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## Portrait of a Youth – Reichel Heirs v. Sarah Blodgett Dunbar

*Oskar Reichel – Sarah Blodgett Dunbar – Artwork/œuvre d'art – Nazi looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/décision judiciaire – Due diligence – Ownership/propriété – Procedural issue/limites procédurales – Statute of limitation/prescription – Request denied/rejet de la demande*

*In the mid-2000s, Claudia Seger-Thomschitz, one of the heirs of Oskar Reichel, attempted to recover the painting “Portrait of a Youth” from Sarah Blodgett Dunbar on the grounds that it had been lost as a result of Nazi persecution during the Second World War. The 2010 appeal decision of the United States Fifth Circuit Court of Appeals settled the case in favour of Sarah Blodgett Dunbar.*

*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

- **1939:** The painting “Portrait of a Youth”, by Oskar Kokoschka, was sold in Vienna to art dealer Otto Kallir by Oskar Reichel, a Viennese art collector of Jewish descent. The subject of the painting was Hans Reichel, son of Oskar Reichel.
- **1940-1945:** Otto Kallir immigrated to the United States and established the art gallery St Etienne, where he organized a Kokoschka exhibition, which included the painting “Portrait of a Youth”.<sup>1</sup>
- **1946:** Sarah Reed-Platt bought the painting at the art gallery St Etienne.
- **1973:** Sarah Blodgett Dunbar, the daughter of Sarah Reed-Platt, inherited the Kokoschka painting from her mother.
- **2007:** Being aware that it had been in Oskar Reichel’s possession, Claudia Seger-Thomschitz, one of his heirs, looked into the fate of the painting “Portrait of a Youth” and found it in the collection of Sarah Blodgett Dunbar.
- **2009:** A case is brought for summary judgement by Sarah Blodgett Dunbar. The US District Court of Eastern Louisiana ruled in favour of Sarah Blodgett Dunbar. Claudia Seger-Thomschitz appealed.
- **2010:** The US Fifth Circuit Court of Appeals ruled in favour of Sarah Blodgett Dunbar.<sup>2</sup>

## II. Dispute Resolution Process

### Judicial claim – Judicial decision

- When Claudia Seger-Thomschitz claimed the return of the painting “Portrait of a Youth” from Sarah Blodgett Dunbar, the latter refused and decided to conduct her own provenance research into the painting’s provenance. Subsequently, Sarah Blodgett Dunbar filed a case before the Court of Louisiana for summary judgement. It follows that the parties made no attempt to find a negotiated solution to the case.

## III. Legal Issues

### Due diligence – Ownership – Procedural issue – Statute of limitation

- The present case deals with the ownership of an artwork that has been allegedly lost by a Vienna-based Jewish family as a result of Nazi persecution during the Second World War. In effect, Oskar Reichel, who was Jewish, sold the painting to Otto Kallir in 1939, after the Nazis had taken control of Austria and poised to wage war across Europe. Oskar Reichel died of

<sup>1</sup> *Dunbar v. Seger-Thomschitz* 638 F. Supp. 2d. 659 (E.D. La. 2009).

<sup>2</sup> *Dunbar v. Seger-Thomschitz* 615 F.3 574 (5th Cir 2010).

natural causes during the Second World War, while his wife was sent to a concentration camp but survived. Fleeing Nazi persecution, Hans Reichel settled in the United States, his brother Raimund settled in South America.

- In the District Court of Eastern Louisiana, the argument of Sarah Blodgett Dunbar was threefold: (i) the legal action is barred because of the expiry of the limitation period as per the Louisiana Civil Code (Article 3491 of the Louisiana Civil Code states “one who has possessed a movable as owner for ten years acquires ownership by prescription. Neither title nor good faith is required for this prescription); (ii) common law could not be relied on as Louisiana had a civil code in place;<sup>3</sup> (iii) the Reichel family had previously sought restitution of a number of paintings, but not the painting “Portrait of a Youth”.<sup>4</sup>
- Claudia Seger-Thomschitz’s argued that: (i) the purchase of the painting by the mother of Sarah Blodgett Dunbar produced an unjust enrichment; (ii) “federal common law authority” should be used when dealing with claims dealing with art that was looted during the Holocaust Era, so as to ensure that the law is developed in accordance with Holocaust Victims Redress Act of 1998;<sup>5</sup> (iii) the sale of the painting to Otto Kallir was a forced sale and the mother of Sarah Blodgett Dunbar should have known that paintings like “Portrait of a Youth” were likely to have been stolen<sup>6</sup> (Claudia Seger-Thomschitz maintained that, while it could not be argued that the Nazis directly confiscated or stole the Kokoschka painting, Oskar Reichel, an Austrian of Jewish descent, sold it under duress to Otto Kallir, a Nazi sympathiser).
- The District Court gave a summary judgement, relying on the Louisiana Civil Code, stating that there were no grounds to return the painting to Claudia Seger-Thomschitz because the prescription period had passed, the possession of the painting was open and known to the public, and no claim had been made by previous heirs.<sup>7</sup>
- In appeal to the Fifth Circuit, Claudia Seger-Thomschitz argued that (i) federal common law should be applied; (ii) the Terezin Declaration on Holocaust Era Assets and Related Issues<sup>8</sup> should have been used in the place of the Louisiana Civil Code.
- The Court of Appeal first held that new arguments could not be introduced at the stage of appeal. For a new argument to be considered extraordinary circumstances had to exist. These circumstances would include situations concerning a question of law or where a serious miscarriage of justice has taken place. As in the case at hand such circumstances did not exist, the Court did not discuss the role of the Terezin Declaration as a ground for reversing the first instance decision.<sup>9</sup> Second, the Court excluded the application of common law in this case. The Court of Appeals was of the view that federal courts are allowed to rely on common law

<sup>3</sup> Ibid.

