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Case La cueillette de Pissarro – Heirs Simon Bauer v. Bruce and Robbi Toll

Heirs Simon Bauer – Bruce et Robbi Toll – Artwork/œuvre d'art – Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/décision judiciaire – Jurisdiction/conflit de juridiction – Ownership/propriété – Procedural issue/limites procédurales – Statute of limitation/prescription – Unconditional restitution/restitution sans condition

The heirs of Simon Bauer, a deported Jew whose collection had been confiscated under the Nazi regime, took advantage of the presence in France - as part of an exhibition – of Pissarro's painting “La cueillette” to request its restitution. The Paris First Instance Court (Tribunal de grande instance de Paris), on the basis of the 1945 Order on the nullity of acts of spoliation (Ordonnance sur la nullité des actes de spoliation accomplis par l'ennemi), ordered the restitution of the painting on 7 November 2017. The Court of Appeal upheld this decision on 2 October 2018.

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I. Chronology

Nazi-looted art

- **1st October 1943: Jean-François Lefranc**, an art dealer appointed by the Commissariat Général aux Questions Juives (CGQJ),¹ **confiscated** 93 master paintings by Simon Bauer, including a gouache by Pissarro entitled “La cueillette” (or “La récolte des pois”).
- **7 April 1944: Lefranc sells** “La cueillette” to a certain Madame Eudeline.²
- **11-12 October 1945:** on his return from the Drancy concentration camp, Simon Bauer requested the return of his collection on the basis of Order No. 45-770 of 21 April 1945,³ which provided for the nullity of all sales.
- **8 November 1945:** the President of the Seine Civil Court (*Tribunal civil de la Seine*) declared the sale of the Pissarro gouache by Lefranc **null** and void and ordered its return to Simon Bauer.
- **4 May 1951:** the Paris Court of Appeal **confirms the decision** of the Seine Civil Court. However, the work **was not returned** to Jean-Jacques Bauer, the only surviving grandchild of Simon Bauer, who died on 1st January 1947.⁴
- **1965:** the gouache reappeared in Paris in the hands of a Parisian woman who **sold** it to an American gallery owner; the latter is arrested in Paris and the work is seized, but it is later **returned** to the gallery owner.⁵
- **February 1966:** the French Museums Directorate authorized the export of “La cueillette”⁶ abroad.
- **22 June 1966:** “La cueillette” was **sold** by a certain David B. Findlay at an auction in London to an unknown buyer.
- **18 May 1995:** Bruce and Robbi Toll **acquired** the painting at a public auction in New York.
- **23 February 2017:** “La cueillette” was included in the **exhibition** organized by the Musée Marmottant Monet in Paris entitled “Pissarro, le premier des impressionnistes”.
- **30 May 2017:** the Paris First Instance Court (*Tribunal de Grande Instance de Paris*), seized by the Bauer heirs, ordered the sequestration of the gouache.
- **13 July 2017:** the Bauer heirs sued the Tolls to obtain the return of “La cueillette”.⁷
- **7 November 2017:** the Paris First Instance Court **ordered the return** of the gouache to the Bauer heirs.⁸

¹ French administrative body created by the Vichy government of Marshal Pétain to deal with all matters related to French antisemitic policy. See <http://akadem.org/medias/documents/--CGQJ.pdf>.

² Paris First Instance Court, judgment given in summary proceedings, 7 Novembre 2017, No. 17/58735, p. 3.

³ Donaud, “Séquestre au musée”, p. 7.

⁴ Paris First Instance Court, judgment given in summary proceedings, 7 Novembre 2017, No. 17/58735, p. 3.

⁵ Noual, “Spoliation et restitution d’une œuvre d’art”, p. 1.

⁶ Ibid.

⁷ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735, p. 4.

⁸ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735.

- **2 October 2018:** the Paris Court of Appeal **upheld** the decision of the First Instance Court.⁹ The Tolls appealed to the Court of Cassation.
- **11 September 2019:** the First Civil Chamber of the Court of Cassation rejected the priority question of constitutionality raised by the Tolls and, consequently, the referral of the case to the Constitutional Council.¹⁰
- **1 July 2020:** the Court of Cassation rejected the appeal against the judgment of 2 October 2018 and confirmed the restitution of the painting to Simon Bauer's heirs.¹¹

II. Dispute Resolution Process

Judicial claim – Judicial decision

- In light of the decision of the Seine Civil Court in 1945 declaring the sale of the gouache null and void and ordering its return to Simon Bauer, as well as its confirmation by the Paris Court of Appeal in 1951, it was pointless for the Bauer heirs to resort to alternative methods of dispute resolution in order to obtain the return of the painting, and it is understandable that they preferred to take legal action. The reason why the gouache was not returned to Simon Bauer in 1951 remains unknown.
- After discovering the presence of “La cueillette” on the French territory as part of the exhibition at the Musée Marmottant, the Bauer heirs applied to the interim relief judge of the Paris First Instance Court (*Tribunal de Grande Instance de Paris*) to have it sequestered. The Court granted the request in view of the fact that the work would be returned to the United States at the end of the exhibition. The First Instance Court appointed the Académie des Beaux-Arts as receiver of the painting until the end of the exhibition, i.e. until 16 July 2017. Subject to the Bauer heirs justifying the referral of the case to the judges before 14 July 2017, the Court appointed the Établissement public des musées d'Orsay et de l'Orangerie as receiver for the remainder of the exhibition.¹²
- The heirs then brought an action against the Tolls before the Paris First Instance court (*Tribunal de Grande Instance de Paris*) to obtain the return of the gouache, which they obtained in 2017¹³ on the basis of Order No. 45-770 of 1945 on the nullity of acts of spoliation.
- The Tolls lodged an appeal against this order but the Paris Court of Appeal uphold the decision of the First Instance Court.¹⁴

