"GEORGIA ON MY MIND"* — REFLECTIONS ON *O'KEEFFE v. SNYDER*

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I. INTRODUCTION

The recent centennial anniversary of the birth of celebrated American artist Georgia O'Keeffe[1] offers occasion to reflect upon the New Jersey Supreme Court's seminal pronouncement in the heralded case of *O'Keeffe v. Snyder*.[2] There, the court overruled those New Jersey cases[3] which had found the doctrine of adverse possession applicable to actions involving personalty. Instead, embracing the equitable principles that sustain the "discovery rule,"[4] the court ruled that a cause of action for replevin of a lost or stolen chattel[5] does not accrue "until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action."[6]

While *O'Keeffe* has not precipitated a readily discernible shift in other courts' treatment of conflicting ownership claims to personal property,[7] in New Jersey the ruling has served as important

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* Music by Hoagy Carmichael, lyrics by Stuart Gorrell, Peer International Corp. (1930).

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1 Born November 15, 1887, Georgia O'Keeffe is considered one of the most outstanding American artists of the twentieth century. *See generally* N. CALLAWAY, GEORGIA O'KEEFFE: ONE HUNDRED FLOWERS (1987); J. COWART & J. HAMILTON, GEORGIA O'KEEFFE, ART AND LETTERS (1987); K. HOFFMAN, AN ENDURING SPIRIT: THE ART OF GEORGIA O'KEEFFE (1984). Perhaps best known for her magnificent, oversized flower paintings, O'Keeffe captured the land and its riches with lavish textures and colors. *See id.* Georgia O'Keeffe died in 1986. In 1987, one of her flower paintings (*Black Hollyhock with Blue Larkspur*, ca., 1930) was sold at Sotheby's in New York for a record $1.9 million. N.Y. Times, Dec. 4, 1987, at 29, col. 3.

2 83 N.J. 478, 416 A.2d 862 (1980).

3 Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq. 464, 28 A.2d 189 (N.J. 1942); Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959).

4 *See infra* notes 58-72, 107-09 and accompanying text.

5 The term "chattel" refers to "[a]n article of personal property, as opposed to real property." BLACK'S LAW DICTIONARY 215 (5th ed. 1979). The term originated from the Norman French. *See* United States v. Sischo, 262 F. Supp. 1001, 1005 (W.D. Wash. 1919).

6 *O'Keeffe*, 83 N.J. at 491, 416 A.2d at 869.

7 *See infra* notes 111-16 and accompanying text.

authority for the continued equitable and expansive application of the discovery rule.[8] Moreover, the decision's departure from the uneasy confines of adverse possession doctrine,[9] together with its creative holding,[10] provides an interesting yet discrete illustration of the New Jersey Supreme Court's well-established willingness to introduce change by abandoning doctrines that in the court's view no longer "represent[] current notions of rightness and fairness."[11]

II. THEORETICAL ANTECEDENTS

A. Adverse Possession

The doctrine of adverse possession, "a composite of statutory and [decisional] law,"[12] serves as a means of transferring title to property without the consent of the owner. Rooted in policy imperatives that there be "a restricted duration for the assertion of 'aging claims,' and that the elapse of a reasonable time should assure security to a person claiming to be [an] owner,"[13] the acquisition of title is based on the expiration of the given jurisdiction's applicable statute of limitations.[14] These statutes are complemented by a large body of case law "as to the kind of possession by another, which is sufficient to cause the statutory period to begin to run, and to continue running, against the [true] owner."[15] Essentially, the courts have required that the possession be "(1) actual, (2) open and notorious, (3) exclusive, (4) continuous, and (5) hostile under a claim of right."[16]

Thus, the acquisition of title to property by adverse posses-

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8 *See infra* notes 131-35 and accompanying text.

9 *See infra* notes 100, 104-06 and accompanying text.

10 *See infra* notes 101-02, 107-09, 122-30 and accompanying text.

11 Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 39, 141 A.2d 276, 282 (1958). *See infra* notes 136-64 and accompanying text.

12 R. POWELL, POWELL ON REAL PROPERTY § 1012, at 1087 (R. Powell & P. Rohan abr. ed. 1968).

13 *Id. See also* Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918) (doctrine's "great purpose is automatically to quiet all titles which are openly and consistently asserted . . . .").

14 Ballantine, *supra* note 13, at 135; R. BROWN, THE LAW OF PERSONAL PROPERTY § 4.1, at 33 (3d ed. 1975).

15 R. POWELL, *supra* note 12, § 1012, at 1087.

16 Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U.L. REV. 1122, 1123 (1984-85) (footnote omitted). *See* 3 AMERICAN LAW OF PROPERTY §§ 15.1 - 15.16 (Casner ed. 1952); C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 157-58 (1971); *see also* Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L.J. 219 (1918); Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983); Walsh, *Title by Adverse Possession*, 17 N.Y.U. L.Q. REV. 44 (1939).

sion is linked inextricably to the expiration of a statute of limitations.[17] Typically, the given limitations period does not begin to run until all of the aforementioned elements of adverse possession are present.[18] Consequently, "the expiration of the statutory period has the effect, not only of barring the legal remedy, but also of extinguishing the owner's title and of transferring it to the adverse possessor or possessors."[19]

Traditionally, the doctrine of adverse possession has been applied to claims involving the acquisition of title to land.[20] However, it is well-settled that "[t]itle to chattels also may be acquired by adverse possession."[21] As with real property, the possession must be "hostile, actual, visible, notorious, exclusive, continuous, and under claim of ownership" for the applicable limitations period.[22] The time limits for "[a]ctions for the recovery of personal property are shorter than those relating to land . . . [and] typically must be commenced between two and six years after the cause of action accrued . . . ."[23]

Although well-established as a matter of doctrine,[24] rela-

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17 R. BROWN, *supra* note 14, § 4.1, at 33; *see* Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 318-19 (1889-90); Walsh, *Title by Adverse Possession*, 17 N.Y.U. L.Q. 44, 82 (1939-40).

18 R. BROWN, *supra* note 14, § 4.1, at 33; *see, e.g.*, Content v. Dalton, 122 N.J. Eq. 425, 194 A. 286 (N.J. 1937).

19 R. BROWN, *supra* note 14, § 4.1, at 33 (footnote omitted). *See generally* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897); Walsh, *supra* note 16, at 82; *Symposium, Time, Property Rights, and the Common Law*, 64 WASH. U.L.Q. 661 (1986); Comment, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950).

20 R. POWELL, *supra* note 12, §§ 1012-1027; C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 157-58 (1971). Indeed, the New Jersey courts have a long history of invoking "[t]he principles on which the doctrine of title by adverse possession rests" to actions concerning land. Foulke v. Bond, 41 N.J.L. 527, 545 (N.J. 1879); *see* Braue v. Fleck, 23 N.J. 1, 16, 127 A.2d 1, 9 (1956) (and cases cited therein); Gordon v. Lumberville Delaware Bridge Co., 108 N.J.L. 261, 158 A. 388 (N.J. 1932). In New Jersey, the applicable statute of limitations governing the acquisition of title to real property by adverse possession is 30 years. N.J. STAT. ANN. § 2A:14-30 (West 1987). *See* Rullis v. Jacobi, 79 N.J. Super. 525, 192 A.2d 186 (Ch. Div. 1963).

