the authors do not state their position as such, a policy favoring reduction of uncertainty, primarily in the marketability and transferability of titles, accords with the utilitarian model, which at times requires that individual rights give way to general societal goals and benefits. Thus while an individual landowner may lose his or her property in a particular instance, this loss is outweighed by the public benefit of reducing transaction costs in establishing and transferring title.

However, the existence of adverse possession statutes permits other


113. Ellickson, who proposes similar analyses from a utilitarian perspective but without using statistical data, does take the costs of the bad faith adverse possessor, which he terms "preying costs," into account. Ellickson, Adverse Possession and Perpetuities Law: Two Dents In The Libertarian Model of Property Rights, 64 WASH. U.L.Q. 723, 728-29 (1986).

inefficiencies to arise. Most notable among these is the monitoring cost which owners incur in order to prevent the loss of their property by adverse possession.\textsuperscript{115} Concern with this cost accords with the libertarian model, which would permit owners to do whatever they wish with their property and would discourage imposing any affirmative obligations on them in order to retain ownership of their property.\textsuperscript{116} A long statutory period reduces owners' monitoring costs by making it easier for them to police their property. This hypothesis necessarily assumes that when real estate is more valuable, the cost to a potential buyer of an error in establishing chain of title is greater. Where property values are high, therefore, the statute of limitations will be less stringent (that is, the time period will be shorter).\textsuperscript{117} The authors concede that property values also could produce the opposite effect because when real estate values are high, owners have more to lose through adverse possession. Nonetheless, the authors prefer the first assumption and argue that monitoring costs are independent of property values because an increase in property values does not increase the probability of a mistake and consequently does not make monitoring more difficult. Therefore the benefits to owners of reducing uncertainty in title transfers by a shorter statutory period outweigh potential losses through adverse possession.\textsuperscript{118}

Thus, the authors suggest the hypothesis that the greater the benefits in a particular state from reducing uncertainty about property ownership, the shorter the statutory period; the greater the costs of monitoring property, the longer the statutory period. The authors test this theory empirically by a regression analysis, using market value of taxable real estate at the time the state entered the Union as a proxy for uncertainty reduction and change in population density as a proxy for monitoring costs.\textsuperscript{119} The authors found a negative correlation between property values in a state and statute length and a positive correlation between changes in population density and statute length.\textsuperscript{120}

In applying this economic model to personal property, several distinctions must be emphasized. First is the difference in statutory length. While time periods for statutes of limitation for real property vary from five to thirty years, many cluster in the ten-to-twenty year range (often with the time period reduced when the possessor claims under color of

\textsuperscript{115} Netter, et al., supra note 112, at 220.
\textsuperscript{116} Ellickson, supra note 113, at 723-25.
\textsuperscript{117} Netter, et al., supra note 112, at 220-22.
\textsuperscript{118} Id. at 222.
\textsuperscript{119} Id. at 221-24.
\textsuperscript{120} Id. at 225.
ADVERSE POSSESSION

Statutes of limitation for personal property vary only from two to six years with a tendency, if any, toward a shorter time period. These shorter periods may reflect a traditional assumption that personal property is generally less valuable than real property.

A second significant difference between real and personal property is the type of costs incurred by the original owner. The owner of real property incurs the cost of policing his or her own property to ensure that no stranger is utilizing it. Recognition of this monitoring cost is reflected in the "open and notorious" requirement, the purpose of which is to give notice to the true owner. As the previous doctrinal analysis demonstrated, with personal property the essential inquiry is not whether the true owner has notice but whether the possessor has acted in good faith. Thus the primary cost incurred by the true owner is a "locating" cost, and it is likely that the effort an owner will expend to locate lost or stolen personal property, as opposed to real property, will correlate positively with the value of the property and the likelihood that it can be found. The shorter statutory period, therefore, may also be a result of the realistic recognition that personal property, if not found within a relatively short period of time, may never be found at all.

Finally, as demonstrated by the study of real property, the shorter statutory period should correlate positively with the goal of reducing uncertainty in transferring property. The emphasis in personal property on the transferee's good faith serves the same purpose. The prevalence of

121. With the exceptions of Rhode Island and Louisiana. See supra note 10.
122. In the last fifty years, five states—Colorado, Massachusetts, New Hampshire, New York and Pennsylvania—have reduced their limitations period. Colorado and New Hampshire shortened their periods from six to three years in 1986. However, not every amendment of a limitation period has resulted in a reduction: Florida and Oregon have lengthened their periods, from three to four and from two to six years, respectively; after reducing its period from six to two years in 1948, Massachusetts raised it to three years in 1973.