⁹ Bommelaer, “La justice confirme la restitution d’un Pissarro à une famille spoliée sous l’Occupation”, p. 1.

¹⁰ Arrêt n°810 du 11 septembre 2019 (18-25.695) - Cour de cassation - Première chambre civile.

¹¹ Gignoux, “La Cour de cassation confirme la restitution de “La Cueillette des pois” de Pissarro”.

¹² Paris First Instance Court, judgment given in summary proceedings, 30 May 2017, No. 17/52901.

¹³ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735.

¹⁴ Bommelaer, “La justice confirme la restitution d’un Pissarro à une famille spoliée sous l’Occupation”, p. 1.

III. Legal Issues

Jurisdiction – Procedural issue – Statute of limitation – Ownership

- In this case, the Paris First Instance Court ruled that the Order of 21 April 1945 was applicable to the case before it. This order provides for the nullity of acts of disposal carried out as a result of sequestration, provisional administration, management, liquidation, confiscation or any other measures in excess of common law in force on 17 June 1940.¹⁵
- The Tolls had criticized its applicability in this case on the grounds that the 1995 sale, during which they had acquired “La cueillette”, did not constitute an act of disposal within the meaning of Article 1 of the Order, which refers only to acts of transfer of ownership occurring during the occupation. The Court, basing itself on Article 4 of the Order, which does not distinguish between the purchaser and successive purchasers, considered that the Order was also intended to apply to all transactions subsequent to the acts of disposal carried out as a result of the transfers of property carried out during the occupation.¹⁶
- The Tolls argued that French courts did not have jurisdiction to rule on the restitution of the Pissarro painting which pertained to the Florida courts. Article 42 of the French Code of Civil Procedure designates the jurisdiction of the place of domicile of the defendant (Florida in this case). However, the Court held that Article 17 of the Order, according to which in the cases provided for in this Order, the claim shall be brought before the president of the civil court or in commercial matters before the president of the civil court or of the commercial court, at the choice of the plaintiff justified its exceptional jurisdiction.
- Article 2276 of the French Civil Code provides for a mechanism of acquisitive prescription allowing the acquisition of ownership of a movable thing by the possessor in good faith (provided that possession has been continuous, peaceful, public and unequivocal).¹⁷ The Tolls argued that the action initiated by the Bauer heirs could not succeed, as they had become owners of the painting by virtue of this acquisitive prescription. The First Instance Court, without examining the length or characteristics of the possession, dismissed the argument, recalling that the statute of limitations did not apply to possessors in bad faith. However, the Tolls are deemed to be in bad faith pursuant to Article 4 of the Order of 21 April 1945, which provides that the purchaser or successive purchasers are considered to be possessors in bad faith with regard to the dispossessed owner.¹⁸

¹⁵ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735, p. 3.

¹⁶ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735, p. 7.

¹⁷ Article 2229 of the French Civil Code.

¹⁸ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735, p. 9.

- The defendants argued that the action of the Bauer heirs could not succeed in view of the time limits for both foreclosure and prescription.¹⁹ As regards the time limit, Article 21 of the Order of 21 April 1945 requires dispossessed owners to act, unless it is materially impossible to do so, within six months of the legal date of the cessation of hostilities, i.e. 1 June 1946.²⁰ However, Simon Bauer had filed his application for annulment of the sale of his property on 27 and 29 August 1945, i.e. within the time limit set by the said order. Consequently, the Paris Court of First Instance ruled that the Bauer heirs' action was not time-barred. As regards the statute of limitations, the French Civil Code, in its version prior to 19 June 2008 and applicable to the case in point, provides for a 30-year statute of limitations for real and personal actions. However, it is settled case law that this limitation does not run against a person who was unable to act. The First Instance Court considered that even though the Bauer heirs had been informed of the sale of the painting in 1965 in France, then in London in 1966 and in New York in 1995, the 1945 Order being a strictly national text, they would not have been able to act before an English or American court. As a result, they could only file a claim to the painting during the period starting from 1965 to 22 June 1966 (date of the London sale) and from 23 February 2017, the date of the reappearance of the gouache on French territory on the occasion of its public exhibition at the Musée Marmottan. Consequently, the Court considered that the statute of limitations has not expired.²¹

IV. Adopted Solution

Unconditional restitution

- On 8 November 1945, the President of the Civil Court of the Seine declared the sale of Pissarro's gouache by Lefranc null and void and ordered its return to Simon Bauer. This decision was confirmed on 4 May 1951 by the Paris Court of Appeal (although the work was not returned to Simon Bauer).
- On 7 November 2017, the Paris First Instance Court ordered - once again - the restitution of "La cueillette" to the Bauer heirs. It also ordered Toll to pay 8,000 euros in legal fees to the Bauer heirs. The Paris Court of Appeal upheld the decision of the First Instance Court in all its provisions.²²

¹⁹ Foreclosure is "the sanction for failure to perform a particular formality within a given period" (see Cornu, *Vocabulaire juridique*, 11th ed. 2016, PUF), while extinctive prescription is "a mode of extinction of a right resulting from the inaction of its holder for a certain period of time" (see Article 2219 of the French Civil Code).