21 J. BRUCE, J. ELY & C. BOSTICK, MODERN PROPERTY LAW 669 (1984). *See* 3 AM. JUR. 2d *Adverse Possession* § 202 (1986); 51 AM. JUR. 2d *Limitations of Actions* § 90 (1986); 3 AMERICAN LAW OF PROPERTY § 15.16, at 834 (1952); R. BROWN, *supra* note 14, at §§ 4.1 - 4.2; Ames, *supra* note 17, at 321-22; Bordwell, *Property in Chattels*, 29 HARV. L. REV. 374, 378 (1915-16); and *infra* notes 41-42 and accompanying text.

22 Isham v. Cudlip, 33 Ill. App. 2d 254, 268, 179 N.E.2d 25, 32 (1962). *See also infra* note 42 (listing cases embracing adverse possession theory).

23 J. BRUCE, J. ELY & C. BOSTICK, *supra* note 21, at 669. *See, e.g.*, Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910) (applying six-year statutory period).

24 *See supra* note 21 and *infra* note 41.

tively few cases have had occasion to apply adverse possession to suits involving chattels.[25] Significantly, in what has been characterized as "one of the leading cases" to explain and apply adverse possession to personal property,[26] the New Jersey Court of Errors and Appeals[27] seized the opportunity to issue a definitive pronouncement on the matter. The case, *Redmond v. New Jersey Historical Society*,[28] concerned entitlement to a portrait of Captain James Lawrence, painted by American artist Gilbert Stuart.[29] Captain Lawrence's granddaughter bequeathed the painting to her son, and stipulated that, if he should die without descendants, it should go to the New Jersey Historical Society.[30] She died in 1887, leaving her son, who was then fourteen years old. In 1888, one of her executors delivered the painting to the Historical Society, where it remained for more than fifty years, until 1938, when the son died and his devisees demanded its return.[31] When the Historical Society refused, the legatees filed a replevin action.[32] The Historical Society countered that the statute of limitations had run and that it was now vested with title to the work by adverse possession.[33]

Called upon to consider whether the doctrine of adverse possession applied to chattels (an "interesting question" of first impression in New Jersey[34]), the Court of Errors and Appeals noted:

> By the great weight of authorities elsewhere, it is settled that "the law relating to adverse possession of chattels, while differing in some respects from that which relates to adverse possession of lands, bears a close analogy thereto. Under the

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25 *See* J. CRIBBET & C. JOHNSON, PROPERTY 151 (5th ed. 1984); *see also infra* notes 42, 114-16 and accompanying text.

26 Comment, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1142 n.79 (1980).

27 The Court of Errors and Appeals served as New Jersey's high court until 1947, when the state ratified its current constitution. G. TARR & M. PORTER, STATE SUPREME COURTS IN STATE AND NATION 188-89 (1988).

28 132 N.J. Eq. 464, 28 A.2d 189 (N.J. 1942).

29 *Id.* at 466, 28 A.2d at 191. Captain James Lawrence, born in New Jersey, "was a distinguished American naval officer in the War of 1812 and the author of the famous command 'Don't give up the ship.' " *Id.* at 466-67, 28 A.2d at 191.

30 *Id.* at 467, 28 A.2d at 191.

31 *Id.* at 467-68, 28 A.2d at 191.

32 *Id.* at 468, 28 A.2d at 191.

33 *See id.* at 468, 28 A.2d at 191-92. New Jersey's applicable statute of limitations provides that an action for replevin or conversion of personal property must be commenced within six years of accrual of the cause of action. N.J. STAT. ANN. § 2A:14-1 (West 1987).

34 *Redmond*, 132 N.J. Eq. at 473, 28 A.2d at 194.

> statutes governing the subject[,] title to chattels may be lost or acquired by adverse possession."[35]

The court embraced "this like application of principle," satisfied that to do so would be "sound and just."[36] Thus, applying the traditional prerequisites to establishing title to real property by adverse possession, the court ruled that the statute of limitations would not begin to run against the true owner of personal property until possession became " 'hostile as well as actual, visible, exclusive and continuous.' "[37] Since, at least until 1938, the Historical Society's possession of the painting was permissive (the equivalent of a " 'voluntary bailment or gratuitous loan' "[38]), it failed to satisfy this first requirement of adversity.[39] Accordingly, the statute of limitations had not expired, and the court ordered the painting returned to the plaintiffs.[40]

The *Redmond* court was accurate in its determination that the weight of available authority countenances application of adverse possession theory to actions involving personal property.[41] In the

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35 *Id.* (citations omitted).

36 *Id.*

37 *Id.* at 474, 28 A.2d at 194 (citations omitted).

38 *Id.* at 474-75, 28 A.2d at 194-95 (citation omitted in original). The court rejected the Historical Society's contrary contention that its possession of the portrait was sufficiently hostile and adverse to cause the statutory period to run. *Id.*

39 *Id.* The court explained:

> Among the several public announcements made as to its acquisition of the portrait, the Society announced that it had become the "possessor" of the portrait, that the portrait was "bequeathed" to it. . . . Obviously, either the Society knew, or, under the circumstances, it was charged with the knowledge . . . that the only claim it had to the portrait was a contingent claim. . . . [T]he portrait was voluntarily delivered to and accepted by the Society. . . . Clearly, the possession of the Society did not begin nor did it continue to be (prior to 1938) in "hostility."

Id. at 475, 28 A.2d at 195.

40 *See id.* at 475-76, 28 A.2d at 195.

41 *Id.* at 473, 28 A.2d at 194. *See generally* Comment, *supra* note 26, at 1141 ("weight of authority today sanctions [adverse possession] in suits involving personal property"); 51 AM. JUR. 2d *Limitations of Actions* § 90 ("it seems to be the generally accepted doctrine that by adverse possession, title to chattels may be acquired which will be paramount to that of the true owner").

On the divergent "demand and refusal" approach (wherein an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return), see DeWeerth v. Baldinger, 836 F.2d 103, 104 (2d Cir. 1987) (holding, in context of suit for return of Monet painting, that owner's obligation to make demand without unreasonable delay includes obligation to use due diligence to locate stolen property); Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1160-64 (2d Cir. 1982) (applying traditional New York "demand and refusal" law to claim involving title to two Albrecht Durer paintings); Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), *aff'd as modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967), *rev'd*, 24 N.Y.2d 91, 246

years preceding and following its ruling, those courts confronted with the issue clothed suits concerning title to chattels in the garb of adverse possession theory.[42] The fit was by no means perfect, however, as demonstrated by the second New Jersey case to apply adverse possession to chattels, *Joseph v. Lesnevich*.[43]

In *Lesnevich*, several negotiable bearer bonds were stolen from the plaintiff, who immediately notified the police of the theft.[44] Months later, in October, 1951, Lesnevich received an envelope containing the bonds.[45] Later that month, he and his business partner pledged them to a credit company to secure a loan.[46] At the debtors' request, the bonds were sold on August 1, 1952 to the president of the credit company, who in turn sold them to his son.[47] On July 31, 1958, within one day of six years from the date of the president's purchase, the true owner brought suit for conversion.[48] The appellate division found that the action was time-barred, insofar as the "plaintiff's cause of action accrued as against the credit company [in 1951] when it became pledgee of the bonds . . . ."[49]

Adhering to the literal letter of the law of adverse possession, the court deemed the pledge of the bonds to the credit company to be open possession.[50] The plaintiff's efforts to locate the property

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N.E.2d 742, 298 N.Y.S.2d 979 (1969) (reinstating trial court award of damages in suit to recover Chagall painting seized by Nazis in 1941 and rediscovered in 1962). *See infra* notes 107, 111.

