

**Crusto, Personal Property:
Adverse Possession, Bona Fide Purchaser, and Entrustment
New Admitted Assignment, Monday, May 11, 2020

Please kindly complete in writing and kindly prepare for discussion for the online class on Friday, May 15, 2020, the following exercises:

I. Reading Assignments (see attached below, following Crusto's lecture notes):

- 1. Adverse Possession, Bona Fide Purchaser, Entrustment: pp. 116-118, 151-163: O'Keefe v. Snyder (see attachment) and**
- 2. Crusto's Notes (below)**

II. Exercises:

Exercise 1

Based on the cases and the reading assignment (above) and Crusto lecture notes (below), write an "outline" listing five legal issues for the personal property topics of 1. Adverse Possession, Bona Fide Purchaser, and Entrustment, and ten rules and authorities (one word case name or other source).

Exercise 2

Answer the following questions, providing a one sentence answer for each question:

1. Provide three examples of personal (not real) property.
2. What are the indicia (evidence) of ownership of personal property?
3. How does a person normally acquire title to personal property?
4. What role does possession play in evidencing ownership of personal property?
5. What is meant by the maxim that "possession is 9/10s of the law"?
6. How, if ever, can a person acquire title to personal property by adverse possession?
7. What is a statute of limitations?
8. What role did the statute of limitations play in the *O'Keefe* case?
9. How does a person qualify as a bona fide purchaser?
10. What benefits result from such a qualification?
11. What is the rule of discovery?
12. How does it impact the outcome of the *O'Keefe* case?
13. What might have O'Keefe done in the past that would have strengthened her legal claim?
14. What is the difference between a legal action for replevin versus one for damages?

III. Skills Exercises

Skills Exercise 1

You are hired as a law clerk for a very prestigious law firm. The managing partner assigns you to prepare for the appeal of the *O'Keefe v. Snyder* case. The managing partner asks you to prepare a memorandum on the following legal matter and answering five specific questions, based on the laws in the assigned reading. For each question, please provide the following information 1) the legal issue in one sentence, 2. the legal rule and case authority in one sentence, 3. the most pertinent fact in one sentence, 4. how the fact applies to the rule in one sentence, and 5. the answer to the question, in one word. Please kindly base each of your answers on the *O'Keefe* reported legal decision provided in the attachment, the note materials following the case, and the Crusto notes.

1. Would O'Keefe be successful in her lawsuit if she could prove in fact that the paintings in litigation were stolen?
2. Would O'Keefe be successful in her lawsuit if she were suing for the value of the paintings rather than for replevin?
3. Would O'Keefe be successful in her lawsuit if she could prove in fact that, when she first realized the paintings were missing, that he immediately notified the police and publicized that they were missing?
4. Following the New Jersey Supreme Court's decision in *O'Keefe*, did Snyder have the burden of proving ownership of the paintings by adverse possession?
5. Following the New Jersey Supreme Court's decision in *O'Keefe*, would Snyder be successful if he could prove that the paintings were not stolen and that he had received the paintings as a gift from Frank, rather than purchasing them from Frank?

CRUSTO'S NOTES:

I. Overview of Title to Personal Property

1. What is property?

1. State support of ownership and other property rights
2. How does one acquire ownership over it?
3. Can more than one person have a property interest in the same property?
4. Can a subsequent possessor have a property interest in property?
5. How and when?
6. Can an owner lose title over property? If so, how?

2. What types of property are there? What kind of property interests?

Two broad divisions, real (real estate) and personal; and a third minor, fixtures

Property can support many property interests.

Can you name some of the various property interests?

1. Ownership or title in personal and real property, or freehold in real property
2. Leasehold in personal and in real property
3. What is meant by the idea that “possession is 9/10 of the law”?

3. What types of personal property are there? Are they as valuable as real estate? Are their different rules to evidence title in them, to transfer title to them? Which, if any, are true “bearer” title, where mere possession is evidence of ownership?

