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## **Case Cranach Diptych – Goudstikker Heirs and Norton Simon Museum**

*Jacques Goudstikker – Norton Simon Museum – Artwork/artwork – Nazi looted art/Nazi spoliations – Negotiations/negotiation – Judicial claim/action – Judicial decision/judicial decision – Ownership/property – Statute of limitation/prescription – Act of State – Request denied/rejection of the application*

*The Cranach diptych “Adam and Eve” was presumably part of Jacques Goudstikker’s collection looted by the Nazis during the Second World War. For several years, Goudstikker’s sole heir, Marei von Saher, and the Norton Simon Museum in California have led unsuccessful negotiations regarding the heir’s restitution claim. Notwithstanding the support received by the State of California and by several organizations, Marei von Saher’s claims in replevin were dismissed by both the District Court for the Central District of California and by the Court of Appeals for the Ninth Circuit. The Supreme Court of the United States denied the heir’s petition for writ of certiorari.*

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

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## I. Chronology

### Nazi looted art

- **May 1931:** The Cranach diptych – two life-size paintings entitled “Adam and Eve” by sixteenth-century artist Lucas Cranach the Elder – was auctioned off in Berlin. The auction catalogue stipulated that they were part of the Stroganoff-Scherbatoff collection. George Stroganoff-Scherbatoff was a great art collector whose family lost all its property during the Bolshevik revolution. Except for the provenance indicated in the auction catalogue, no other document has been found which conclusively links the Stroganoffs to the diptych. The buyer at the auction was presumably the Dutch art collector, Jacques Goudstikker. His notebook lists the Cranach diptych as Numbers 2721 and 2722.
- During the **Second World War:** Jacques Goustikker’s art collection was seized by Nazi officials.
- **May 1945:** The Allied Forces recovered the Cranach diptych at Göring’s mansion in Berlin and sent them for identification to the Munich Central Collection Point.
- In or about **1946:** The Cranach diptych was returned to the Netherlands under the policy of external restitution according to which looted art objects were not returned directly to the dispossessed owners, but to their respective country of nationality. In the Netherlands, the return was administered by the Dutch Art Property Foundation. Three hundred of all the paintings returned to the Netherlands were from the Goudstikker collection.<sup>1</sup>
- **1966:** The Cranach diptych was returned to George Stroganoff (and not to the Goudstikker family) as part of a settlement with the Dutch government.<sup>2</sup>
- **1970-1971:** George Stroganoff sold the Cranach diptych to the Norton Simon Museum for \$800,000, which put it on display since 1979.
- **9 January 1998:** The Goudstikker heir filed a claim with the Dutch government demanding the return of “the Goudstikker collection and all proceeds received by the Dutch government from the sale of any of the works taken by Göring”.<sup>3</sup> The heir was not yet aware that the Cranach diptych was no longer with the Dutch government.<sup>4</sup> According to her complaint, she located the paintings at the Norton Simon Museum only on **25 October 2000**.
- **2002:** The state of California enacted the “Holocaust-Era Claims Provision”, which barred the statute of limitations for claims filed against galleries or museums **on or before 31 December 2010** regarding Nazi-looted art thefts (by implementing section 354.3 California Code of Civil Procedure, CCP). Subsequently, Jacques Goudstikker’s sole living heir, Marei von Saher, initiated discussions with the Norton Simon Museum.
- **2006:** The Cranach diptych was appraised for insurance purposes and valued at \$24,000,000.

<sup>1</sup> See Anne Laure Bandle, Raphael Contel, Marc-André Renold, “Case 200 Paintings – Goudstikker Heirs and the Netherlands,” Platform ArThemis (<http://unige.ch/art-adr>), Centre of Art-Law, University of Geneva.

<sup>2</sup> A report from October 2000, sponsored by the State Secretary of the Netherlands, entitled “Origins Unknown”, revealed that the paintings were sold at auction in 1966 by the Dutch Government to the Stoganoff family.

<sup>3</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

<sup>4</sup> *Ibid.* On the outcome of the Dutch claim, see Anne Laure Bandle, Raphael Contel, Marc-André Renold, cit. n. 1.