[42] *See, e.g.*, Rabinof v. United States, 329 F. Supp. 830, 843 (S.D.N.Y. 1971); Rowe v. Bonneau-Jeter Hardware Co., 245 Ala. 326, 16 So. 2d 689 (1943); Henderson v. First Nat'l Bank of Dewitt, 254 Ark. 427, 494 S.W.2d 452 (1973); San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 239 P. 319 (1925); O'Connell v. Chicago Park District, 376 Ill. 550, 34 N.E.2d 836 (1941); Isham v. Cudlip, 33 Ill. App. 2d 254, 179 N.E.2d 25 (1962); Morey v. Haggerty, 122 Me. 212, 119 A. 527 (1923); Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910); Adams v. Coon, 36 Okla. 644, 129 P. 851 (1913); Riesinger's Jewelers, Inc. v. Roberson, 582 P.2d 409 (Okla. Ct. App. 1978); Priester v. Milleman, 161 Pa. Super. 507, 55 A.2d 540 (Pa. Super. Ct. 1947); *cf.* Gee v. CBS, Inc., 471 F. Supp. 600, 656 (E.D. Pa. 1979), *aff'd*, 612 F.2d 572 (3d Cir. 1979) (title to intangible property (Bessie Smith recording) can be acquired by adverse possession).

[43] 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959).

[44] *Id.* at 343-44, 153 A.2d at 351. Three local newspapers also reported the incident. *Id.* at 344, 153 A.2d at 351.

[45] *Id.* at 344, 153 A.2d at 351-52. Lesnevich maintained that he had received the bonds from an anonymous benefactor. *Id.*

[46] *Id.* at 345, 153 A.2d at 352.

[47] *Id.*

[48] *Id.* at 353, 153 A.2d at 356. *See supra* note 33 (explaining New Jersey six-year limitations period applicable to actions for conversion).

[49] *Id.* at 355, 153 A.2d at 357.

[50] *Id.* at 356, 153 A.2d at 358. The law of negotiable instruments was of no consequence to the decision, insofar as the court deemed it unlikely that the credit company and its president would be considered holders in due course. *Id.* at 352,

were irrelevant, as was the fact that the plaintiff had not actually discovered the bonds' whereabouts until two years after they had been pledged. As the court proclaimed, "[i]t is settled that ignorance of the facts giving rise to the cause of action does not prevent the statute of limitations from running."[51] The credit company and its president had held the bonds "as openly and notoriously as the nature of the property would permit."[52] Accordingly, the defendants could not "be deprived of the benefit of the statute of limitations."[53]

Lesnevich demonstrates the difficulties inherent in applying the "open and notorious" requirement to personalty. Developed in and well-suited to the real property setting, this element of adverse possession doctrine serves to place the landowner on notice of the possessor's claim, so as "to enable [the owner] to take preventive action."[54] Typically, the requirement is satisfied if the possessor uses the land as the average owner would use it.[55] The problem that arises with respect to chattels, however, is that ordinary use of an item is not likely to place the true owner on notice, particularly when the property is moved to some other location.[56] Still, it would be another twenty years before the New Jersey courts would have occasion to reconsider the issue, in *O'Keeffe v. Snyder*.[57] In the interim, the New Jersey judiciary was fashioning the "discovery rule," an equitable doctrine that would come to provide an alternative to the uneasy confines of adverse possession analysis.

B. The Discovery Rule

To mitigate the harsh results that strict and mechanical adherence to a given statute of limitations might otherwise produce, courts have ruled that in appropriate cases a cause of action will not accrue until the injured party discovers or reasonably should have discovered facts which form the basis of the cause of action.[58] This concept, known as the "discovery rule," was first

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153 A.2d at 354. In any event, the court declared, since the applicable statute of limitations had expired, the grant of summary judgment was proper. *See id.* at 357, 153 A.2d at 358.

51 *Id.* at 355, 153 A.2d at 357 (citations omitted).

52 *Id.*

53 *Id.* at 356, 153 A.2d at 358.

54 R. POWELL, *supra* note 12, § 1013, at 1089.

55 *Id.* at § 1018.

56 *See* Comment, *supra* note 26, at 1144.

57 83 N.J. 478, 416 A.2d 862 (1980).

58 *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 165-66 (5th ed. 1984). As summarized by Justice Handler:

recognized by the New Jersey Supreme Court in 1961, in the context of a medical malpractice suit.[59] Subsequent New Jersey decisions acknowledged the pertinence of the doctrine in a host of diverse contexts,[60] deeming the rule relevant "whenever equity and justice have seemed to call for its application."[61]

Thus, "in each case the equitable claims of opposing parties must be identified, evaluated and weighed"[62] to ascertain whether the cause of action may be brought even after the limitations period, as measured from the date of the alleged wrongful conduct, has expired.[63] The legitimate aims of repose, including the defendant's interest in being free from the specter as well as

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> [W]hen a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or facts suggesting the fault of another person.

Tevis v. Tevis, 79 N.J. 422, 432, 400 A.2d 1189, 1195 (1979).

[59] Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961). In *Fernandi*, a wing nut was left in a patient's abdomen following surgery, and was not detected for three years. *Id.* at 435-36, 173 A.2d at 278. While the court confined application of the discovery rule to such foreign body medical malpractice actions, subsequent decisions soon extended the concept to other areas of medical malpractice. *See, e.g.*, Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973) (alleged negligent radiation therapy); Yerzy v. Levine, 108 N.J. Super. 222, 260 A.2d 533 (App. Div. 1970) (negligent severance by surgeon of bile duct), *aff'd per curiam as modified*, 57 N.J. 234, 271 A.2d 425 (1970).

[60] *See, e.g.*, Burd v. New Jersey Tel. Co., 76 N.J. 284, 386 A.2d 1310 (1978) (products liability); Rosenberg v. Town of N. Bergen, 61 N.J. 190, 293 A.2d 662 (1972) (personal injury and property damage actions against designer of real property improvements); Diamond v. New Jersey Bell Tel. Co., 51 N.J. 594, 242 A.2d 622 (1968) (action against utility for negligent installation of conduit); New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1968) (action against land surveyor for negligent miscalculation of acreage); Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968) (action based on water meter defect); Federal Ins. Co. v. Hausler, 108 N.J. Super. 421, 261 A.2d 671 (App. Div. 1970) (action based on stockbroker's error in wrongful detention of securities); Brown v. College of Medicine & Dentistry, 167 N.J. Super. 532, 401 A.2d 288 (Law Div. 1979) (action based on union's breach of duty to represent fairly plaintiff bargaining unit); Gibbins v. Kosuga, 121 N.J. Super. 252, 296 A.2d 557 (Law Div. 1972) (breach of contract action against vendor of real property based on misrepresentation of well location).

[61] *Lopez*, 62 N.J. at 273, 300 A.2d at 566. *See supra* note 60.

[62] *Id.* at 274, 300 A.2d at 567.

[63] *See* Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115, 299 A.2d 394, 396 (1973). The New Jersey Supreme Court explained:

> Where . . . the plaintiff does not know or have reason to know that he has a cause of action against an identifiable defendant until after the normal period of limitations has expired, the considerations of individual justice and the considerations of repose are in conflict and other factors may fairly be brought into play.