It is far from clear what significance the changes in the statutes of individual states may have vis-a-vis an economic model of adverse possession of personal property. Unlike real property actions, personal property actions are typically not governed by a limitations provision which is separate and distinct from that governing other types of actions. See supra note 10. In the absence of an express statement, it is difficult to infer what a legislature may have contemplated in altering a limitation period that may apply equally to contract, negligence and replevin actions.

123. The doctrine, as previously discussed, has very limited application when the defendant (whether the current possessor or not) has acted in bad faith. Thus there is a parallel to the assumption used by the authors of this study that the doctrine and its economic basis derived primarily to conform to situations of innocent mistake. The only time that the original owner can be said to incur a monitoring cost is probably in the case of a bailment of indefinite time. Even here, however, courts are most relaxed in their application of adverse possession to cut off the true owner's rights when the defendant is the original bailee who has acted in bad faith.
short statutory periods for personal property demonstrates that the purpose of these statutes of limitations is to reduce the risks of commercial transactions concerning personal property and to increase certainty in the transfers of such property.

Another line of analysis has recently been generated by Helmholz's article emphasizing the importance of subjective intent. In one of these studies, Epstein has attempted to apply economic theory to various aspects of the temporal dimension of property law. In considering adverse possession, his primary emphasis seems to be the utilitarian goal of reducing transaction costs caused by uncertainties in establishing title. He also stresses that the statutorily determined time period, as both a reflection of and means to accomplish the cost-reducing purposes of the doctrine, should be the initial point of inquiry.

Epstein essentially tries to find a utilitarian solution to the problem of subjective intent posed by Helmholz. Helmholz, who was the first to recognize, at least in modern literature, the importance of subjective intent, suggested that the bad faith possessor is disfavored by the law and often fails to satisfy the judicial requirements for successful adverse possession, even though a good faith requirement is rarely stated as such. The ultimate effect of an initially bad faith possession, however, was left unclear. Epstein proposed to remedy this uncertainty by suggesting a two-tiered statute of limitation which would differentiate between good and bad faith conduct while still reducing transaction costs by providing a definite cutoff time for suits against even bad faith possessors.

Yet another approach has been suggested by Professor Merrill, who made the same distinction between good and bad faith possessor but attempted to accommodate it not by a difference in statutory time period but by the application of a different set of legal rules: a property rule to benefit the good faith possessor but only a liability rule to protect the bad faith possessor. After passage of the statutory period, a good faith adverse possessor will not only be awarded the property with good title but will have the right to evict all others, including the original owner, from

124. Helmholz, Subjective Intent, supra note 7.
125. Epstein, supra note 8.
126. Helmholz, Subjective Intent, supra note 7, at 331-32.
127. Epstein, supra note 8, at 685-89. In accord with his general approach, Epstein advocates a relatively short limitation period of approximately six to ten years which would double for cases of adverse possession in bad faith. He also advocates use of a two-tiered statutory system to resolve other problems in the running of the statutory time period, such as delays caused by disabilities and future interests. Id. at 682-85, 689-91.
128. Merrill, supra note 7, at 1145-50.
the property. According to Merrill's limited indemnification proposal, however, the bad faith possessor who is sued by the original owner after the statutory period has expired will be permitted to retain the property, but he or she must pay compensation to the original owner based on the market value of the land at the time the adverse possession was initiated.

This proposal has been criticized by Epstein for failing to provide a definite cutoff for suits against bad faith possessors. Although in real property there is a considerable advantage in being awarded the property itself, in personal property, the property and damages are often considered interchangeable. Therefore, the practical result of both the limited indemnification proposal and the traditional formulation of personal property adverse possession is that the bad faith possessor remains vulnerable to a suit by the original owner for recovery of either the property or its value. Merrill's proposal, however, would presumably force the original owner into an exchange of the property and would therefore provide a considerably reduced sanction to the bad faith possessor.129 In addition, it is unclear whether a good faith subsequent possessor would be able to obtain clear title to the property in question without having to indemnify the original owner.130

There are thus juxtaposed, in essence, three conflicting considerations which must be satisfied in devising an adverse possession doctrine. These considerations may be termed the libertarian model, the utilitarian model, and the ethical model.131 The libertarian model emphasizes the position of the original owner who should be permitted to do as he or she wishes with his or her own property without risk of losing it or being

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129. The cases involving personal property which may be considered unique, particularly art works, are precisely those which have attempted to make it easier for the original owner to recover his or her property. Furthermore, in the Menzel decision, when the original owner regained possession of a Chagall painting, the good faith possessor was ultimately compensated by an award of damages from the art gallery which sold him the painting. These damages were set at the fully appreciated fair market value of the painting at the time it was returned to the owner. Menzel v. List, 24 N.Y.2d 91, 97-98, 246 N.E.2d 742, 745, 298 N.Y.S.2d 979, 983 (1969).

