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## Case Two Lithographs of the Glaser Collection – Glaser Heirs and Kunstmuseum Basel

*Curt Glaser – Kunstmuseum Basel – Canton of Basel-City – Artwork/oeuvre d’art – Nazi-looted art/spoliations nazies – Conciliation – Mediation/médiation – Negotiation/négociations – Settlement agreement/accord transationnel – Due diligence – Ownership/propriété – Statute of limitation/prescription – Procedural issue/limites procédurales – Request denier/rejet de la demande – Financial compensation/indemnisation*

*In 1933, the Kunstmuseum Basel purchased about 200 drawings and prints at the Max Perl auction in Berlin. These works belonged to Curt Glaser, a Jewish art collector and director of the Art Library in Berlin. In 2004, the Glaser heirs requested the Kunstmuseum to return two artworks by Edvard Munch, but the Museum refused. Following negotiations, the Kunstmuseum Basel and the heirs of Curt Glaser reached a seemingly “just and fair solution”.*

*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

- **April-May 1933:** Curt Glaser, a Jewish collector and director of the Art Library in Berlin, was suspended from his job, lost his accommodation, and was **obliged to sell** his belongings, including his library, furniture and **art collection**, by the Nazis.<sup>1</sup>
- **18-19 May 1933:** Curt Glaser **auctioned** the art collection at the Berlin Buch- und Kunst-Antiquariat (Max Perl auction No. 180). Otto Fischer, curator of the **Kunstmuseum Basel**, **purchased** about **200 drawings and prints** (hereafter “Glaser Collection”).
- **August 1933:** Curt Glaser and his second wife, Maria Milch, fled Germany. After a short stay in Paris, they settled down in Switzerland. Then they moved to the United States in **1941**, where Curt Glaser died after a protracted illness in **1943**.<sup>2</sup>
- **2004:** The heirs of Curt Glaser demanded to the Kunstmuseum Basel to **restitute** two lithographs by Edvard Munch, which were part of the Glaser Collection. The government of the Canton of Basel-City and the Kunstmuseum Basel **rejected** the request in **2008**.
- **November 2017:** Upon request of the Glaser heirs to the Canton of Basel-City, the case was **re-examined**.
- **27 March 2020:** The Kunstmuseum Basel announced that the parties have reached an **agreement**.

## II. Dispute Resolution Process

### Conciliation – Mediation/médiation – Negotiation – Settlement agreement

- The heirs of Curt Glaser pursued the recovery of the two works of the Glaser Collection held by the Kunstmuseum Basel only through extra-judicial means: they proposed to resort to mediation, and requested the support of both the Bureau on Looted Art of the Swiss Federal Office of Culture (in 2009) and of the political authorities of the Canton of Basel-City. Importantly, when at the end of 2017 the heirs contacted the government of the Canton of Basel-City, the Kunstmuseum Basel and the trustees of the museum did not reject the request (as in 2008) but decided to re-examine the case. To this end, a working group was set up at the Kunstmuseum Basel (hereafter “Kunstkommission”) to look into the case in greater depth.<sup>3</sup> In the light of its powers, it can be argued that this working group provided a scheme of resolution that resembles conciliation. It was because of this resolve that a settlement agreement was eventually reached.

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<sup>1</sup> The collection of Curt Glaser, which he had built with his wife Elsa Kolker (who died in 1932), included works by Munch, Kokoschka, van Gogh and Matisse (as far as is currently known, no inventory had survived)

<sup>2</sup> Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 10-12.

<sup>3</sup> The evaluation of this Kunstkommission included several meetings, some of them with the Glaser heirs. Ibid., pp. 8-9.