1. Cash
2. Goods (Uniform Commercial Code, Article 2)
3. Stocks and bonds, securities (UCC, Article 8)
4. Commercial paper, negotiable instruments (UCC, Article 3)
5. Paintings
6. Jewelry
7. Commodities, gold, corn

***4. How do you acquire property/property interests?**

1. gift (inter vivos and causa mortis)
2. sale (transfer from a grantor to a grantee)
3. accession
4. confusion
5. capture
6. discovery
7. creation
8. conquest
9. find
10. adverse possession

***5. Can a person acquire property interests by mere possession of the property? If so, when and how? If you found a \$100 bill on the street, what would you do with the money?**

II. Other Title Concepts

A. Overview

O’Keefe v. Snyder continues to explore the laws of personal property, introducing several legal concepts.

1. The first is the idea of a “chain of title.”

This concept traces the current owner’s title to the prior title to establish the “quality” of the current owner’s title.

2. The second is the statute of limitations.

Usually by state statute, every cause of action has a time period for which it has to be exercised by the owner of the action. If they wait to sue after the statute of limitations has run they legally lose their right to sue. For example, an action in tort in Louisiana has a one year statute of limitations from the time of the injury (with some exceptions based on the type of tort).

3. The third involves transfer of title. A thief has no good title and cannot pass good title to anyone. And the title you receive cannot be better than that of the person from whom you are getting title.

4. The fourth involves adverse possession, a very unlikely long-shot way of getting title. If an owner fails to exercise their ownership rights past the statute of limitations, an adverse possessor may be successful in gaining a form of title. Relative to adverse possession, the law in some very rare instances, allows a person to lose their property interests, what might be called “constructive abandonment,” and to allow another “adverse possessor” to gain some sort of title against the true owner. While the case we have involves personal property, adverse possession also applies to real property, often involving boundary lines between neighbors.

5. The fifth is the distinction between void and voidable title. Under the UCC, for the sale of goods, the law developed a distinction between situations where a buyer could not get good title (void) from those where a buyer might get good title (voidable).

6. The sixth is the concept of bona fide purchaser, wherein the law seeks to provide a good faith purchaser (for value, innocent of any title problems) with title over a true owner, in some instances, perhaps even when innocently purchasing from a thief. This is a very vital legal concept to promote the free marketability of goods. Otherwise, every purchaser would have to be skeptical of the source of her title to purchased goods. That is because a person cannot normally pass on better title than what he or she has.

7. The seventh is the definition of tolling or stopping the running of the statute of limitations, for example, due to some deception of the adverse possessor.

8. The eighth is the definition of tracking or the accumulation of time calculated for the running of adverse possession, such as adding time of adverse possessor 1 + that of adverse possessor 2.

9. And the ninth is the burden of proof, which is the burden the law places on one party or another to prove their case or provide their defense.

III. Adverse Possession in Personal Property

1. Overview of the Topic.

What is adverse possession? How does it relate to the statutes of limitations?

2. What context?

When, if ever, can a subsequent possessor act openly in conflict with a true owner and obtain legal recognition? Is it possible for a neighbor to encroach on the boundary of his neighbor and over time to acquire title to the encroachment? Can a trespasser of land ever acquire legal title contrary to the true owner? Can a possession of personal property acquire legal title to a thing contrary to the true owner? Broader issue, how does the statute apply in justice cases, for hate crimes, for murder, for reparations for 19th Century enslavement?

3. What issues? And what is at stake in this case?

Why is there a need for the law to “quiet title”? What does the law do to “quiet title”? Ownership of three valuable paintings, if O’Keeffe wins, she gets the paintings for the cost of litigation. If Synder wins, he gets to keep what he purchased (with the increased value, minus litigation costs.)

4. What is the statute of limitations?

The law fixes a period of time beyond which an owner of a right can no longer enforce that right through legal action.

5. How does the statute of limitations relate to property interests?

It permitted recent ownership, even if tortiously acquired, to become protected ownership.

6. What is the rationale for the statute of limitations relative to property interests?

Social judgment that there should be a restricted time period for the assertion of “aging claims,” and that the passage of a reasonable time period should assure security to a person claiming to be an owner.