- **1 May 2007:** Marei von Saher filed an action with the United States (US) District Court for the District of California (hereafter “District Court”) seeking the return of the paintings. The heir alleged the following claims for relief: (1) replevin; (2) conversion; (3) damages under California Penal Code section 496; (4) quiet title; and (5) declaratory relief.
- **9 July 2007:** The Norton Simon Museum, in return, filed a motion to dismiss the plaintiff’s complaint arguing that: (1) the applicable statute of limitations is the three-year limitation period provided by section 338 CCP as section 354.3 CCP was unconstitutional; (2) Marei von Saher failed to show “plausible grounds” for challenging the museum’s ownership of the paintings; and (3) Marei von Saher did not sufficiently establish the violation of section 496 California Penal Code.
- **18 October 2007:** The District Court dismissed von Saher’s claim, holding that section 354.3 CCP was unconstitutional, and hence did not apply. Therefore, in view of the original statute of limitations of three years (section 338 CCP) declared applicable here, the Court concluded that von Saher’s claim was time barred.<sup>5</sup>
- **14 January 2010:** The US Court of Appeals for the Ninth Circuit (hereafter “Court of Appeals”) affirmed in part and reversed in part the District Court’s decision. According to its opinion, the heir’s complaint should not have been dismissed without leave to amend. Marei von Saher filed a petition en banc (that the full panel should revisit her case and not only 3 judges), which the Court of Appeals denied on **14 April 2010**.<sup>6</sup>
- **25 February 2010:** Based on the decision from the Court of Appeals, the Committee on Judiciary introduced Assembly Bill 2765, establishing: (1) a six-year statute of limitations instead of three years if the action is brought against a museum, dealer, gallery or auction house; (2) the standard of “actual discovery” instead of “constructive discovery”; and (3) retroactive application.<sup>7</sup>
- **14 April 2010:** Marei von Saher then filed a petition for writ of certiorari with the US Supreme Court, asking for a revision of the case.
- **27 June 2011:** The Supreme Court denied the petition.<sup>8</sup>
- **8 November 2011:** The heir filed an amended complaint alleging the same claims as in the original complaint, but now based them on the amended statute of limitations provisions (section 338 CCP). Marei von Saher asserted that she discovered the location of the Cranach diptych not earlier than **25 October 2000**.
- **22 March 2012:** The Norton Simon Museum filed a motion to dismiss for failure to state a claim upon which relief can be granted, which was granted by the District Court.<sup>9</sup>
- **6 June 2014:** The Court of Appeals reversed and remanded the case for the District Court to determine whether initial transfer of paintings from the Netherlands to Stroganoff was a sovereign act, and whether any exception to the Act of State doctrine applied if it was.<sup>10</sup>

<sup>5</sup> *From Saher v Norton Simon Museum of Art*, 2007 WL 4302726 (C.D. Cal. October 18, 2007).

<sup>6</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9<sup>th</sup> Cir. 2010) No. 07-56691, 2010 U.S. App. LEXIS 1018.

<sup>7</sup> Assemb. Bill No. 2765, Chaptered, 30 September 2010.

<sup>8</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2011).

<sup>9</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

<sup>10</sup> *From Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9<sup>th</sup> Cir. Cal. 2014).

- **29 June 2015:** A Magistrate Judge denied the parties' Stipulation Regarding Confidentiality Protective Order, as it failed to identify any specific privilege that applied to the information and documents within its ambit.<sup>11</sup>
- **13 June 2016:** Marei von Saher and the Norton Simon Museum each submitted a Motion for Summary Judgment with the District Court. The court granted the Museum's Motion and denied the heir's Motion.<sup>12</sup>
- **15 August 2016:** The Honorable John F. Walter of the Central District of California entered judgment stating that the Norton Simon Museum is the sole owner of the title to the Cranach diptych, and Marei von Saher has no right, title, or interest in them.<sup>13</sup>
- **9 September 2016:** Marei von Saher appealed the judgment to the 9th Circuit Court of Appeals.
- **30 July 2018:** The Court of Appeals affirmed the decision of the District Court.
- **13 August 2018:** Marei von Saher filed a petition for panel rehearing and rehearing en banc which the Court of Appeals denied on **11 September 2018**.
- **8 February 2019:** Marei von Saher filed a petition for writ of certiorari with the Supreme Court asking for a revision of the case.<sup>14</sup>
- **14 March 2019:** The Commission for Art Recovery, the 1939 Society, and current and former members of congress filed briefs as Amici Curiae.
- **20 May 2019:** The Supreme Court denied the petition.<sup>15</sup>

## II. Dispute Resolution Process

### Negotiations – Judicial claim – Judicial decision

- Negotiations between the Norton Simon Museum and Marei von Saher were unsuccessful as both parties were entrenched by their belief that they would have a very strong legal case. While von Saher had evidence showing that the Cranach diptych was part of Goudstikker's collection, the Norton Simon Museum pleaded that it bought the Cranach diptych from their "historical owner".
- Following the failure of negotiations, Marei von Saher initiated legal proceedings in California. Her claim was "eased" by the Governors engagement for Holocaust victims who amended the initial limitation period and the degree of required discovery. Marei von Saher filed a claim for replevin with the District Court and, following its dismissal, with the Court of Appeals. The Court of Appeals allowed the heir to file sufficient evidence which would show that her claim was timely.