Id.

the often painful reality of aged claims (where "memories have faded, witnesses have died and evidence has been lost"[64]) must be balanced against the hardship to the plaintiff in having his or her claim barred although "the fact of the wrong lay hidden until after the prescribed time had passed."[65] When the court finds that the balance is struck in favor of the plaintiff,[66] literal application of the statute of limitations will yield, thereby permitting assertion of the cause of action.[67]

The years preceding *O'Keeffe* found the New Jersey courts expansively fashioning the contours of the discovery rule, extending that doctrine's equitable reach whenever rigid adherence to the rule of law would result in manifest injustice.[68] Peculiar factual conditions in diverse categories of actions, from personal injury and property damage suits[69] to professional malpractice claims,[70] permitted a finding that the plaintiff could not reasonably have known on the date the harm was inflicted that he or she had sustained an injury, or that the injury was attributable to the fault of another.[71] These cases shared as their common ground circumstances strongly favoring the grant to the plaintiff of equitable relief. This landscape perhaps portended subsequent application of the discovery rule to an action for replevin of a painting, where the plaintiff presumably could not have known, through the exercise of due diligence, of the facts which formed the basis of the claim until years after the actual loss.[72]

III. *O'KEEFFE V. SNYDER*

A. Salient Facts

In March of 1946, Georgia O'Keeffe allegedly was the victim of art theft, when three of her small oil paintings, entitled *Cliffs*, *Seaweed*, and *Fragments*, were stolen from a New York art gallery.[73] The purported crime was never reported to the authorities nor to

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64 *Lopez*, 62 N.J. at 274, 300 A.2d at 567.

65 *Id.*

66 The decision whether to permit application of the discovery rule "should be made by a judge and by a judge conscious of the equitable nature of the issue before him." *Id.* at 275, 300 A.2d at 567 (footnote omitted).

67 *See id.* at 275-76, 300 A.2d at 567-68.

68 *See supra* notes 59-61 and accompanying text.

69 *See* Rosenberg v. Town of N. Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

70 *See* New Market Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1968).

71 *See supra* notes 59-61 and accompanying text.

72 O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980).

73 *Id.* at 484, 416 A.2d at 865.

an insurance company, as the paintings were uninsured.[74] It was not until 1972 that O'Keeffe reported the theft to the Art Dealers Association of America, Inc., which maintains a registry of stolen art work.[75]

The whereabouts of the paintings remained unknown to O'Keeffe until September of 1975, when she discovered that they were in a New York art gallery.[76] In February, 1976, she demanded their return from their present owner, Barry Snyder, who less than one year earlier had purchased the paintings from Ulrich Frank.[77] Frank formally acquired the paintings from his father in 1965, but claimed continuous possession for a period in excess of thirty years insofar as his father allegedly was in possession of the art work as early as 1941.[78] Until the sale in 1975, the paintings were kept in the Frank family's private residences.[79]

When Snyder refused to return the paintings, O'Keeffe brought an action in replevin.[80] Snyder motioned for summary judgment, on the ground that the suit was barred by the expiration of the applicable limitations period,[81] which requires that an action for replevin be commenced within six years of accrual of the cause of action.[82] Moreover, Snyder maintained that title had vested in Frank by adverse possession.[83] On her cross motion for summary judgment, O'Keeffe asserted that because the paintings were stolen, the statute of limitations had not run and title to them had not passed.[84]

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74 *Id.* at 485, 416 A.2d at 865. However, O'Keeffe did mention the loss to associates in the art community, and discussed the matter with an administrator of the Art Institute of Chicago. *Id.* at 484, 416 A.2d at 868.

75 *Id.* at 485-86, 416 A.2d at 866.

76 *Id.* at 486, 416 A.2d at 866.

77 *Id.* at 483, 486, 416 A.2d at 865-66. The appellate division opinion indicates that Snyder paid $35,000 for the three paintings. O'Keeffe v. Snyder, 170 N.J. Super. 75, 80, 405 A.2d 840, 842 (App. Div. 1979), *rev'd and remanded*, 83 N.J. 478, 416 A.2d 862 (1980).

78 *O'Keeffe*, 83 N.J. at 486, 416 A.2d at 866. Thus, Frank's factual contentions were inconsistent with O'Keeffe's allegation that the theft occurred in 1946. *See id.*

79 *Id.* In 1968, the paintings *Cliffs* and *Fragments* were exhibited anonymously in a one day art show in Trenton, New Jersey. *Id.*

80 *Id.*

81 *Id.* at 486, 416 A.2d at 866.

82 *Id.* at 483, 416 A.2d at 865. *See supra* note 33.

83 *O'Keeffe*, 83 N.J. at 486, 489, 416 A.2d at 866, 868.

84 *Id.* at 486-87, 416 A.2d at 866. For the purposes of these cross-motions, defendant Snyder conceded that the paintings had been stolen. *Id.* at 486, 416 A.2d at 866.

B. The Lower Courts' Rulings

The trial court concluded that the paintings had not been held "visibly, openly and notoriously,"[85] thereby precluding title from vesting by adverse possession. Nonetheless, the court granted Snyder's motion for summary judgment, on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft.[86] The appellate division, bound by *Redmond*[87] and at least constrained by *Lesnevich*,[88] reversed the decision of the trial court on the theory that the defenses of adverse possession and expiration of the statute of limitations were identical.[89] The court explained:

> [A]ctions for the recovery of property, real or personal, of the character required by the law of adverse possession, has [sic] persisted throughout the statutory period of limitations. With respect to real property, that period is 20 or 30 years. With respect to personal property, that period is six years. In both cases, however, the property must be possessed for the required period in the required manner. If one of the essential ingredients to adverse possession is missing, the claim for the property is simply not barred.[90]

Accordingly, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.[91]

Significantly, the majority and dissenting appellate division opinions, albeit for different reasons, perceived difficulties in linking the statute of limitations to adverse possession doctrine. The majority noted, "[w]e fully recognize that by adoption of this view, applying all of the requirements for the adverse possession of land to chattels, we are in many, if not in most, cases foreclosing any real opportunity to acquire adverse title to stolen personalty."[92] The dissent strenuously objected to the majority's "superimposition of the doctrine of adverse possession upon the statute [of limita-

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[85] *Id.* at 496, 416 A.2d at 871. The unpublished opinion of the trial court is contained in Amram, *The Georgia O'Keeffe Case: New Questions About Stolen Art*, MUSEUM NEWS, Jan.-Feb. 1979, at 49-51, 71-72. The decision is discussed in Feldman, *Stolen Art Ruling*, 4 ART & L. 93 (1979).

[86] *O'Keeffe*, 83 N.J. at 488-89, 416 A.2d at 867-68.

[87] Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq. 464, 28 A.2d 189 (N.J. 1942). As noted, until 1947, the Court of Errors and Appeals served as New Jersey's high court. *See supra* note 27.

[88] Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959).

[89] O'Keeffe v. Snyder, 170 N.J. Super. 75, 86, 90, 405 A.2d 840, 845, 847 (App. Div. 1979), *rev'd and remanded*, 83 N.J. 478, 416 A.2d 862 (1980).

[90] *O'Keeffe*, 170 N.J. Super. at 89, 405 A.2d at 847.

[91] *Id.* at 92, 405 A.2d at 848.