7. How is adverse possession related to the statute of limitations?

That the adverse possessor may acquire title as such time as an action in ejectment (or other action for possession of real property) by the record owner would be barred by the statute of limitations.

8. What is the rationale for adverse possession?

To dispossess the non-diligent, to reward the utility of the diligent trespasser, and to quiet title.

9. How is adverse possession anti-environmental protection?

It promotes the use of property.

10. Does a trespasser automatically acquire title of that of another through the mere passage of time?

No, must prove case for adverse possession.

11. How long is the statute of limitations for adverse possession?

30 years to 3 years.

IV. O’Keeffe v. Snyder

1. What is the procedural history in O’Keeffe?

The trial court granted summary judgment for Snyder because O’Keeffe’s action was not commenced within the six year of the alleged theft, and thus was barred. The appellate court granted summary judgment to plaintiff, Georgia O’Keeffe, against defendant, Barry Snyder, for replevin (return) of three small pictures painted by O’Keeffe. The majority of the court of appeals found that the paintings were stolen, the defense of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. And therefore O’Keeffe could still enforce her right to possession of the paintings. The Supreme Court reversed and remanded for a plenary (all judges) hearing in accordance with this opinion.

2. What is unusual or wrong with the appellate court’s decision? What did the Supreme Court say on the issue of whether the paintings were stolen? What other factual issues did the court note? Why is the Supreme Court going forward with its analysis with disputed facts as to whether the painting was stolen?

There was a finding of fact that the paintings were stolen and a remand for a plenary hearing on the issues. Other issues were whether the paintings were stolen but lent, consigned, or given by O’Keeffe’s husband to Dr. Frank or someone else with O’Keeffe’s knowledge before he died or whether there was any business or family relationship between O’Keeffe’s husband and Dr. Frank so that the original possession of the paintings by the Frank family may have been under claim of right. At trial, Snyder conceded the paintings were stolen for purposes of the motion for summary judgment.

3. What are the facts in O’Keeffe?

O’Keeffe alleged that she was the owner of the paintings, and that they were stolen from a New York gallery in 1946. Snyder asserted that he was a purchaser for value of the paintings, had acquired title by adverse possession, and that O’Keeffe’s action was barred by the expiration of the six-year statute of limitations, for an action in replevin. Snyder impleaded third party, Frank, from

whom Snyder purchased the painting in 1975 for \$35,000. The court notes that there is little agreement as to the facts.

4. What is O’Keeffe’s version of the facts?

That one painting, Cliffs, which at the time was worth \$150.00 was on display at her husband’s gallery, An American Place, in March 1946, when she and her husband discovered it missing from the exhibit. Two weeks later, she discovered the disappearance of Seaweed and Fragments, from a storage room at the gallery. She did not tell anyone, not even her husband, about those paintings missing, as she did not want to upset him. She had previously sold Seaweed to Mrs. Weiner (now deceased) for a string of amber beads. Following the trial court’s motion for summary judgment, O’Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning their interest in the sale to O’Keeffe. O’Keeffe believes that the paintings along with others at the gallery may have been stolen by Estrick who distributed them to members of the theatre world, some of whom when confronted returned them (by not O’Keeffe’s). There was no evidence of break in at the gallery; the theft was not reported to the authorities. The loss was not insured and she did not receive insurance for them. She did not advertise the loss to the Art News or any other publication. She discussed it with others but did little to seek their recovery. She does not contend that Frank or Synder had actual knowledge of the alleged theft. She finally reported the theft of the paintings in 1972, to the Art Dealers Association of America, which maintains a registry of stolen paintings. In September, 1975, O’Keeffe learned that the paintings were in the Crispo Gallery in New York on consignment (?) from Danenberg Gallery. On February 11, 1976, O’Keeffe discovered that Frank had sold the painting to Synder. She demanded their return and then instituted this action for replevin.

