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Case Two Dürer Paintings – Kunstsammlungen Zu Weimar v. Elicofon

Kunstsammlungen Zu Weimar – Edward I. Elicofon – Grand Duchess of Saxony-Weimar – Germany/Allemagne – Artwork/oeuvre d'art – Spoils of war/butins de guerre – Judicial claim/action en justice – Judicial decision/décision judiciaire – Criminal offence/infraction pénale – Ownership/propriété – Choice of law/droit applicable – Due diligence – Procedural issue/limites procédurales – Statute of limitation/prescription – Unconditional restitution/restitution sans condition

In 1945, two portraits by Albrecht Dürer were stolen from the collection of the Staatliche Kunstsammlungen zu Weimar, the predecessor to the Kunstsammlungen zu Weimar (Weimar Art Collection). During the Second World War the paintings had been stored for safekeeping in the Schwarzburg Castle. While American troops occupied the Castle, the paintings disappeared. In 1966, they were discovered in the possession of a New York collector, Edward I. Elicofon, who had bought them in 1946 from an American serviceman. Upon learning of the Dürers paintings' location, the Kunstsammlungen zu Weimar filed suit seeking restitution. In 1981, after nearly 13 years of litigation, a court ordered Elicofon to deliver the paintings to the rightful owner, the Kunstsammlungen zu Weimar.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Spoils of war

- **1945:** Two paintings by Albrecht Dürer (“Portrait of Hans Tucher” and “Portrait of Felicitas Tucher”) were **stolen** from the Schwarzburg Castle, in Weimar, Germany. In anticipation of an Allied bombardment, the paintings had been transferred to the Castle for safekeeping by the then Director of the *Staatliche Kunstsammlungen zu Weimar*, a State museum in the German Democratic Republic (GDR) and the predecessor to the *Kunstsammlungen zu Weimar* (Weimar Art Collection).
- **1946:** The two paintings were **purchased** by Edward I. Elicofon from an US serviceman, **without knowledge** that they were by Dürer and that they had been stolen in Germany.
- **1966:** Mr. Elicofon **discovered** that the two paintings were by Dürer through a friend who had seen them listed in a book about works of art stolen in Germany during the Second World War. Afterwards, the Federal Republic of Germany (FRG), the Grand Duchess of Saxony-Weimar and the *Kunstsammlungen zu Weimar* demanded the return of the paintings. Elicofon **refused** these demands.
- **27 January 1969:** The FRG commenced **legal action** in New York against Mr. Elicofon to recover the paintings. The bases of FRG’s action were: (i) the paintings belonged to the collection of the *Staatliche Kunstsammlungen zu Weimar*; (ii) they were stolen in 1945 from the Schwarzburg Castle when the US forces withdrew from the Weimar territory; and (iii) the FRG had a right to custody and possession of the paintings under the Joint Declaration of the Three Allied Powers of 19 September 1950, which recognized the FRG as the only representative of the people of Germany.¹
- **1969:** The Grand Duchess of Saxony-Weimar intervened in the lawsuit initiated by the FRG in order to assert title in her own right. She alleged that the paintings were the private property of the successive Grand Dukes of Saxony-Weimar and that title to the paintings was assigned to her by her husband Grand Duke Carl August.
- **1969:** The *Kunstsammlungen zu Weimar* applied to intervene in the action against Elicofon, seeking restitution on the grounds that the paintings belonged to the Museum’s collection.
- **26 September 1972:** Memorandum of Decision and Order of Chief Judge Mishler of the District Court for the Eastern District of New York, which denied the *Kunstsammlungen zu Weimar* a motion to intervene on the ground that it was an “arm and instrumentality” (i.e. a State organ) of the GDR, a country not recognized by the United States at the time.²
- **4 September 1974:** The GDR is formally recognized by the United States.
- **1975:** Upon motion, the US District Court for the Eastern District of New York vacated the order of 26 September 1972 and allowed the *Kunstsammlungen zu Weimar* to file its

¹ F.A. Mann, “Germany’s Present Legal Status Revisited,” *International & Comparative Law Quarterly* 16 (1967): 760-799, cited in Helen L. Ostenberg, “International Law in Domestic Forums: The State of the Art. *Kunstsammlungen zu Weimar v. Elicofon*,” *Brooklyn Journal of International Law* 9 (1983): 183.