130. Merrill first states that the original owner's suit for indemnification would not run against good faith transferees for value. Subsequently, however, he implies that if the original bad faith adverse possessor refuses to pay the original owner, then this would interfere with third party reliance. Merrill, supra note 7, at 1148-49. The extent of protection afforded the good faith transferee is therefore somewhat unclear.

131. Radin, supra note 114, at 748-50 & n.26, suggests yet another model based on personality theory, which she also terms a "moral judgment." While in some senses her discussion of personhood parallels the consideration of good faith, it is still not an explicit moral or ethical standard. Furthermore, one might suggest that personality theory is less applicable to personal than to real property because personal property does not usually have the unique characteristics often attributed to real property, although clearly there are exceptions for items with intrinsic "sentimental" value. See also Radin, Property and Personhood, 34 Stan. L. Rev. 957, 959-61 (1982).
forced into an involuntary exchange, even for compensation. The utilitarian model looks to the general societal benefits derived from such economic efficiencies as ease of clearing and transferring title to both real and personal property and certainty of reliance on indicia of apparent ownership, even if these benefits sometimes come at the expense of individual rights and liberties. Finally, the ethical model concentrates on the blameworthy conduct of either party and, in particular, on the conduct of the adverse possessor, who would be severely penalized if possessing in bad faith. Much of the recent literature discussing applications of these three models relates to adverse possession of real property, and it is still unclear which of these models will prevail. In analyzing the doctrine of adverse possession as applied to personal property, however, it appears that common law jurisprudence has in fact evolved as an amalgam of all three models or considerations.

In the traditional formulation of the doctrine, the libertarian model is the least emphasized consideration. The original owner is at risk of losing his or her property both when negligent in caring for it and when pursuing the property diligently. The owner is not even generally accorded a guarantee of notice before suffering loss of the property. The more recent judicial formulations of a discovery rule in O'Keeffe, the "demand and refusal" rule in Menzel, and even some of the criticisms of tacking all attempt to shift more of the focus to the conduct of the original owner in order to reduce the risks of loss to the owner. While presumably none of these modifications goes far enough in protecting the owner's interest to accord fully with a libertarian model, they seem to be motivated by sympathy for the hapless owner and clearly inject a libertarian concern into the operation of the doctrine. Nonetheless, by the weight of prevailing judicial and statutory formulations, the libertarian model is the least emphasized of the three considerations, probably because the societal costs of sympathy for the owner would simply be too great.

The utilitarian model, on the other hand, emphasizes the benefits to society of clearing titles and encouraging certainty in commercial transactions. In some sense, this is even more important for personal than for real property because there is no universal system of recording or registering titles to personal property, and so the transferee in a conveyance is largely defenseless. Perhaps as a reflection of this concern, the traditional

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132. However, as Radin points out, supra note 114, at 750, libertarianism, when seen from the perspective of the squatter, especially the good faith squatter, would provide some justification for adverse possession doctrine.
formulation of the adverse possession doctrine goes far in effectuating the utilitarian model by focusing exclusively on the conduct of the adverse possessor. At least in situations of good faith, there is a definite point for "accrual" of the cause of action and thus a definite cutoff of the original owner's rights after a relatively short period of time. There is no need to inquire into the original owner's conduct, and in fact, after the initial determination of the possessor's good faith, there is also no need to scrutinize the possessor's conduct or the nature of the use of the property. Here adverse possession does not concern itself with the rubrics of continuous, hostile, visible, exclusive, or even "open and notorious," except as used to define good faith. The traditional formulation of the doctrine thus goes far to effectuate utilitarian concerns and the correlative benefits to society.