[92] *Id.* at 86, 405 A.2d at 845.

tions]," fearing that such linkage could "develop into a handbook for larceny . . . ."[93] Instead, Judge Fritz proposed that the appropriate statutory period of limitation be measured not by analogy to adverse possession, but by application of the discovery rule.[94] So measured, the six-year period of limitations would commence when plaintiff knew or should have known of the cause of action.[95]

The appellate division's ruling was criticized as an illustration of "a hard case making bad law."[96] One commentator charged that "[b]y imposing an unattainably high standard of notoriety the court admittedly rendered statutes of limitations entirely inoperable in replevin actions, saying only that such is the difficulty in applying real property doctrines in a personal property context."[97] Certainly, the lesson of the court's strained pronouncement (preordained in large measure by the *Redmond* precedent),[98] was that traditional adverse possession doctrine, as applied to chattels, offered the potential for arbitrary, if not disparate, results. Against this backdrop, the Supreme Court of New Jersey granted certification.[99]

C. *The New Jersey Supreme Court's Pronouncement*

Writing for the majority of the New Jersey Supreme Court, Justice Pollock determined that "the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute."[100] Consequently, the court overruled *Redmond* and *Lesnevich* and held instead that the discovery rule would now apply to this action for replevin.[101] Accordingly, "O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings."[102] Thus, the court reversed the de-

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93 *Id.* at 96, 405 A.2d at 850 (Fritz, J., dissenting).

94 *Id.* at 97, 405 A.2d 851 (Fritz, J., dissenting).

95 *Id.* at 96-97, 405 A.2d at 850-51 (Fritz, J., dissenting).

96 Comment, *supra* note 26, at 1149 n.114.

97 *Id.* at 1148.

98 Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq. 464, 28 A.2d 189 (N.J. 1942). *See supra* notes 26-40 and accompanying text. It has been postulated that had there not been "such a strong and ready adverse possession precedent in New Jersey," the appellate division in *O'Keeffe* "probably would have adopted the discovery rule . . . ." Comment, *supra* note 26, at 1155 (footnote omitted).

99 O'Keeffe v. Snyder, 81 N.J. 406, 408 A.2d 800 (1979).

100 O'Keeffe v. Snyder, 83 N.J. 478, 496-97, 416 A.2d 862, 872 (1980).

101 *Id.* at 493, 416 A.2d at 870.

102 *Id.* Justice Handler dissented, believing there to be "a much sounder approach . . . than one that requires the parties to become enmeshed in duplicate or cumulative hearings that focus on the essentially collateral issues of the statute of

termination of the appellate division and remanded the case for trial to resolve several outstanding factual issues.[103]

Significantly, the court's departure from the confines of adverse possession doctrine in large part was rooted in its perception of the "inherent problem" of applying the open and notorious requirement to personalty.[104] As Justice Pollock hypothesized, it is doubtful that the owner of lost or stolen jewelry, for instance, "would learn that someone is openly wearing that jewelry in another county or even in the same municipality."[105] *Lesnevich* had demonstrated that traditional adverse possession doctrine would place the owner in the untenable position of having to locate the item within the statutory period or lose title.[106] By contrast, the discovery rule permits an owner ignorant of facts which form the basis of the cause of action to preserve entitlement to repossession so long as he or she is duly diligent[107] in

limitations and its possible tolling by an extended application of the discovery doctrine." *Id.* at 508, 416 A.2d at 878 (Handler, J., dissenting). Rather, Justice Handler would recognize the "owner's right to assert a claim against a newly-revealed receiver or possessor of stolen art as well as the correlative right of such a possessor to assert all equitable and legal defenses." *Id.* In a separate dissenting opinion, Justice Sullivan embraced the majority's legal analysis but challenged its interpretation of the salient facts. *Id.* at 506-07, 416 A.2d at 877-78 (Sullivan, J., dissenting).

103 *Id.* at 484, 505, 416 A.2d at 865, 877. The principal case was never retried, as the parties settled by agreeing to share the paintings. N.Y. Times, Dec. 8, 1980, § 3, at 20, col. 1; *see also* Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 353 n.139 (1982). *Cliffs* was sold at auction at Sotheby's in New York, offered for sale jointly by O'Keeffe and Snyder. *O'Keeffe, Princeton Gallery Settle Dispute on Ownership of Paintings*, The Star-Ledger, Dec. 4, 1980, at 21, col. 1.

104 *O'Keeffe*, 83 N.J. at 495, 416 A.2d at 871.

105 *Id.* at 496, 416 A.2d at 871. The court noted that the same concerns are not implicated in the real property setting. *Id.* at 499, 416 A.2d at 873. Unlike personalty, "[r]eal estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open . . . possession [of] it." *Id.*

106 *See supra* notes 43-53 and accompanying text.

107 The *O'Keeffe* court contemplated that "[t]he meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property." *O'Keeffe*, 83 N.J. at 499, 416 A.2d at 873. Thus, the court explained, "with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more." *Id.*

It is unclear, however, whether "due diligence" is to be measured by an objective standard of reasonableness or by a subjective assessment that would factor in the given owner's unique abilities or resources. A recent Second Circuit Court of Appeals case embraces the latter alternative, in the context of holding that under New York's "demand and refusal" law an owner's obligation to make a demand for lost or stolen property without unreasonable delay includes a duty to use due diligence to locate the property. DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987); *see supra* note 41 and *infra* note 111. In examining the plaintiff's conduct to determine whether she had exercised reasonable diligence in attempting to recover

seeking the item's return. Conversely, a dilatory plaintiff, who either negligently or intentionally fails to pursue the chattel, should not be permitted to disturb the defendant's justifiable repose. Thus, application of the discovery rule "shifts the emphasis from the conduct of the possessor to the conduct of the owner."[108] As the *O'Keeffe* court elaborated, "[t]he focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property."[109]

IV. THE *O'KEEFFE* LEGACY

A. Subsequent Applications

While the subject of considerable attention and commentary when first announced,[110] *O'Keeffe* has not precipitated a readily discernible shift from adverse possession doctrine in other

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a stolen painting, the court took into account her status as a "wealthy and sophisticated art collector." *DeWeerth*, 836 F.2d at 112. Rejecting the lower court's finding that the plaintiff's failure to search for the property was excusable in view of the fact that she was elderly and that, as an individual, she could not be expected to wage a comprehensive investigation, the Second Circuit noted that "even if she could not have mounted a more extensive investigation herself, she could have retained someone to do it for her." *Id.*

[108] *O'Keeffe*, 83 N.J. at 497, 416 A.2d at 872. Moreover, as a consequence of the court's ruling, the burden of proof shifts from possessor to owner. Justice Pollock explained:

> Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations.

Id. at 500, 416 A.2d at 873 (citations omitted).

[109] *Id.* at 497, 416 A.2d at 872.