² Reported in *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff’d*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931, *reh. denied*, 416 U.S. 952 (1974).

complaint by order of 24 February 1975.³ In its complaint, the *Kunstsammlungen zu Weimar* alleged that: (i) the Dürer paintings had been stolen in 1945 from the *Kunstsammlungen zu Weimar*; (ii) Elicofon acquired them from a thief or his transferee and, therefore, had no right to them; and (iii) as successor to the rights of former sovereign State, *Kunstsammlungen zu Weimar* was entitled to immediate possession.

- **1978:** The District Court granted a motion by the FRG to discontinue its claim⁴ and a second motion by the *Kunstsammlungen zu Weimar* to dismiss the claim of the Grand Duchess based on the evidence that she no longer had ownership of the paintings.⁵
- **1981:** The District Court found that the Dürers had been stolen in July 1945, that the *Kunstsammlungen zu Weimar* was the rightful owner and that Elicofon had to deliver the paintings to the Museum.⁶
- **1982:** The Court of Appeals upheld the decision of the District Court that the *Kunstsammlungen zu Weimar* was entitled to possession of the paintings and ordered Elicofon to deliver the paintings to the *Kunstsammlungen zu Weimar*.⁷

II. Dispute Resolution Process

Judicial claim (civil) – Judicial decision

- This case concerned the question of the ownership of two valuable Dürer paintings stolen during the Second World War and was complicated by the involvement of different legal issues and the submission of a number of conflicting claims by several actors: two foreign claimants – the *Kunstsammlungen zu Weimar* and the Grand Duchess of Saxony-Weimar – one US citizen – Mr. Elicofon – and three States – i.e. the United States (the State of the forum) and the FRG and the GDR (claimants).
- After the 1966 refusal by Edward Elicofon to return the paintings, no attempt was made by any of the parties to settle the case out-of-court. A judicial decision by a court of law appeared as the proper method of dispute settlement to adjudicate the claims and the interests involved.
- The Grand Duchess of Saxony-Weimar claimed that the paintings were the private property of the successive Grand Dukes of Saxony-Weimar and that title to the paintings was assigned to her by her husband Grand Duke Carl August. By decision of 1978, Judge Mishler dismissed the Grand Duchess' claim by holding that, at the time of the removal, the paintings were owned by the State and hence were not in the private property of the Grand Duke. The Judge further held that the paintings became State property in 1918, when the Grand Duke abdicated due to the turmoil brought about by the First World War and the

³ *Federal Republic of Germany v. Elicofon*, 536 F. Supp. 813 (E.D.N.Y. 1978), at 815.

⁴ *Ibid.*

⁵ *Ibid.*, at 824.

⁶ *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), 859.

⁷ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), 1165-1166.

- impending Germany's defeat of 1920 and as a consequence of the settlements that were concluded in 1921 and 1927.⁸
- The *Kunstsammlungen zu Weimar*, as a juristic person with legal capacity, intervened as plaintiff to represent the interests of the GDR, to which the title to the paintings had passed in 1949 from the predecessor in interest (the precedent State).⁹
 - Elicofon claimed ownership title based on his good faith acquisition and the uninterrupted and open possession of the paintings since 1946. He maintained that the paintings were purchased from a custodian who, under German law, could convey good title even though he was not the true owner. In the alternative, Elicofon claimed that he acquired good title under the German doctrine of "*Ersitzung*" (adverse possession under US law), under which a good faith purchaser gains title to a stolen object upon 10 years' possession without notice of defect in title. Finally, the defendant asserted that the New York statute of limitations had run and therefore the restitution claim of the *Kunstsammlungen zu Weimar* was barred.
 - The claimant States – the FRG and the GDR – did not claim to pursue an interest different from and superior to the interest in the reparation for the violation of property rights, such as the interest of the State to the integrity of the national patrimony. In particular, the FRG's complaint stated that it was suing to obtain "custody of the possession of the Dürer paintings in order to restore them to the person or party who is truly and rightfully entitled to their possession".¹⁰ In this respect, the United States stated that it recognized the FRG as "entitled in this litigation to represent the Weimar Museum as trustee of its interests".¹¹