However, the utilitarian model does not provide the entire explanation of the traditional formulation because if it were the sole explanation, all adverse possessors, regardless of their good or bad faith, would be treated in the same way. Instead, the ethical model here introduces a third consideration of subjective intent. Professor Epstein's suggestion of a two-tiered statute of limitations exemplifies a more utilitarian approach because, although the bad faith possessor is at a disadvantage in having to wait a longer time period, he or she is ultimately protected by the statute of limitations, as is the good faith possessor. The traditional formulation of personal property adverse possession doctrine grants greater consideration to the ethical model and thus may be seen as undermining the utilitarian advantages of the doctrine. When the adverse possessor acts in bad faith, his or her ability to claim the property is not cut off; instead, it is balanced by granting the owner the opportunity to obtain knowledge of the property's location.

In several ways, however, the injection of these ethical considerations does not, in fact, undermine the utilitarian goals of the doctrine and may even advance them. First, preventing a bad faith possessor from acquiring title does not frustrate commercial certainty. The bad faith possessor knows that he or she took the property in bad faith and therefore cannot be said to have relied on his or her right to retain the property. Because an innocently mistaken possessor is treated like the good faith possessor, only the intentional wrongdoer is subject to this more stringent treatment. Second, discouraging criminal conduct not only has an

133. The only situation in which commercial certainty is reduced because of this formulation is that in which a good faith possessor, who has purchased the property in reliance on the predecessor's good title, is sued within the statutory time period. This good faith transferee is unknowingly ex-
ethical value in itself but also reduces risks inherent in commercial activity and eliminates other types of costs to society in general. To the extent that would-be criminals are aware of such doctrines and their activities deterred, a general societal benefit results.

Finally, there is another cost which has not been specifically considered—that of litigating the relative rights of the original owner and the adverse possessor. Although the possibility of increased litigation and uncertainty is, as even Helmholtz admits, the primary criticism of making distinctions between good and bad faith, such determinations, particularly in the area of personal property, are not difficult to make and, in fact, pervade the law of commercial transactions. The determination of whether the original owner had notice (actual or constructive) or whether the adverse possessor's use of the property constituted notice to the owner and the community at large is much more difficult and, in the area of real property, has itself been the subject of many judicial opinions. The realm of personal property, however, has been spared such inquiries and has developed into a much clearer and more certain body of jurisprudence as a result.

Many of the recent economic analyses of adverse possession of real property, with the notable exception of Helmholtz's work, have concentrated on the statutory language divorced from judicial opinions. Yet without a recognition of the disputation concerning the formulaic rubric, one cannot appreciate the costs to society of litigating the meaning of such terms, most of which are ultimately incapable of definition. Such judicial confusion not only results in increased litigation costs but also in increased uncertainty as to precisely what conduct is needed to establish adverse possession.

A good faith/bad faith standard is, in comparison, easy to determine and provides a guideline to which individuals may easily conform their conduct. The determination of good faith acts as a substitute for notice because when the adverse possessor acts in bad faith, the original owner retains the right to notice. The substitution of a good faith/bad faith standard for notice and other types of qualifying conduct thus simplifies

posed to suit for the statutory period because of the predecessor's bad faith. Of course, any differentiation in the operation of the statute of limitation for good and bad faith possessors, even Epstein's two-tiered statute, increases the risk for the transferee who unwittingly purchases property from a bad faith adverse possessor. In addition, any weakness is largely compensated for, at least in the context of personal property, by the relatively short statutory period which applies to personal property. That this situation does not arise often may be inferred from the dearth of cases which present such a fact pattern.

134. Helmholtz, Subjective Intent, supra note 7, at 357.
the process of adverse possession, establishes clearer guidelines for behavior, decreases litigation and perhaps even investigative costs, and increases the utilitarian benefits of the adverse possession doctrine to society. Thus, limiting the bad faith possessor’s ability to obtain property does not in fact defeat the purpose of reducing transaction costs. It does allow the law to operate on an ethical level and discourages criminal conduct. Because the transfer to a good faith possessor cures any original bad faith, inquiry regarding intent will generally be limited to the current possessor unless tacking is involved, and this possibility is minimized by the relatively short statutory time periods for recovery of personal property.

Therefore the purposes which the doctrine is intended to accomplish—rewarding good faith and encouraging commercial certainty—are not in conflict with each other. Rather, this formulation of the adverse possession doctrine, as applied to personal property, demonstrates that both purposes can and perhaps must be accomplished at the same time. The requirement of good faith actually advances the goals of commercial certainty and economic efficiency. Furthermore, this formulation illustrates a resolution of the conflicting models and creates a more certain operating mechanism for the doctrine which may be advantageously applied as well to the adverse possession of real property.