5. Who is Frank, what is Frank’s version of the facts, and does he care about the outcome of the matter?

He traces his title back to his father, Dr. Frank, who died in 1968. He claims that there was a family relationship by marriage between his family and O’Keeffe’s husband’s family. (O’Keeffe disputes this.) Frank does not know how his family obtained the paintings, but recalls seeing them in his father’s apartment in New Hampshire as early as 1941-43, a period preceding the alleged theft. Until 1965, Dr. Frank occasionally lent the paintings to Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Frank. In 1968, he exhibited the paintings for one day. All these events were prior to O’Keeffe’s listing the paintings as stolen with the Art Dealers Asso. Frank claims continuous possession of the paintings through his father for over thirty years and admits selling them to Synder, who together did not trace the painting to O’Keeffe. Was the painting signed by the artist? If Synder loses, he will look to Frank for indemnification for the price paid, plus interest, and litigation costs.

6. What is meant by a purchaser for value? Why did Synder raise it as a defense? What is the rationale behind the rule?

See fn 27, p. 148, UCC, 2-403

7. What are the topics?

Statute of limitations, adverse possession, bona fide purchaser, transfer of title of stolen property, bailment, finder.

8. What are the issues?

1. What title does a thief acquire? And what title can a thief transfer?
2. Did Frank or his father acquire voidable title? And what does that matter?
3. When did O'Keeffe's cause of action accrue?
4. What is the statute of limitations, and when does it start to run?
5. What is the discovery rule?
6. Who has the burden of proof under the discovery rule?

9. What are the rules?

- 1) Thief acquires no title and could not transfer good title even to an innocent purchaser.
- 2) A mere possessor cannot transfer good title, but a good faith purchaser may obtain good title in certain instances, when he receives voidable title. The statute of limitation for replevin of goods or chattel must be commenced within six years after the accrual of the cause action.

10. What did the trial court find as to the date of the accrual of the cause of action?

The date of the alleged theft was March, 1946. The trial court concluded that the action was barred. The Appellate court found that the accrual might be more than six years if possession by the defendant or his predecessors satisfied the elements of adverse possession. The Appellate Div. found that those elements had not been established and that the action was not barred.

11. What is the rationale for the statute of limitations?

To stimulate to activity and punish negligence and promote repose by giving security and stability to business affairs. Wood.

12. How is the adverse possessor rule related to the statute of limitations?

To avoid the harsh results from the mechanical application of the rule, the courts placed additional restrictions on the claiming party and other doctrine.

13. What is the discovery rule? What is its rationale?

It provides that in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. To avoid unfair results on the statute of limitations rule. Why? Because even though there is a cause of action, the plaintiff would not know who to sue in a personal property setting. Why should the doctrine not apply in real property settings?

14. What is the Supreme Court's rationale for the discovery rule?

That it applies to an action for replevin of a painting. There is no reasonably available method for an owner of art to record the ownership or theft of paintings. This rule shifts the burden on the owner to show she has acted with due diligence.

15. What instructions does the Supreme Court supply to the trial court on the discovery issue?

1. Whether O'Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter,
2. Whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world,
3. Whether registering the paintings with the Art Dealers Association would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner?

16. What are the elements of adverse possession?

The possessor has to establish that the possession was hostile, actual, visible, exclusive, and continuous. There is an inherent problem with many kinds of personal property.

17. Do you agree with the Court's approach? Could the old rule, requiring the adverse possessor to prove up the element produce the same outcome?

18. What is the entrustment rule and how does it apply to the O'Keeffe case?

19. How does the bona fide purchase fair against the true owner, when the true owner sues within the statutory time period?

Depends on void vs voidable title, e.g. was the painting stolen?

20. Does an adverse possessor get good title simply by the running of the statute of limitations?

No, must prove up elements of adverse possession.

21. Does the transfer of title from one possessor to another start the clock running again? What is tacking?

No. Tacking allows the adverse possessor to accumulate consecutive periods of time to his claimed possession.