- Regarding the mediation of the case by the Swiss Confederation, the Canton of Basel-City rejected this possibility due to the lack of legal basis.<sup>4</sup>
- Interestingly, the Kunstmuseum Basel justified its refusal to return the disputed objects by relying on the experience of other States, notably it referred to a decision of the Spoliation Advisory Panel in the United Kingdom<sup>5</sup> on a case concerning other works of the Glaser collection. In its decision of 24 June 2009, the Spoliation Advisory Panel held that the circumstances of the Max Perl auction of 1933 did not justify any restitution request on the part of the Glaser heirs.<sup>6</sup>

### III. Legal Issues

#### Due diligence – Ownership – Statute of limitation – Procedural issue/limites procédurales

- In 2008, the government of the Canton of Basel-City and the Kunstmuseum Basel rejected the first claim of the Glaser heirs exclusively on legal arguments. In particular, they relied on the Swiss Civil Code in force at that time. Article 728(1) provided: “[i]f a person has possessed a chattel belonging to another person uninterruptedly and without challenge for five years believing in good faith that he or she owns it, he or she becomes its owner by adverse possession”. Article 3(2) provided: “[n]o person may invoke the presumption of good faith if he or she has failed exercise the diligence required by the circumstances”. On this issue, the Swiss Supreme Court has ruled that the level of scrutiny required to fulfil the due diligence requirement depends on the circumstances.<sup>7</sup> In the present case, the Kunstmuseum Basel argued that the disputed works had been acquired by adverse possession because of the good faith exercised at the moment of the acquisition (the price paid was typical of the time and conformed to the market) and of the over 70 years of uncontested possession.<sup>8</sup> As a consequence, the Kunstmuseum Basel considered itself as the owner of the two lithographs by Edvard Munch claimed by the Glaser heirs.

<sup>4</sup> Pursuant to Swiss law, the Confederation can play the role of mediator only in disputes between cantons or between cantons and the Confederation (see art. 44(3) of the Swiss Constitution).

<sup>5</sup> The Spoliation Advisory Panel was established by the Department for Culture, Media and Sport of the United Kingdom Government in 2000. It consists of a group of expert advisors, appointed by the Secretary of State, in accordance with section 3 of the Holocaust (Return of Cultural Objects) Act 2009. Article 2 of the Panel’s Rules of Procedure states: “The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object during the Nazi era (1933 to 1945) where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit [...]. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner”.

<sup>6</sup> Spoliation Advisory Panel, Report of the Spoliation Panel in Respect of Eight Drawings Now in the Possession of the Samuel Courtauld Trust, 24 June 2009, p. 8.

<sup>7</sup> BGE 139 III 305, para. 3.3.2.

<sup>8</sup> Regierungsrat, Press Release.

- After 2017, the Kunstkommission re-examined the restitution request on the assumption that the Canton of Basel-City was facing a moral claim.<sup>9</sup> It therefore took account of the following sources: the Principles on Nazi-Confiscated Art adopted in 1998 at the Washington Conference (hereinafter “Washington Principles”),<sup>10</sup> the ICOM Code of Ethics for Museums, the case law of Swiss Supreme Court,<sup>11</sup> the Terezin Declaration of 2009,<sup>12</sup> and the German Guidelines for implementing the “Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property” of December 1999.
- Article 8 of the Washington Principles reads as follow: “If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or the heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case”. The question that arises is the following: has the Glaser Collection “been confiscated by the Nazis”? Or, to use the terminology of the Terezin Declaration and the German Guidelines: “did the transfer of ownership of the Glaser Collection take place against the will of Curt Glaser? And did Curt Glaser suffered a financial loss?”.
- As regard the involuntariness of the transfer of ownership, the Kunstkommission noted that the present case should be examined in accordance with the Washington Principles, irrespective of the exact time when Curt Glaser made the decision to sell. Although Glaser emigrated and auctioned off a considerable part of his art collection as a result of Nazi persecution, the extent of the duress to sell his goods (instead of exporting them) is unclear.<sup>13</sup>
- As regards the financial loss, the Kunstkommission held that the purchase price of the Glaser Collection cannot be considered appropriate in light of the market situation. However, it cannot be stated that the Kunstmuseum Basel, at the time of the purchase, considered the price to be “rock-bottom”. The compensation received by the widow of Curt Glaser in 1963, based on the German Compensation Act, did not clash with the Glaser heirs’ present claim. The present value of the artworks is irrelevant as to whether a just and fair solution can be found, but relevant to the question of the amount of a compensation under the Washington Principles. Finally, it is assumed that Curt Glaser received the purchase price paid by the Kunstmuseum Basel.<sup>14</sup>

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<sup>9</sup> Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 20, 31. On the competence of the Kunstkommission to take this decision, see Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 6-7, Art. 7 of the Act on the Museums of the Canton of Basel-City and Art. 4 of its Ordinance.