III. Legal Issues

Choice of law – Criminal offence – Due diligence – Ownership – Procedural issue – Statute of limitation

- Once the FRG discontinued its claim and the Duchess's claim was dismissed, the dispute became a classic court case between a dispossessed owner and an innocent post-theft possessor.¹² This type of cases involves the following typical legal issues.
- **Standing:** In every legal system, an entity may be admitted as a plaintiff only if it is recognized by the judge of the forum as a legal person capable of suing under the law of the forum.
 - o In the instant case, for instance, the suit filed in 1969 by the *Kunstsammlungen zu Weimar* was dismissed. This was motivated by the fact that the *Kunstsammlungen zu Weimar* was an agent of the GDR, a country not recognized by the forum State, and

⁸ Ibid., 1153-1154.

⁹ Ibid., at 1152.

¹⁰ Ibid., at 1156.

¹¹ *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), 232.

¹² Elicofon maintained that he purchased the paintings in good faith, without knowledge of their source. Elicofon's good faith was not contested by the plaintiff, as it was demonstrated that the defendant openly displayed the two paintings on the wall of his home, even during gatherings which included some who were knowledgeable about art. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), 833.

therefore without right to sue in US courts. However, in 1974, when the US officially recognized the GDR, the *Kunstsammlungen zu Weimar* was allowed to re-file the lawsuit.

- In appeal, Elicofon contested the legal capacity of *Kunstsammlungen zu Weimar* to pursue a legal action under German law. The defendant contended that the GDR was not the successor State of the Third Reich and of pre-Third Reich States – and hence that the *Kunstsammlungen zu Weimar*, as representative of the GDR, was not entitled to prosecute the restitution claim. Basically, Elicofon argued that the paintings – which were part of the property owned by the Weimar State – had not passed to the GDR because this had not claimed to take the place of the Third Reich, to which all public property had passed as a result of legislation adopted in 1934. According to the defendant, only the FRG had a possible claim of right as it had asserted its rights to all assets of the Third Reich.¹³ In this respect, the Court of Appeals upheld the District Court’s decision that the *Kunstsammlungen zu Weimar* had capacity and standing to bring this action to recover possession of the Dürer paintings because the GDR, “while disclaiming any identity with the Reich, ha[d] established itself as an International Person in connection with its territory and thereby ha[d] become a successor to the German Reich”.¹⁴
- **Timeliness of the legal action:** Elicofon contended that the New York statute of limitations had run and hence the *Kunstsammlungen zu Weimar* was barred from bringing suit.¹⁵ The New York statute provided a three year limitation period. The question was when the limitation period began to run, or, in other words, when the claim of the *Kunstsammlungen zu Weimar* against Elicofon accrued. If it accrued only upon Elicofon’s refusal in 1966, then the suit was timely commenced. If, on the other hand, it accrued in 1946, when Elicofon bought the paintings, the action was barred. In this respect, the Court of Appeals decided that the cause of action against Elicofon accrued only in October 1966, when he refused to return the paintings.¹⁶ Therefore, the Court confirmed the validity of the “**demand and refusal**” rule. According to this rule, the judges of New York State established that a cause of action did not accrue against a good faith purchaser of stolen property until the true owner had made a demand for its return and the possessor had refused the demand. Until the refusal, the purchaser was considered to be in lawful possession. Accordingly, the Court concluded that the legal action of the *Kunstsammlungen zu Weimar* was not barred because it begun in 1969, within the three-year limitation period.¹⁷

¹³ *Ibid.*, at 853.

¹⁴ *Ibid.*, at 855.

¹⁵ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), at 1158.

¹⁶ *Ibid.*, at 1164. The District Court affirmed that the action was not barred under the defense of laches because efforts to locate the paintings had been immediate, “reasonably diligent” and the plaintiff did not “unreasonably delay” filing suit. It was proved that as soon as the theft was discovered, the museum reported the theft and engaged in diligent efforts to trace the paintings, for instance, by contacting German museums and administrative organs, the Allied Control Council, the Soviet Military Administration and the United States Department of State. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), 850-852.