[110] *See, e.g.*, Ward, *The Georgia Grind—Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J. COLLEGE & U.L. 533 (1981-82); Wertheimer, *The Implications of the O'Keeffe Case*, 6 ART & L. 44 (1981); Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443 (1983); Survey, *Personal Property - Adverse Possession - In Action for Replevin of a Chattel, "Discovery Rule," Not Doctrine of Adverse Possession, Determines When Cause of Action Accrued for Purpose of Statute of Limitations*, 11 SETON HALL L. REV. 347 (1980); *see also* Amram, *supra* note 85 (discussing trial court decision); Feldman, *supra* note 85 (discussing trial court decision); Comment, *supra* note 26 (discussing trial and appellate court rulings and calling for application of discovery rule). Moreover, the case has received considerable treatment in many, if not most, casebooks on property law. *See, e.g.*, O. BROWDER, R. CUNNINGHAM & A. SMITH, BASIC PROPERTY LAW 80-94 (4th ed. 1984); J. BRUCE, J. ELY & C. BOSTICK, MODERN PROPERTY LAW 669 (1984); A. CASNER & W. LEACH, PROPERTY 63-64 (2d ed. 1969); J. CRIBBET & C. JOHNSON, PROPERTY 154-67 (5th ed. 1984); C. DONAHUE, T. KAUPER & P. MAR-

courts' treatment of conflicting ownership claims to personalty.[111] Other jurisdictions have not expressly embraced the ruling.[112] Nationally, the decision has not prompted application of the discovery rule to analogous actions for recovery of lost or stolen chattels.[113]

TIN, PROPERTY 145-57 (2d ed. 1983); J. DUKEMINIER & J. KRIER, PROPERTY 117-29 (2d ed. 1988); S. KURTZ & H. HOVENKAMP, AMERICAN PROPERTY LAW 212-26 (1987).

111 Significantly, however, a recent Second Circuit Court of Appeals case to apply New York's "demand and refusal" doctrine to a suit for recovery of a stolen Monet painting held that "an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property." DeWeerth v. Baldinger, 836 F.2d 103, 110 (2d Cir. 1987). The court determined that the plaintiff's failure to conduct "even the most minimal investigation" during a 24 year period would prevent her from disturbing the repose of the defendant good faith purchaser who had owned the painting for 30 years. *Id.* at 112. Certain jurisdictions adhere to some semblance of adverse possession doctrine. *See supra* notes 41-42, 107. New York law, however, focuses on the conduct of the owner of lost or stolen property such that when the owner proceeds against an innocent purchaser, the limitations period begins to run only when the owner demands return of the property and the purchaser refuses. *See supra* note 41. The demand for return must be made within a reasonable time after the possessor is identified. *See id. DeWeerth* augments this emphasis on the owner's actions by imposing the additional obligation that the owner use reasonable diligence in attempting to locate the property. *DeWeerth*, 836 F.2d at 108-09. The court cited *O'Keeffe* when it noted that "[a]t least one other state has recently confronted the limitations problem in the context of stolen art and has imposed a duty of reasonable investigation." *Id.* at 109 (citing O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980)). Elaborating on the sort of "search efforts that may reasonably be expected of an owner" of lost or stolen property, *DeWeerth* helps to elucidate the nature and extent of the due diligence requirement. *Id.* at 110. *See supra* note 107.

112 *See supra* note 111 and *infra* notes 113-16 and accompanying text.

113 However, the Seventh Circuit Court of Appeals, applying Illinois law to an action for return of a painting, found it "worth noting," in dictum, "that the Supreme Court of New Jersey, in interpreting a discovery rule apparently much like Illinois', has held that an artist . . . is entitled to invoke the discovery rule when diligently seeking the recovery of a lost or stolen painting." Mucha v. King, 792 F.2d 602, 612 (7th Cir. 1986)(citing O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980)). The case was decided on other grounds, with Judge Posner, writing for the court, leaving it "a matter of speculation whether an Illinois court would apply [the discovery rule] in a case such as this . . . ." *Id.* Significantly, Illinois shares with New Jersey a particularly well-developed and expansively-applied discovery rule. *See, e.g.*, Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975) (defamation suit); Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970) (non-foreign body medical malpractice action); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (misrepresentation based on inaccurate land survey); Praznik v. Sport Aero, Inc., 42 Ill. App. 3d 330, 355 N.E.2d 686 (Ill. App. Ct. 1976) (wrongful death action). *See generally* Comment, *The Evolution of Illinios Tort Statutes of Limitation: Where Are We Going and Why?*, 53 CHI.[-]KENT L. REV. 673 (1977).

On the relevance of the discovery rule to actions for conversion, compare Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. Dist. Ct. App. 1984) (cause of action will not accrue until plaintiff knows or is chargeable with knowledge of invasion of his legal right) with Fuscellaro v. Industrial National Corp., 117

At least part of the reason for this quiescence may lie in the simple fact that such matters are neither litigated nor revisited with any frequency.[114] Since 1980 (when *O'Keeffe* was decided), few courts have had even the opportunity to consider, within the rubric of adverse possession *or* discovery rule doctrine, issues pertaining to entitlement to lost or stolen personalty.[115] Indeed, since *O'Keeffe*, no New Jersey court has had occasion to apply the supreme court's standard squarely to a suit concerning the timeliness of an action to regain possession of lost or stolen goods.[116]

More fundamentally, it may be argued that by manipulating the traditional "open and notorious" requirement to accommodate the special circumstances of personalty, results comparable to those achieved by *O'Keeffe* are possible within the framework of adverse possession doctrine.[117] As Professor Brown notes in summarizing courts' application of adverse possession to personal property:

> While an innocent removal of the chattel from the locality or even from the state does not alone prevent the statute operating, simple morality requires that one who intentionally, by removal, concealment or otherwise prevents the owner from ascertaining his property's whereabouts should not by such means defeat the latter's cause of action and acquire title to the withheld goods. While it is possible that a thief, or a pur-

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R.I. 558, 368 A.2d 1227 (1977) (representing prevalent view refusing to apply discovery rule in suits for conversion). *Accord*, Trust Company Bank v. Union Circulation Co., 241 Ga. 343, 245 S.E.2d 297 (1978); Christensen Grain, Inc. v. Garden City Coop. Equity Exch., 192 Kan. 785, 391 P.2d 81 (1964); Continental Casualty Co. v. Huron Valley Nat'l Bank, 85 Mich. App. 319, 271 N.W.2d 218 (Mich. Ct. App. 1978).

[114] Most courts' adherence to adverse possession doctrine in the context of claims involving personalty has remained unchallenged and unchanged. *See supra* notes 111-13 and accompanying text.

[115] *See supra* notes 111-13 and accompanying text. As a general matter, it has been noted that adverse possession law "tends to be treated as a quiet backwater. Both judicial opinions and leading treatises treat the legal doctrine as settled. The theory underlying the doctrine, although routinely discussed in the opening weeks of first-year property courses, is only rarely aired in the law reviews anymore." Merrill, *supra* note 16, at 1122.

[116] One lower court, in the context of resolving the "novel" question of how long a gratuitous bailment of indefinite duration should survive "in the absence of any demand by the bailor and of any act by the bailee inconsistent with the bailor's title," noted in dicta the *O'Keeffe* standard. Desiderio v. D'Ambrosio, 190 N.J. Super. 424, 428-29, 463 A.2d 986, 987-88 (Ch. Div. 1983). Called upon to determine whether the plaintiff's belated demand for goods left in the defendant's custody was timely (as opposed to whether a suit for breach of the bailment agreement was barred), the court concluded "that plaintiff failed to make a demand for the property within a reasonable time of the bailment." *Id.* at 430, 463 A.2d at 989.

[117] *See* P. GOLDSTEIN, REAL PROPERTY 59 (1984).