<sup>4</sup> Duboff, Burr and Murray, *Art Law Cases and Materials*, 571.

<sup>5</sup> *Dunbar v. Seger Thomschitz* 615 F.3 574 (5th Cir 2010).

<sup>6</sup> Duboff, Burr and Murray, *Art Law Cases and Materials*, 571.

<sup>7</sup> *Dunbar v. Seger-Thomschitz* 638 F. Supp. 2d. 659 (E.D. La. 2009).

<sup>8</sup> Signed by 46 governments at the Conference on Holocaust Era Assets, organized in 2009 by the Czech Government in Prague, the Declaration was the result of discussions and deliberations based on the Washington Principles on Nazi Looted Art. These Principles were adopted at the Washington Conference on Holocaust Era Assets of 1998. The Terezin Declaration calls for the settlement of Holocaust-related cases through fair and equitable means.

<sup>9</sup> This principle was laid down in the cases *Little v. Liquid Air Corporation* 37 F.3d 1069, 1071 (5th Cir. 1994); and *Bridgman v. Array Systems Corporation* 325 F.3d 572, 576 (5th Cir. 2003).

provided that the Congress has not passed a statute with regard to the issue in question or that the State considers such a matter to be of national interest. The Court did not believe that the present case fell under any of these categories.<sup>10</sup>

#### IV. Adopted Solution

##### Request denied

- US courts found no merit in the claims and arguments raised by Claudia Seger-Thomschitz and concluded that there was no reason to oblige Sarah Blodgett Dunbar to return the painting “Portrait of a Youth”.

#### V. Comment

- During the Nazi era, the Third Reich aimed at wiping out all artefacts that they called “degenerate art”, which included art made by Jewish artists. Many of these works had been either destroyed or sold on the market.
- Besides the outright looting and destruction of works of art, the “forced sales” occurred as a result of Nazi persecution has largely been ignored. Indeed, owners were coerced into selling their property at prices much lower than their market value.<sup>11</sup>
- Claudia Seger-Thomschitz presented evidence that Otto Kallir – who bought the painting “Portrait of a Youth” in 1939 from Oskar Reichel – was a known sympathiser of the Nazi party and that he profited from the persecution of Jews in Germany. The US courts of Louisiana, however, did not accept the argument that Reichel had been forced to sale the painting to Kallir. They also ignored international practice that required special evidence to show that sales of art from 1933 to 1945 were actually legitimate. For instance, the Court of Appeal ruled that the Terezin Declaration could not be taken into consideration in this case.
- Unlike most of the federal States of the US, which follow the common law system, Louisiana follows the civil law system. This creates a conflict as under the common law system, the legal maxim of *nemo dat quad non habet* (literally meaning a person cannot transfer what he does not have) entails that a sale of stolen property could be vitiated if it could be proven that Kallir himself did not have title to the painting as it had been taken by lack of consent and fraud or coercion from the Reichel family.<sup>12</sup>
- Claudia Seger-Thomschitz has lost a similar claim against the Boston Museum of Fine Arts regarding another Kokoschka painting.<sup>13</sup>

<sup>10</sup> On this issue the Court relied on the cases: *Orkin v. Taylor* 128 S. Ct. 491 (2007); *Toledo Museum of Art v. Ullin* 477 F.Supp.2d 802 (2006); *Von Saher v. Norton Simon Museum of Pasadena* 578 F.3d 1016, 1029-30 (9th Cir. 2009); and *Texas Industries Inc v. Radcliffe Materials* 451 U.S. 630, 640-41, 101 S. Ct. 2061, 2067 (1981).

<sup>11</sup> Mirdamadi, “Too Little, Too Late”, 70.

<sup>12</sup> Anglim Kreder, “The New Battleground of Museum Ethics and Holocaust-Era Claims”, 37.

<sup>13</sup> *The Museum of Fine Arts, Boston v. Dr Claudia Seger-Thomschitz* 623 F.3d 1 (1st Cir. 2010).

## VI. Sources

### a. Bibliography

- Anglim Kreder, Jennifer. “The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?” *Oregon Law Review* 88, (2009), 37-94.
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- Mirdamadi, C. Jhiela. “Too Little, Too Late: Dunbar v. Seger-Thomschitz and the Ongoing Challenge Posed by Prescriptive Periods in Holocaust-Era Art and Cultural Property Restitution Matters.” *Art Antiquity and Law*, 17 (2012), 69-89.

### b. Court decisions

- *Texas Industries Inc v. Radcliffe Materials*, 451 U.S. 630, 640-41, 101 S. Ct. 2061, 2067 (1981).
- *Little v. Liquid Air Corporation* 37 F.3d 1069, 1071 (5th Cir. 1994).
- *Bridgman v. Array Systems Corporation* 325 F.3d 572, 576 (5th Cir. 2003).
- *Von Saher v. Norton Simon Museum of Pasadena* 578 F.3d 1016, 1029-30 (9th Cir. 2009).
- *Dunbar v. Seger-Thomschitz* 638 F. Supp. 2d. 659 (E.D. La. 2009).
- *Dunbar v. Seger Thomschitz* 615 F.3 574 (5th Cir 2010).
- *The Museum of Fine Arts, Boston v. Dr Claudia Seger-Thomschitz* 623 F.3d 1 (1st Cir. 2010)

### c. Legislation

- Louisiana Civil Code, Article 3491.

### d. Documents

- Terezin Declaration on Holocaust Era Assets and Related Issues, 2009
- Washington Principles on Nazi Looted Art, 1998.