<sup>10</sup> The Washington Conference on Holocaust-Era Assets took place in the period 30 November-3 December 1998 in order to find a general solution to the problem of the cultural assets looted by the Nazis.

<sup>11</sup> See notably Swiss Federal Supreme Court, BGE 139 III 305, para. 3.3.2.

<sup>12</sup> Terezin Declaration on Holocaust Era Assets and Related Issues adopted at the Holocaust Era Assets Conference, which took place in Prague and Terezin on 26-30 June 2009 under the auspices of the European Union of which the Czech government held the Presidency.

<sup>13</sup> Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 27-29. Curt Glaser allegedly fled Germany with 14 large crates of household effects such as “works of art, silver, precious porcelain, carpets and all kinds of valuable”.

<sup>14</sup> *Ibid.*, pp. 29-30.

- The following elements had also been taken into consideration: (i) the Kunstmuseum was certainly aware that the works purchased in 1933 belonged to Curt Glaser, and that he was a victim of Nazi persecution for being Jewish; (ii) Curt Glaser's relative economical and personal success after emigrating from Germany should not be held against him; (iii) it is irrelevant in the light of the Washington Principles whether the heirs claiming restitution were not the direct descendants or blood relatives of Curt Glaser; (iv) in comparable cases in Germany and the Netherlands, the Glaser heirs have obtained the restitution of a number of works (or have received compensation); (v) in comparable cases in the United Kingdom and United States, the requests by the Glaser heirs had been rebuffed.<sup>15</sup>
- On the basis of these elements, the Kunstkommission decided that restitution would not constitute a "just and fair solution" under the Washington Principles, but that other options should be examined.

#### IV. Adopted Solution

##### Request denied – Financial compensation

- The Kunstkommission adopted its decision on the request of the Glaser heirs on 21 November 2018. As part of a "just and fair solution", it recommended to: (i) recognize that Curt Glaser was a victim of National Socialism; (ii) reject the restitution of the two lithographs; (iii) enter into negotiation with the heirs regarding financial compensation.<sup>16</sup>
- On 27 March 2020, the Kunstmuseum Basel publicly announced that the parties reached a settlement. In its decision, the Kunstkommission considered that "the Kunstmuseum Basel did not act wrongfully when it acquired the works of Curt Glaser. But it has taken on a responsibility that it must face today". Although the restitution of the works that had belonged to the Glaser collection "would be too one-sided", a "just and fair solution" under the Washington Principles is to be found in the organization of an exhibition, as a tribute to Curt Glaser, and in a financial compensation to the heirs.<sup>17</sup> As agreed with the Glaser heirs, the settlement figure was not disclosed.<sup>18</sup>

#### V. Comment

- The restitution request of the Glaser heirs was dealt with differently in 2008 and 2020. In 2008, the Canton of Basel-City and the Kunstmuseum Basel rejected the claim on the basis of exclusively legal arguments. In 2020, they followed a more nuanced approach, by setting up a working group, the Kunstkommission, and taking into account moral and ethical

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<sup>15</sup> Ibid., pp. 31-32.

<sup>16</sup> Ibid., p. 36.

<sup>17</sup> Ibid., p. 35.

<sup>18</sup> Kunstmuseum Basel, Media Release. The Glaser Collection is estimated to be worth more than USD 2 millions. RICKLEY.

considerations, which in turn led to a more nuanced, “just and fair” solution – a settlement with the Glaser heirs.

