

THE RECOVERY OF STOLEN ART SOLD IN THE UNITED STATES FROM A “NEUTRAL” COUNTRY

THOMAS KLINE*

I began work in this area—representing theft victims in the recovery of stolen art and cultural property—by representing the Greek Orthodox Church of Cyprus in a case involving mosaics stolen from the Turkish-occupied area of northern Cyprus that showed up in Indianapolis.

Indianapolis and Amsterdam dealers were involved in the transaction, and the art moved through Switzerland on its way to Indianapolis. So, in my first case, I saw the sweep of the wonders of the art world and the movement of stolen art, learning that theft of art is attendant on all war, and that displacement of art and movement of art is attendant on theft. I also learned that enormous profits can be made and that the art can sit for long periods of time.

After representing the Greek-Orthodox Church of Cyprus, I represented the Quedlinburg Church that recovered medieval treasures that had been stolen by an American serviceman at the close of World War II and shipped home to Texas. Many of you may have seen that other members of the family just escaped from a criminal indictment for transporting stolen property on statute of limitations grounds. This was a case that went on for some time.

But in the civil case that we settled, we laid claim to, and ultimately recovered, a number of medieval treasures that this American serviceman had taken at the end of the war.

* Mr. Kline is an attorney at Andrews & Kurth. This paper is a transcript of the proceedings that took place at the Conference on Neutrality, Morality, and the Holocaust, which took place at the American University Washington College of Law on April 23, 1998.

My lesson there was that the looting attendant on World War II was not limited to Nazis. I now handle about a half-a-dozen of these cases; half of them or so are Holocaust-related cases and the other group involve thefts by Americans and by Soviets.

If we inventory the unfinished business of World War II, we have to say that all of these thefts belong on the list; not merely the thefts by the Nazis, but the other thefts as well, which are also considerable in volume.

In looking at the role of the neutral nations—I appreciate following Ms. Nicholas, who I work closely with on some matters—it is important to appreciate the scope of theft by the Nazis that she described.

It was Nazi policy to steal art. It was, in particular, the policy of the German government to steal abandoned Jewish art. Numerous government institutions were actuated to accomplish that purpose. The art was gathered and shipped back to Germany.

Now, if you can visualize government agencies that were tasked to steal art, you can also imagine what happens on the fringes. There were multiple overlapping patterns of theft and movement of art with people stealing for Germany and for German institutions, people stealing for their own account, and people engaging in forced sales or theft for high level German officials.

Where did all of this art go? As Ms. Nicholas mentioned, much of it was recovered at the end of the war through heroic efforts by the United States Monuments, Fine Arts and Archives troops, and efforts by other countries. We really do not know, however, how much stolen art was not recovered.

The lists of thefts that you can see are so enormous that it leaves us with the impression that large amounts of art have never been recovered.

Given what we know about art, we know that it has moved. As Ms. Nicholas mentioned, and it was mentioned this morning, much of the art that moved has been the subject of multiple transactions, moving from one person to another. Given the “Don’t ask, don’t tell,” “No questions asked” policies of the art world, the art moves with less and less information attaching to it about its origins. Re-

covery of any art at this point, fifty or sixty years later, is an ambitious undertaking. Finding it alone is very difficult.

In terms of this notion of successive transactions coupled with art moving through neutral countries, this raises one of the most difficult issues in any art recovery lawsuit.

I mentioned the Greek-Orthodox Church of Cyprus case not merely to qualify myself and to review my background, but because that is a case in which we were required to litigate a claim under Swiss law. Because the mosaics had passed through Switzerland and had changed hands in Switzerland, the defense was made that there was a good faith transaction governed by Swiss law.

To take a step back. In the United States, our guiding principle is that a thief cannot pass title. Someone who buys an object from a thief and anyone further down the chain, takes only what rights the thief had, which is possession but not a possessory interest. The same is not true in civil law countries, particularly in Switzerland. In Switzerland, five years after the theft a good faith purchaser can obtain title.

In looking at any case now, whether it is a Holocaust case or some other case in which the art has moved through Switzerland or through any other neutral country, the question would be: Does that country's law apply?

In the case of Switzerland, it's law would generally apply if there was a transaction consummated in Switzerland. Our first principle is if the art merely moved through Switzerland or through a neutral country, then that movement would not necessarily change the legal relationships with respect to that property. The Swiss would view their own law as not attaching.

If there is a transaction and the art does change hands in Switzerland, that fact alone does not necessarily dictate that Swiss law would apply. Indeed, in the Greek-Orthodox Church case that I mentioned, the mosaics actually changed hands in Switzerland; but the court ultimately decided, however, that United States law would apply because the connections with Switzerland were just transitory—there was no substantial connection to Swiss commerce.