<sup>11</sup> Mem. and Order the. Parties' dot. re. Conf. Prot. Order June 29, 2015.

<sup>12</sup> Civil Min. Gen., August 9, 2016.

<sup>13</sup> Judgment, August 15, 2016.

<sup>14</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2019 WL 626442

<sup>15</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 139 S. Ct. 2616, 204 L. Ed. 2d 264 (2019).

- However, before amending the complaint, the heir sought a rehearing en banc of the claim, supported by amicus briefs from the Attorney General of California, the Commission for Art Recovery and a group of California organizations. The California legislature immediately reacted to that decision by introducing Assembly Bill 2765 shortly after it came out. The Bill amended section 338 CCP retroactively. As enacted, claims for the recovery of an artwork against a museum, gallery, dealer or auction house could be brought within six instead of three years starting from the moment of “actual discovery” and not of “constructive discovery” as previously required. This means that the statutory period run from the time the identity and whereabouts of the artwork as well as the information establishing a claim of ownership are actually discovered.
- On the day of the refusal from the Court of Appeals, the plaintiff filed a petition for certiorari with the Supreme Court, asking for her case to be reviewed, which was refused.
- Ultimately, the plaintiff took advantage of the extended statute of limitations provided by the amended section 338 CCP and filed an amended complaint alleging that the plaintiff’s claim was timely given that “she did not actually discover that the Cranach diptych was on display at the Norton Simon Museum of Art at Pasadena until October 25, 2000”.<sup>16</sup>
- The Court of Appeals held that the heir’s claims for replevin and conversion did not conflict with foreign policy and serious weight did not have to be given to the Executive Branch’s view of the impact that case had on foreign policy.<sup>17</sup>
- The Norton Simon Museum opposed the heir’s Motion for Summary Judgment, arguing that it had good title for the Cranach diptych; thus, it precluded judgment in favor of the heir and entitled the museum to summary judgment.<sup>18</sup> The heir opposed the museum’s Motion for Summary Judgment, arguing that the Dutch government did not acquire ownership or a power to transfer the Cranach diptych after the Second World War; thus, the museum did not have good title, and she was entitled to summary judgment.<sup>19</sup>

### III. Legal Issues

#### Act of State – Ownership – Statute of limitation

- Court proceedings essentially focused on the constitutionality of the California Holocaust-Era Claims Provision, amending the California Code of Civil Procedure by enacting section 354.3 CCP, which states that “any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any [museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance]”, which “shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31,

<sup>16</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

<sup>17</sup> *From Saher v Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. Cal. 2014).

<sup>18</sup> Def’s up. to Pl’s against. Summ. J. July 1, 2016.

<sup>19</sup> Civil Min. Gen. August 9, 2016.

- 2010”.<sup>20</sup> Both the District Court and the Court of Appeals held that it violated (1) the foreign affairs doctrine, as it also applied to a museum exhibiting looted art that was located outside the State’s territory; and (2) the federal government’s exclusive power to make and resolve war, including the resolution of war claims.<sup>21</sup> The Court of Appeals noted that such a change of law has to be conducted by the federal government and not by a local tribunal.<sup>22</sup>
- Secondly, in dismissing the applicability of section 354.3 CCP, the courts had to evaluate whether von Saher had stated a cause of action within the statute of limitations provided by section 338(c) CCP valid at the time of the Museum’s acquisition of the Cranach diptych in 1971. The District Court considered that in the present case, the limitation period under section 338(c) CCP had expired. However, the Court of Appeals allowed the plaintiff to amend her complaint by showing precisely when she had received constructive knowledge of the paintings’ location. Evidence in this regard was of great importance, as the statute of limitations runs from the moment “when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts”.<sup>23</sup> The plaintiff instead first filed a petition with the Court of Appeals, asking the court to review her case en banc. The petition was denied by the court, following which the heir filed a writ of certiorari with the Supreme Court, which was ultimately denied as well. The plaintiff then filed an amended complaint, to which the Museum responded with a motion to dismiss, which was granted.
  - Finally, the Court of Appeals considered that the case might implicate the Act of State doctrine, underlining the importance of determining whether the conveyance to Stroganoff constituted an official act of a sovereign. Thus, the Court of Appeals remanded the case back to the District Court to determine whether the remedies that von Saher sought – namely, a declaration that she is the rightful owner of the Cranach diptych and an order both quieting title in them and returning them to her – implicate the Act of State doctrine.<sup>24</sup> The District Court held that the Dutch State had acquired ownership of the Cranach diptych under Dutch law (Royal Decree E133), thus the transfer to Stroganoff by the Dutch State constituted an official act of a sovereign.<sup>25</sup> The District Court concluded that the Norton Simon Museum has good title to the Cranach diptych and entered judgment in favor of the Museum, noting that the heir takes nothing, the action is dismissed on the merits, and the Museum recovers its costs.<sup>26</sup>
  - In its 2018 decision, the Appellate Court held that (1) the Act of State doctrine barred the heir’s claim; (2) the claim did not fall within the scope of the commercial act exception to the Act of State doctrine; (3) the Second Hickenlooper Amendment did not preclude application of Act of State doctrine; and (4) the policies underlying the Act of State doctrine support its application to bar the heir’s claim.<sup>27</sup>