> chaser from a thief, with knowledge may hold so openly and notoriously as to acquire title, secret rather than open holding will be presumed.[118]

Professor Helmholz ventures further still when he posits that "[t]he heralded recent case of *O'Keeffe v. Snyder*" in fact is "less innovative than the New Jersey Supreme Court announced. The test it adopted is very much like what American courts have long done in practice."[119] He maintains that *O'Keeffe* "expressly laid down" the "hornbook rule of simple possession when the equities have favored the bona fide purchaser."[120]

> For title to accrue to the purchaser, three things generally must exist: (1) honesty on the part of the purchaser; (2) open use by him for the statutory period; and (3) failure on the part of the owner to take reasonable steps to secure his rights.[121]

This characterization, however, belies the genesis and content of the *O'Keeffe* ruling, which subjugates the traditional requirement of visible and open possession (with its inherent emphasis on the possessor's actions), in favor of a discovery rule that renders controlling the conduct of the owner.[122] With respect to personalty, the viability of the discovery rule as an alternative to the open and notorious requirement, however that requirement is finessed or quietly defied, seems manifest.[123] At a minimum, the discovery rule obligates a more explicit and responsive balancing of the relevant equities,[124] thereby freeing courts to engage in such inquiry openly (and more accountably),[125] without having to accommodate the inhibiting confines of adverse possession doctrine.

Prior to the supreme court's pronouncement in *O'Keeffe*, the lesson in New Jersey had been that, as applied to personalty, the traditional hornbook rule of possession produced arbitrary and conflicting results.[126] Indeed, the incongruous determinations of the lower courts in *O'Keeffe*[127] had demonstrated that adverse pos-

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118 R. BROWN, *supra* note 14, § 4.2, at 36 (footnotes omitted).

119 Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U.L. REV. 1221, 1236 (1986) (footnotes omitted).

120 *Id.* (footnote omitted).

121 *Id.* (footnote omitted).

122 *See supra* notes 107-09 and accompanying text.

123 *See supra* notes 54-56, 104-09 and accompanying text.

124 *See supra* notes 62-67 and accompanying text.

125 One is reminded of Justice Handler's characterization of "[a] valid judicial decision" as "one that holds no secrets or hidden meanings . . . ." Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571, 596 (1986).

126 *See supra* notes 26-40, 43-53, 85-97 and accompanying text.

127 *See supra* notes 85-95 and accompanying text.

session "no longer provides a fair and reasonable means of resolving this kind of dispute."[128] The New Jersey Supreme Court's holding is rooted immutably in its conviction that, "[p]roperly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin."[129] As one commentator would concur,"[t]he policy of applying the discovery rule to those situations where equity and justice demand flexibility favors the extension of the rule to the situation of an art theft victim who knows he has a replevin cause of action but does not know against whom or in which jurisdiction it may be brought."[130]

Thus, *O'Keeffe* found the New Jersey Supreme Court heeding its earlier entreaty to extend the discovery rule "whenever equity and justice" warrant its application.[131] Perhaps fittingly, then, in New Jersey the case's principal legacy to date resides in its value as precedent for the continued expansion of the discovery rule.[132] Repeatedly, *O'Keeffe* is cited as authority for that doctrine's accommodating and equitable application, as the discovery rule reaches categories of allegations ranging from legal malpractice[133] to fraudulent inducement to enter into a contract[134] to conversion of negotiable instruments.[135]

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128 O'Keeffe v. Snyder, 83 N.J. 478, 496-97, 416 A.2d 862, 872 (1980).

129 *Id.* at 498, 416 A.2d at 872.

130 Comment, *supra* note 26, at 1153-54. The author concluded:

> Unlike the doctrines of demand and refusal and adverse possession, the discovery rule's comprehensive inquiry into all relevant factors sufficiently protects the rights of art theft victims who encounter practical difficulties in locating stolen works of art without trampling on the rights and expectations of innocent purchasers of art.

Comment, *supra* note 26, at 1157.

131 Lopez v. Swyer, 62 N.J. 267, 273, 300 A.2d 563, 566 (1973). *See supra* notes 59-67 and accompanying text.

132 *See, e.g.*, Mancuso v. Mancuso, 209 N.J. Super. 51, 55-57, 506 A.2d 1253, 1255-56 (App. Div. 1986) (tort action based on automobile negligence); Mant v. Gillespie, 189 N.J. Super. 368, 372-73, 460 A.2d 172, 174-75 (App. Div. 1983) (legal malpractice); Axelrod v. CBS Publications, Inc., 185 N.J. Super. 359, 369-70, 448 A.2d 1023, 1028-29 (App. Div. 1982) (fraudulent inducement to enter into contract); Torcon, Inc. v. Alexian Bros. Hosp., 205 N.J. Super. 428, 432, 501 A.2d 182, 184 (Ch. Div. 1985) (demand for arbitration under construction contract); *see also* Hadden v. Eli Lilly & Co., 208 N.J. Super. 716, 720-21, 506 A.2d 844, 846-47 (App. Div. 1986) (absent statutory tolling right, discovery rule would apply to products liability action for injuries resulting from drug (DES) plaintiff's mother took during pregnancy).

133 *Mant*, 189 N.J. Super. at 372-73, 460 A.2d at 172.

134 *Axelrod*, 185 N.J. Super. at 369-70, 448 A.2d at 1028.

135 DeHart v. First Fidelity Bank, 67 Bankr. 740, 744-45 (Bankr. D.N.J. 1986).

B. The Tradition of Reform

O'Keeffe has a place in the New Jersey Supreme Court's tradition of displaying "considerable ingenuity in adapting common law principles to new conditions and new uses."[136] The decision's departure from strained precedent,[137] coupled with its innovative application of the discovery rule,[138] reflects a larger and well-established willingness on the part of the court to introduce change by abandoning doctrines that no longer "represent[] current notions of rightness or fairness."[139] Moreover, viewed in the context of its theoretical and conceptual antecedents,[140] *O'Keeffe*'s deviation from the norm of stare decisis[141] illustrates certain of the jurisprudential considerations that are involved when a state court of last resort announces new law.[142]

As a general matter, the importance of precedent in judicial decision-making is well-documented.[143] Adherence to the doc-

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136 G. TARR & M. PORTER, *supra* note 27, at 225. *See infra* notes 150-55 and accompanying text. For an insightful discussion by a member of the New Jersey Supreme Court on the implications of judicial responsiveness in the context of contemporary jurisprudence, see Handler, *supra* note 125.

137 As noted, the *O'Keeffe* court overruled Redmond v. New Jersey Historical Soc'y, 132 N.J. Eq. 464, 28 A.2d 189 (N.J. 1942), and Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959), to the extent that those decisions held that the doctrine of adverse possession applies to chattels. *See supra* notes 26-40, 43-53, 85-97 and accompanying text.

138 *See supra* notes 68-71, 101-02, 107-09 and accompanying text.

139 Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 39, 141 A.2d 276, 282 (1958). In *Collopy*, the supreme court abrogated the doctrine of charitable immunity. Subsequently, the legislature reinstated the doctrine. *See* N.J. STAT. ANN. § 2A:53A-7 to -11 (West 1986). *See infra* notes 150-55 and accompanying text.

140 *See supra* notes 26-71 and accompanying text.

141 The term stare decisis is an abbreviation of the doctrine *stare decisis non quieta movere*, which has been interpreted to mean "[w]hen a rule has been once deliberately adopted and declared, it ought not to be disturbed . . . ." 1 J. KENT, COMMENTARIES ON AMERICAN LAW 477 (Lacy ed. 1889).