With regard to Switzerland, if there is a good faith purchase, title can pass. Good faith is defined as lack of actual knowledge of the

theft, a situation that would give an honest and careful purchaser a sense that there might be a problem.

Now, when we litigated the Cyprus case, we were looking at two questions: Were there suspicious circumstances? And, if so, were sufficient steps taken to resolve those doubts?

In the case of a Holocaust theft and art moving through Switzerland, you might look at such things as: Did the art come out of an occupied country? Who were the individuals involved? Were they known to be involved with art looting? Was there any indication that the art came from a Jewish family? The inquiry might proceed that way to see whether the seller might be seen by the purchasers not to have title.

Then we look at the actions of the purchaser in Switzerland. Did he take steps to allay any doubts that were there? Did he make any inquiry? Did he talk to people other than the seller? Did he research on the provenance and on the history of the art?

The Swiss have taken their knocks today so I do want to say from my perspective, in the nine years since I have litigated the Cyprus case, the law has developed in Switzerland. Litigating under Swiss law now, the inquiry would be somewhat different because the Swiss have recognized their unique role as a market for art.

Art has continued to move through Switzerland since World War II with great freedom. I have had many cases in which art has moved through Switzerland into the United States.

Based on a recent decision of the highest court, the Swiss law is—with regard to objects of a type where there often is a problem, such as art that is being resold—the purchaser needs to do some inquiry. It is no longer necessary for there to be concrete suspicious circumstances present to trigger the need for an inquiry. Some inquiry is always needed, which I think is a very positive step forward in Swiss law.

The other feature of Swiss law that I wanted to call attention to—because I think it plays very prominently in current thinking about these events—is the notion that five years after the theft the good faith purchaser can acquire title.

What we seem to see in many of these cases is that art moved into New York in the early 1950s. I do not believe it is a coincidence.

There does seem to be a pattern that, slightly more than five years after World War II, a great deal of art moved into the United States and was the subject of transactions in New York.

Now, we take a step back from the straight litigation context and ask ourselves: What should museums be doing? What should collectors be doing? Where are these unanswered questions and unresolved problems of World War II? The question can be raised by looking at the provenance of artwork.

The provenance is the history of possession of an object. If you go to a museum and you see an impressionist work that came out of France and the dates of transactions between 1935 and 1950 are a little bit rubbed out and you cannot read them very well, and it showed up in New York in the early 1950s, then you have a piece that you have to ask some questions about. I would give the same advice to anybody in the art market.

Focus for a moment on the rest of the burden of recovering art in the United States. When art does come here, is found, and claims are made, the issues in the lawsuit include such obvious matters as proof of initial ownership or at least quiet possession, proof of theft, and issues related to the statute of limitations.

The ownership issues are often addressed through research into archives. There are many art dealer archives around. Even though families may not have the records, initial ownership or possession can be proved through historical research.

I also want to emphasize a point that Ms. Nicholas made. Immediately after World War II, in addition to the efforts made to return art that could be found, there was a process for claims to be made on Germany through the countries in which the art was stolen. If, for example, you had art that was stolen in France, you made a claim on France, and they pursued the claim to Germany.

Through the process, an enormous amount of documentation has been generated and is available now to provide evidence that, for example, the work was viewed as being within the family's collection immediately after the war.

In terms of theft, obviously most theft occurs when there are no witnesses present. Usually theft is proven by showing that an object disappeared without the permission of the owner. In fact, that is the

legal standard. You do not actually have to prove theft, but only a loss without authorization, just as you do not have to actually prove initial ownership, merely quiet possession.

In some cases, we have pictures of paintings on the wall to show quiet possession. In other cases, we have storage records as the basis for a claim of theft.

Issues related to the statute of limitations are very complicated. I do not want to go into them in any detail, but the question of whether an American statute of limitations has been triggered typically turns on an analysis of whether the victim has been diligent in looking for art. Sometimes these inquiries might be a comparison of the diligence of the victim in looking for the art to the diligence of the buyer in trying to determine whether the art was legitimately on the market at the time that was purchased.

Just from this brief recitation, I think you can see that recovering art through private litigation in the United States is a problematic process. Although it gets a tremendous amount of attention in the media, it is very labor intensive and very expensive. It is a very difficult process.

I always say that litigation is the dispute mechanism of last resort, no one would use it who did not have to. So, this is a situation that really does call out for further government action, as well as other institutional action. We know that major museums in the United States are looking at their collections.

It is hard for me to make predictions about the direction things are headed. There are really only a few families who have the resources and the history to recover their art through this cumbersome process.

I do join Ms. Nicholas in suggesting that opening of archives will help, particularly if the Swiss have records about the movement of art through their country, such as the abuse of the diplomatic pouch by the German Embassy during the war.

I think any effort by the United States or other countries to accept some responsibility to help victims solve these problems would be very well received.

Thank you.