¹⁷ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), at 1166. The Court affirmed that the legal action of the *Kunstsammlungen zu Weimar* would not have been barred even if the cause of action had accrued in 1946

- **Proof that theft occurred:** The fact that the removal of the paintings occurred during the Second World War involve problems such as the lack of evidence by witnesses, documents and the fading of memories. Nevertheless, the *Kunstsammlungen zu Weimar* provided enough evidence, convincing testimony and supporting documents to defeat Elicofon's contention that the theft of the Dürer paintings was dubious. As a consequence, the District Court ruled that the theft of two Dürer paintings from the Schwarzburg Castle between 12 June 1945 and 19 July 1945 "was beyond dispute".¹⁸
- **Good faith acquisition:** Elicofon argued that **under the German law of "good faith acquisition"** a thief could have transferred good title to an innocent purchaser in Germany, even though he did not himself have good title. In turn, the good faith purchaser or his transferee could have transferred good title to Elicofon. Indeed, pursuant to the German Civil Code (paras. 926-936)¹⁹ a purchaser acquires good title to property even if the seller has disposed of the property in violation of a fiduciary obligation under which he acquired possession, i.e. even if the seller does not have title. In this respect, however, the Court found that the thief could not have conveyed title to the contested Dürer paintings under German law because Military Government Law No. 52²⁰ – which superseded the German law – rendered void any transfer of cultural property. It provided, in pertinent part: "All property within the occupied territory owned or controlled, directly or indirectly, in whole or in part, by [the German Reich, or any of the Laender, Gaue, or Provinces, or other similar political subdivisions or any agency or instrumentality thereof] is hereby declared to be subject to seizure of possession or title, direction, management, supervision or otherwise being taken into control by Military Government" (Article I (1)); "[...] no person shall import, acquire or receive, deal in, sell, lease, transfer, export, hypothecate or otherwise dispose of, destroy or surrender possession, custody or control to any property [...] (d) which is a work of art or cultural material of value or importance, regardless of the ownership or control thereof" (Article II).
- **Acquisition of good title under the German doctrine of "Ersitzung":** In the alternative, Elicofon argued that he had acquired good title to the paintings under the German doctrine of "Ersitzung". Under this doctrine, a good faith purchaser gains title to a stolen object upon 10 year's possession without notice of defect in title. In this respect, the Court of Appeals held that New York's interest in regulating the transfers of property located within its border overrode any interest the GDR may have had in applying the policy of "Ersitzung" to extraterritorial transactions. Accordingly, the Court excluded the application of the doctrine of "Ersitzung" and affirmed that the law of New York governed the case. The law of New York is more favourable to owners of stolen art than to good faith possessors as it provides that a purchaser cannot acquire good title from a thief.²¹

in light of the New York's judicially created "non-recognition" toll: the fact that the US recognized the GDR only in 1974 would have tolled the statutes of limitations. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), 850-852.

¹⁸ *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), at 839.

¹⁹ German Civil Code, Federal Law Gazette, I, p. 42, 2909; 2003 I p. 738.

²⁰ Law No. 52 Blocking and Control of Property, Military Government Gazette [Germany, US Zone, Issue A] 1 June 1946, 142.

²¹ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), at 1160.

IV. Adopted Solution

Unconditional restitution

- The Court of Appeals ordered Elicofon to deliver the paintings “Portrait of Hans Tucher” and “Portrait of Felicitas Tucher” by Albrecht Dürer to the Kunstsammlungen zu Weimar.²² This decision followed the findings: (i) that the *Kunstsammlungen zu Weimar* had capacity and standing to bring the lawsuit; (ii) that the *Kunstsammlungen zu Weimar* had a greater right to a claim of ownership of the paintings at the time of the theft than the Grand-Duchess of Saxony-Weimar; (iii) that the claim was timely filed; (iv) that the paintings had been stolen; (iv) that Elicofon did not acquire good title to the paintings in spite of his good faith at the moment of the acquisition.