<sup>20</sup> Section 354.3 (a)(2) CCP defines Holocaust-era artwork by “any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive”.

<sup>21</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9<sup>th</sup> Cir. 2010).

<sup>22</sup> *Ibid.* (20166 Royal Decree E133.als).

<sup>23</sup> *Ibid.*, at 969.

<sup>24</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 726 (9<sup>th</sup> Cir. 2014).

<sup>25</sup> Civil Min. Gen. August 9, 2016.

<sup>26</sup> Judgment August 15, 2016.

<sup>27</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9<sup>th</sup> Cir. 2018).

- The Appellate Court determined that the Second Hickenlooper Amendment did not restrict the application of the Act of State doctrine here because the Dutch government did not “confiscate” the paintings from von Saher’s family when it conveyed them to Stroganoff in 1966. Additionally, the court found the Dutch system was in line with other contemporary restitution schemes, and therefore the Stroganoff conveyance did not violate principles of international law.<sup>28</sup>

#### IV. Adopted Solution

##### Request denied

- The Appellate Court affirmed the District Court’s decision to bar the heir’s claim, and the Supreme Court denied her petition for writ of certiorari.
- Marei von Saher has exhausted all available remedies within the US court system, and there are no other avenues for recovery.
- Title and possession of the Cranach Diptych remain with the Norton Simon Museum, where they are currently on display. This case is now final between the two parties.

#### V. Comment

- Frequently, procedural hurdles prevent courts from dealing with Holocaust-era related restitution claims.<sup>29</sup> In the case under consideration, the Supreme Court had indeed not decided on the substance of the case, given the Act of State doctrine recognized by US federal courts (in the absence of any treaty, it cannot decide over foreign takings, i.e. the restitution decisions made by the Dutch government and courts).<sup>30</sup> As commented by one of the heir’s attorneys, Lawrence Kaye on the June 2011 decision, “the Norton Simon Museum has tried to avoid having the courts address von Saher’s claim on the merits and has instead hidden behind technical defenses like the statute of limitations”.<sup>31</sup>
- As an alternative, Marei von Saher could consider filing a claim for the Cranach diptych in the Netherlands, based on Dutch property law (lack of property title for the sale in 1966).<sup>32</sup> However, as the Dutch government agreed in 2006 with the Dutch Restitution Committee, to return her 200 paintings, formerly part of the national collection, her chances to obtain sufficient political and public support again for another claim in the Netherlands would be unlikely.<sup>33</sup>

<sup>28</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018).

<sup>29</sup> See Lawrence M. Kaye, “Avoidance and Resolution of Cultural Heritage Disputes”.

<sup>30</sup> *From Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

<sup>31</sup> Press Release – Herrick, Feinstein LLP, “Despite Setback by the Supreme Court”.

<sup>32</sup> See Demarsin, “The Third Time Is Not Always a Charm”.

<sup>33</sup> See Anne Laure Bandle, Raphael Contel, Marc-André Renold, cit. n. 1.

- The case could be reopened as Ukraine is currently considering a claim for the return of the diptych. According to Yelena Zhivkova, deputy director of the Art Museum in Kyiv, in 1939 the works were confiscated from a monastery in Kyiv and sent to Leningrad where they were auctioned to raise money for the Soviet Union. The works were sold to Goudstikker under false pretenses, as they were advertised as part of the aristocratic Russian Stroganoff family's collection.<sup>34</sup>

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<sup>34</sup> See Baranovskaya, "Ukraine Seeks to Bring Home Renaissance Artwork Sold Under False Pretenses".



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