- Several elements may have influenced the work of the Kunstkommission. First, the changing approach towards the collection of Curt Glaser in disputes occurred in a number of European countries: in 2009, the Spoliation Advisory Panel took the view that the information available about the May 1933 auction of Curt Glaser collection were insufficient to justify a restitution to the heirs; by way of contrast, between 2007 and 2018, the Rijksmuseum in Amsterdam, nine museums in Germany as well as two private German collectors restituted or offered financial compensation to the Glaser heirs for works that they had acquired from Curt Glaser in May 1933.<sup>19</sup> Second, the donation of a collection of artworks by Cornelius Gurlitt to the Kunstmuseum Bern in 2014. Third, the Swiss Government’s provenance research program launched in 2016. This is aimed at encouraging Swiss museums to conduct research on the provenance of their collections in order to identify Nazi-looted art. As a party to this program, the Kunstmuseum Basel was granted financial support by the Swiss government. Fourth, the case of the painting *La Vallée de la Stour*, by John Constable. The city of La Chaux-de-Fonds returned this painting to the legitimate heirs in 2018.<sup>20</sup> Fifth, in 2017, the Swiss public television revealed reports according to which Otto Fischer, the curator of the Kunstmuseum Basel in June 1933, declared that the Max Perl auction was a “favorable” opportunity, and that he had “bought a large number of modern works for a cheap price”.<sup>21</sup>
- In order to find a “just and fair solution”, the Kunstkommission examines the Washington Principles, as well as – in a limited measure – the Terezin Declaration and the German Guidelines. These Guidelines are particularly interesting as they define circumstances in which purchases are presumed to be Nazi-confiscated property, and they reverse the burden of proof: the presumption has to be waived by the buyer. Although these Guidelines do not bind *per se* Switzerland or Swiss museums, they can be integrated in a contract. This was the case, for example, of the Kunstmuseum Bern, the Federal Republic of Germany and the Free State of Bavaria with regard to the legacy of the Gurlitt collection.<sup>22</sup>

## VI. Sources

### a. Court decision

- Swiss Federal Supreme Court, BGE 139 III 305, para. 3.3.2.

### b. Legislation

- Swiss Civil Code (SG 210).

<sup>19</sup> Decision of the Kunstkommission in the Matter of Curt Glaser, pp. 13-19.

<sup>20</sup> See BANDLE/VUILLE/RENOLD.

<sup>21</sup> GEHRIGER. However, the Kunstkommission argues that it was, and still is, common practice for art institutions to describe their purchase as acceptable. This allows them to defend their expenses vis-à-vis their funders. Decision of the Kunstkommission in the Matter of Curt Glaser, p. 30.

<sup>22</sup> See the Response of the Swiss Federal Council to Interpellation No. 14.4157.

- Act on the Museums of the Canton of Basel-City (Gesetz über die Museen des Kantons Basel-Stadt) (SG 451.100).
- Ordinance to the Act on the Museums of the Canton of Basel-City (Verordnung zum Gesetz über die Museen des Kantons Basel-Stadt) (SG 451.110).

#### c. Documents

- Anne Laure BUNDLE, Vanessa VUILLE, Marc-André RENOLD, «Affaire Vallée de la Stour – Héritiers Jaffé et La Chaux-de-Fonds», Plateforme ArThemis (<http://unige.ch/art-adr>), Centre du droit de l'art, Université de Genève.
- Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998, available at: <https://www.lootedartcommission.com/Washington-principles>.
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- Federal Government Commissioner for Culture and the Media, Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property" of December 1999, as revised in November 2007, p. 29, available at: [https://www.lootedart.com/web\\_images/pdf/English%20handreichung.pdf](https://www.lootedart.com/web_images/pdf/English%20handreichung.pdf).
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- Kunstmuseum Basel, Media Release, 27 March 2020, available at: <https://kunstmuseumbasel.ch/en/research/provenance-research/curtglaser>.

#### d. Media

- Res GEHRIGER, Basler Regierungsrat : Flunkern mit « Madonna », in : Schweizer Radio und Fernsehen, 1 November 2017, available at: <https://www.srf.ch/news/schweiz/debatte-um-raubkunst-basler-regierungsrat-flunkern-mit-madonna>.
- Catherine RICKLEY, Swiss Museum Settles Claim Over Art Trove Acquired in Nazi Era, in : New York Times, 27 March 2020, available at: <https://www.nytimes.com/2020/03/27/arts/design/swiss-nazi-era-art-claim-settled.html>.