142 *See generally* Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966); von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409 (1924); Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 ST. JOHN'S L. REV. 445 (1985).

143 A thorough recitation of the voluminous legal scholarship on the nature and implications of stare decisis is beyond the scope of this article. The leading texts and articles include: B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); R. DWORKIN, LAW'S EMPIRE 240-50 (1986); R. DWORKIN, TAKING RIGHTS SERIOUSLY 110-15 (1977); H.L.A. HART, THE CONCEPT OF LAW (1961); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Maltz, *The Nature of Precedent*, 66

trine of stare decisis provides stability in the law,[144] thereby facilitating the worthy aims of predictability,[145] uniformity[146] and efficiency.[147] The precept that like cases should be treated alike,[148] however, is tempered by judicial recognition that, in certain instances, change is necessary.[149]

The New Jersey Supreme Court has long vindicated one of the common law's "most essential attributes—its inherent capacity constantly to renew its vitality and usefulness by adapting itself gradually and piecemeal to meeting the demonstrated needs of the time."[150] Indeed, in diverse categories of actions implicating both individual rights and societal interests, the court has departed from established common law doctrine and instituted extraordinary change.[151] The court's common law jurisprudence is replete with illustrations of landmark judicial decision-making,[152] as it has initiated broad reform in such complex areas as products liability,[153] social host liability,[154] and public trust

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N.C.L. REV. 367 (1988); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U.L. REV. 1 (1983).

144 *See* Douglas, *supra* note 143, at 736 ("Stare decisis serves to take the capricious element out of law and to give stability to a society."); von Moschzisker, *supra* note 142, at 409 ("A natural desire for stability in the law gave rise to a reliance on decided cases as far back as Bracton . . . .").

145 *See, e.g.*, R. WASSERSTROM, *supra* note 143, at 68-70; Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1, 4 (1953).

146 *See, e.g.*, R. WASSERSTROM, *supra* note 143, at 69-72.

147 *See* B. CARDOZO, *supra* note 143, at 149 ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."); R. WASSERSTROM, *supra* note 143, at 72-74 (efficiency justification for adherence to precedent is persuasive).

148 *See* R. WASSERSTROM, *supra* note 143, at 69-72.

149 *See* D. CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS: ITS REASONS AND ITS EXTENT 19 (1885) ("degree of authority" to be afforded a given precedent "depends, of necessity, on its agreement with the spirit of the times . . . and . . . the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible"); Douglas, *supra* note 143, at 737 ("stare decisis must give way before the dynamic component of history").

150 Fox v. Snow, 6 N.J. 12, 14, 76 A.2d 877, 878 (1950) (Vanderbilt, J., dissenting). *See generally* G. TARR & M. PORTER, *supra* note 27, at 225 ("[A]t least in the period since 1958, the New Jersey Supreme Court has eagerly adopted—and frequently initiated—changes in the common law.").

151 *See infra* notes 152-55 and accompanying text.

152 With respect to the New Jersey Supreme Court's tradition of reform in the arena of constitutional adjudication, see Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988). *See also* G. TARR & M. PORTER, *supra* note 27, at 205-24.

153 In Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), the court determined that the privity requirement would no longer be a bar to auto-

doctrine.[155]

By contrast, the subject-matter and procedural concerns implicated by *O'Keeffe* are far more discrete, and not apt to transcend with substantial magnitude the interests of the litigants themselves.[156] The court was not acting in an area susceptible to significant reliance interests.[157] Moreover, in the years since it had issued its last pronouncement on the application of adverse possession doctrine to personalty,[158] the discovery rule had been promulgated.[159] The likely absence of widespread reliance, coupled with the intervening advent of new equitable doctrine, suggests that in this context application of the norm of stare decisis should be limited. As aptly stated by Justice Cardozo:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.[160]

Moreover, insofar as *O'Keeffe* imposed a new procedural, as opposed to substantive, standard, "[t]he considerations of policy that dictate adherence to existing rules . . . apply with diminished force . . . ."[161]

Certainly, then, *O'Keeffe* is neither as profound nor as potentially

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mobile manufacturer liability, and that the warranty limitation in the contract of sale would not insulate the manufacturer from liability when the automobile proves defective. *Id.* at 404-05, 161 A.2d at 95. The decision inspired "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-94 (1966). The standard of strict liability soon followed. *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

154 *See* Kelly v. Gwinnell, 96 N.J. 538, 552-53, 476 A.2d 1219, 1226 (1984) (principles of negligence, coupled with public policy concerns, warranted judicially-imposed liability on social host for injuries caused by guest who becomes intoxicated and drives).

155 *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (transforming doctrine obligating sovereign to use land covered by navigable waters for public interest).

156 *See supra* notes 73-84, 101, 114-16 and accompanying text.

157 As noted, prior to *O'Keeffe*, the last judicial pronouncement in New Jersey on the application of adverse possession doctrine to personalty was issued in 1959. *See* Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959); *see supra* notes 43-53 and accompanying text.

158 *Lesnevich*, 56 N.J. Super. at 356-57, 153 A.2d at 358. *See supra* notes 43-53 and accompanying text.

159 *See supra* notes 59-71 and accompanying text.

160 B. CARDOZO, *supra* note 143, at 151.

161 *Id.* at 156. *See also* von Moschzisker, *supra* note 142, at 420 (In domain of procedural law, "changes may be made with a greater degree of freedom . . . .").

far-reaching as many of the court's pioneering departures from existing doctrine.[162] Still, the decision is indicative of the New Jersey Supreme Court's responsible willingness to critically reassess and, when necessary, innovatively reformulate the law to accommodate imperatives of "rightness and fairness."[163] *O'Keeffe* reflects, however modestly, "the court's acceptance of the legitimacy of judicial creativity"[164] to ensure those ends.

V. CONCLUSION

Prior to the supreme court's pronouncement in *O'Keeffe*, the lesson in New Jersey had been that, as applied to personalty, adverse possession doctrine produced arbitrary and incongruous results.[165] *O'Keeffe* renounced the strained precedent that had yielded such inconsistencies, introducing in its stead the discovery rule. With respect to chattels, the viability of that equitable principle as an alternative to the open and notorious requirement, however that requirement is manipulated or quietly defied, seems evident.[166] At a minimum, the discovery rule obligates a more explicit and responsive balancing of the relevant equities,[167] thereby freeing courts to engage in such inquiry openly and more accountably.

Moreover, *O'Keeffe*'s ready departure from the norm of stare decisis, coupled with its creative holding, offers a discrete illustration of the New Jersey Supreme Court's endorsement of the viability of judicial innovation to vindicate perceived aims of fairness and justice.[168] While the subject-matter and procedural concerns associated with the case are modest, and not likely to implicate with substantial magnitude collective or societal interests, the decision has a place in the supreme court's distinguished tradition of reform.

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162 *See supra* notes 139, 150-55 and accompanying text.

163 Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 39, 141 A.2d 276, 282 (1958).

164 G. TARR & M. PORTER, *supra* note 27, at 231.

165 *See supra* notes 26-40, 43-53, 85-97 and accompanying text.

166 *See supra* notes 51-53, 104-09, 122-30 and accompanying text.

167 *See supra* notes 62-67 and accompanying text.

168 *See supra* notes 150-55.