V. Comment

- The significance of this 13-year-long ownership claim lies in that it is one of the few litigated cases that originated from a theft committed during the Second World War that did not involve victims of Nazi looting. However, just as any Holocaust-related art claim, the *Elicofon* case involved a bitter confrontation between an innocent possessor and a theft victim as well as the usual issues of standing, evidence, ownership and good faith.
- Furthermore, the *Elicofon* decision is significant because it was one of the first cases where a court of law ordered the restitution of stolen artworks on the basis of **policy reasons** that can now be traced through the **cultural heritage treaties** adopted under the aegis of UNESCO. In effect, it appears that the court considered each issue – State succession, good faith acquisition and limitation periods – in light of its **international implications** and, as a result, declined to yield to the foreign laws that conflicted with a specific **national policy** that, in turn, reflected an **internationally recognized policy of restitution of works of art disappeared during times of warfare**.²³ In this respect, it is worth noting that the United States Department of State assumed the role for post-war recovery of cultural objects that were stolen during the Second World War and found their way into the United States.²⁴ In 1982, the Department of State affirmed: “The United States considers that on grounds of principle, good foreign relations, and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations”.²⁵
- Therefore, the resolution of the choice of laws issue in favour of the **law of the forum** (which also corresponded to the *lex rei sitae*, the law of the last transaction) was critical

²² Ibid., at 1165-1166.

²³ Helen L. Ostenberg, “International Law in Domestic Forums: The State of the Art. *Kunstsammlungen zu Weimar v. Elicofon*,” *Brooklyn Journal of International Law* 9 (1983): 179-180, 190-192.

²⁴ A.R. Hall, “Return of Looted Objects of Art to Countries of Origin,” *Department of State Bulletin* 16 (1947) 358, and A.R. Hall, “The US Program for the Return of Historic Objects to Countries of Origin,” *Department of State Bulletin* 31 (1954) 493, cited in Ana F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006), 143.

²⁵ US Code Cong. & Adm. News 4100 [1982], cited in Ana F. Vrdoljak, *ibid.*, 143.

because, under the law of New York, a purchaser cannot acquire good title from a thief.²⁶ More precisely, the application of the law of New York was functional to the interest in prohibiting the transportation of stolen goods into the United States and in preventing the State from becoming a haven for traffickers in stolen art. By way of contrast, the application of the *lex originis*, that is the law of the country of origin of disputed art, would have helped Elicofon. Indeed, the German rules on prescription and on limitation periods would have shielded Elicofon's title from any legal action.

- As far as the good faith acquisition is concerned, for instance, the Court of Appeals – thereby upholding the decision of the District Court – affirmed that “[t]he fact that the theft of the paintings occurred in Germany is totally irrelevant to the policy of *Ersitzung* to protect bona fide purchasers so as to promote the security of transactions”.²⁷ However, “New York’s interest in regulating the transfers of property located within its border [...] overrides any interest the GDR may have in applying the policy of *Ersitzung* to extraterritorial transactions [...]. Thus [...], *Ersitzung* is inapplicable and New York law governs, under which a purchaser cannot acquire good title from a thief.”²⁸ The Court clarified that “[i]n applying the New York rule that a purchaser cannot acquire good title from a thief, New York courts do not concern themselves with the question of where the theft took place, but simply whether one took place. Similarly, the residence of the true owner is not significant for the New York policy is not to protect resident owners, but to protect owners generally as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods.”²⁹
- Therefore, it can be submitted that the *Elicofon* court was the first to affirm the relevance of the interests in the protection of cultural heritage and in the preservation of the integrity of national patrimonies from the danger of dispersion. True, the court did not make any reference to cultural heritage treaties in force at the time. However, it did so by engaging in a comparative effort that encompassed the laws of the United States and of Germany, Allied Military Forces laws and international law. It was the adoption of this comparative and internationalist perspective on the part of the *Elicofon* courts that ultimately led to the proper settlement of this complex ownership claim.

VI. Sources

a. Bibliography

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²⁶ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), at 1160.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

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c. Legislation

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