22. Is the discovery rule the law of the land?

No, California has adopted this but not many others. New York said that it is not enough protection against art theft and adopts a rule that accrual does not begin until the true owner makes a demand for return and that is rejected.

V. Bona Fide Purchaser and Entrustment

1. Overview of the Topic.

Who is bona fide (good faith) purchaser? What property rights does a bona fide purchaser acquire?

2. What is the context?

When, if ever, can a subsequent possessor act openly in conflict with a true owner and obtain legal recognition? Imagine that you are purchasing an item on E-Bay, and the item that you purchase is subject to a prior contractual claim (was used to pay for painting a house that was never painted). Can the purchaser's title be tainted by the breached contract? What if the item were stolen and then sold? Does the new owner have superior title over the true owner?

3. What are the issues? And what is at stake in this case?

Who should win when there are two innocent owners to the same property? The true owner or the innocent purchaser?

4. What is the bona fide purchaser rule?

It modifies in certain special circumstances the common law rule that a person cannot transfer greater title than they own, in other words, it grants an innocent, good faith purchaser of goods to obtain superior title over the true owner.

5. What is the rationale for the rule?

To promote the free flow of commerce, the law makes a conscious choice in favor of the good faith purchaser over the true owner. The true owner is left to pursue her remedy against the wrongdoer.

6. How was the issue raised in the O'Keeffe v. Synder?

The court mentions that Synder may have received voidable title from Frank. But mentions that the UCC rule does not change the basic principle that a mere

possessor cannot transfer good title. But that it permits a person with voidable title to transfer good title to a good faith purchaser for value in certain circumstances. See fn 27, p. 148, UCC, 2-403

Then on p. 149, the court states that the art world needs to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting.

7. What is an entrustment? And how is this discussed in O’Keeffe?

This is a UCC rule that passes good title to a good faith purchaser when she purchases from a merchant who deals in like goods, when the true owner entrusts the good such as in a bailment. Discussed in O’Keeffe: A bona fide purchaser who purchases in the ordinary course of business a painting entrusted to an art dealer should be able to acquire good title against the true owner. Under the UCC entrusting possession of goods to a merchant who deals in that kind of goods gives the merchant the power to transfer all the rights of the entruster (true owner?) to a buyer in the ordinary course of business. In a transaction under that statute, a merchant may vest good title in the buyer as against the original owner.

8. Was the O’Keeffe court wrong in its treatment of the bona fide purchaser rule?

Does the rule apply to a painting? Is it a good? What does it mean to pass on the rights of the entruster?

9. What are the rules?

- 1) Thief acquires no title and could not transfer good title even to an innocent purchaser.
- 2) A mere possessor cannot transfer good title, but a good faith purchaser may obtain good title in certain instances, when he receives voidable title (the painting was paid for with a check that bounced).
- 3) The good faith purchaser must be a purchaser for value (not a donee), and must have no knowledge or reason to question title issues.
- 4) Entrustment clears title, the owner brought the painting to a dealer to appraise and the dealer mistakenly sells it to a buyer.

10. What is the common law rule that applied prior to the UCC and outside of the UCC?

True owner always wins (unless abandoned) against the world. A person can only transfer the title that they have. And a buyer should beware (caveat emptor) that they may not be obtaining the title they hope or believe they are obtaining.

11. What is the market overt and what relationship to title?

England and other European countries have a rule that if a stolen good is sold in an open market, the new, innocent buyer gets good title from the seller. They believed that the owner of the stolen good, such as a horse, could visit and claim their good. Does this encourage a market in stolen goods?

12. What is void versus voidable title?

Voidable is created by the true owner voluntarily, no theft or absolute fraud.

13. Who is a good faith purchaser?

One who purchases for value, in good faith, purchase the property, and without notice of prior claims of title.

14. What are goods under the UCC? Does a special painting apply? Rationale?

Manufactured goods, not specialty items like paintings.

15. How does the bona fide purchaser fair against the true owner, when the true owner sues within the statute of limitations time period?

The answer depends on whether the transaction is void (theft) or voidable title. No good title can be transferred, if the property in question is stolen.