²⁰ Law No. 46-991 of 10 May 1946 fixing the legal date for the cessation of hostilities as 01-06-1946 for the execution of laws, decrees and contracts.

²¹ Paris First Instance Court, judgment given in summary proceedings, 7 November 2017, No. 17/58735, p. 10.

²² Bommelaer, "La justice confirme la restitution d'un Pissarro à une famille spoliée sous l'Occupation", p.1.

- The Tolls have announced that they intend to lodge an appeal by the French Supreme Court (*Cour de cassation*).²³ However, as this appeal will not have suspensive effect, they will have to return the painting in accordance with the provisions of the judgment confirmed by the Court of Appeal.
- On 1 July 2020, the Court of Cassation definitively confirmed the restitution of the painting to Simon Bauer's descendants.

V. Comment

- The Order of 21 April 1945 allows victims of acts of disposal carried out as a result of sequestration, provisional administration, management, liquidation, confiscation or any other measures exorbitant to common law in force on 17 June 1940 to obtain the restitution of their property, rights or interests, by applying the principle of the nullity of the initial act of disposal.²⁴
- This order enshrines the commitments taken by the French National Committee in an order of 12 November 1943 concerning the nullity of acts of spoliation carried out by the enemy or under its control.²⁵ In the months following the promulgation of the 1945 Order many victims took legal action and obtained the restitution of their property. This frenetic judicial activity continued over the following years, slowing down in 1949, picking up slightly between 1955 and 1969, and then drying up until the Mattéoli Commission in 1997²⁶ gave rise to a new wave of restitution actions.²⁷ The order of the Paris First Instance Court in the present case is therefore the first decision made on the basis of this specific text in 20 years.
- The 1945 Order is particularly interesting for victims of looted art in that it irrefutably presumes the initial purchaser and successive purchasers to be in bad faith²⁸ and therefore avoids the French Civil Code's mechanism of acquisitive prescription. Some may regret that this irrefutable presumption results in depriving judges, seized of a restitution case on the basis of the Order of 1945, of any discretion. Others will argue that this avoids the need for the courts to arbitrate a situation in which two perfectly valid property rights are in conflict - at least in appearance - and to assess the good faith of the successive purchaser, which is a very vague notion. In other words, the courts are obliged to mechanically apply a text and cannot do "justice", as requested by the Tolls, who argued that their accusation was unfair.

²³ Bommelaer, "La justice confirme la restitution d'un Pissarro à une famille spoliée sous l'Occupation", p.1.

²⁴ Article 1 of the Order No. 45-770 of 21 April 1945.

²⁵ Ordinance of 12 November 1943 on the nullity of acts of spoliation carried out by the enemy or under its control, issued to implement the United Nations Solemn Declaration of 5 January 1943.

²⁶ The Mattéoli Commission is a study taskforce on the spoliation of Jews in France during the Occupation set up in 1997 and chaired by Jean Mattéoli. The Commission was charged with studying the method of spoliation of Jewish property that had been seized by both the occupying forces and the Vichy authorities between 1940 and 1944, with assessing the extent of the spoliation and locating the property.

²⁷ Noual, "Spoliation et restitution d'une œuvre d'art", p. 3.

²⁸ Article 4 of the Order No. 45-770 of 21 April 1945.

- However, it seems that the Paris First Instance Court was aware that its hands were tied and wanted to limit the impact of its decision. Indeed, the procedure of the 1945 Order is not only easy, but also quick and final: this is why it was entrusted to the president of the Civil Court or the Commercial Court ruling in summary proceedings and why the restitution order is, by way of principle, immediately enforceable. However, provisional enforcement was expressly excluded by the First Instance Court in this case, which means that the Tolls were not obliged to return the painting until the time limit for lodging an appeal had expired. However, as the order was upheld in its entirety by the Court of Appeal, the Tolls are now obliged to return the painting. Moreover, it is interesting to note that, although Article 6 of the 1945 Order provides that the dispossessed owner shall reimburse the purchaser for the price paid by the latter [...], nothing is mentioned in this respect in the order of the First Instance Court, a point that will surely be discussed on appeal.

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c. Laws

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- Ordonnance n° 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12 novembre 1943 sur la nullité des actes de spoliation accomplis par l'ennemi ou sous son contrôle et édictant la restitution aux victimes de ces actes de leurs biens qui ont fait l'objet d'actes de disposition (<http://www2.culture.gouv.fr/documentation/mnr/or2104.htm>).
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