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Philippe Matthew Roy

RECOVERING ART LOOTED BY THE NAZIS: A COMPARATIVE VIEW OF TWO CASES

PHILIPPE MATTHEW ROY*

Abstract

Attempts to recover art forcibly taken by the Nazis have seen only limited success in United States courts. The 2008 case of *Vineberg v. Bissonnette* was a rare victory at that time for the heirs of Jews seeking recovery of artwork expropriated during the period of National Socialist rule in Germany. The decision, however, has been criticized for resting on a shaky legal foundation, due in large part to poor defense counsel. Further clouding this area of the law, a German court judgment in 2016, as well as German commentators have criticized the *Bissonnette* decision. This Article examines *Vineberg v. Bissonnette*, introduces the reader to the 2016 case in Cologne, and explains the contradictions between the two.

I. INTRODUCTION

The following Article examines two fairly recent conflicting court decisions dealing with artwork that was forcibly sold during the Third Reich – one from the United States and one from Germany. While commentary on *Vineberg v. Bissonnette*[1] has been published in the United States,[2] little has been published in United States publications attempting to understand the rationale of a judgment the High Regional Court of Cologne, Germany, ("Cologne High Regional Court") handed down in 2016 that conflicts with the *Bissonnette* decision.[3] In the Cologne case, Richard Feigen, a prominent New York art dealer, brought suit against the Lempertz Auction House ("Lempertz") in Cologne after he felt compelled to relinquish possession of a painting he had bought from Lempertz.[4]

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*Temple University (BA with honors); Duquesne University School of Law (JD with honors); Doctoral candidate at the Chair for U.S. Law, University of Cologne. Former visiting scholar at Brooklyn Law School. Admitted to practice law in New York and Connecticut, as well as before the United States Tax Court. The author would like to thank Dr. Larry Solan and the Brooklyn Law School for offering their support and resources in the preparation of this article.

1. Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007), *aff'd,* 548 F.3d 50 (1st Cir. 2008).

2. E.g., Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, von Saher and Their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 411-12 (2016); David S. Gold, *Is There Any Way Home? A History and Analysis of the Legal Issues Surrounding the Repatriation of Artwork Displaced During the Holocaust*, 21 N.Y. ST. B. ASS'N ENT., ARTS & SPORTS L.J. 12, 17-21 (2010); Jessica Grimes, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U. L. REV 521, 527-31 (2010).

3. Oberlandesgericht Köln [OLG Köln] [High Regional Court of Cologne], July 8, 2016 (Ger.), www.justiz.nrw.de/nrwe/olgs/koeln/j2016/1_U_36_13_Urteil_20160708.html. For discussion of the Cologne case in a European publication, see MATTHIAS WELLER, RETHINKING EU CULTURAL PROPERTY LAW 90-92 (Nomos 2018).

4. Oberlandesgericht Köln, *supra* note 3.

After Feigen purchased the painting, it was revealed that the piece had once belonged to Dr. Max Stern, a prominent Jewish art dealer in Dusseldorf.[5] In 1937, the Nazis forced Dr. Stern to close his gallery and sell the works in it.[6]

This Article begins by examining the *Bissonnette* decision, its fidelity to the state of the law in the United States at that time, and the effectiveness of Ms. Bissonnette's defense counsel in pursuing proper defenses. It ends with a discussion of criticism of the decision by the Cologne High Regional Court and German publications. An examination of this criticism and an analysis of *Bissonnette* is important for the purpose of uncovering the differences between the American and German understanding perspectives on this area of the law. As stated above, many in Germany – most importantly the courts – question the grounds upon which the *Bissonnette* decision rests.

These fundamental differences of perspective between the United States and Germany do not bode well for American buyers of artwork who may ask the right questions about it when considering a purchase, only to discover that the provenance of a piece is not clean at all. A mistaken or otherwise misinformed buyer may then have to confront an uncomfortable predicament. If the buyer relinquishes the work or is otherwise compelled to turn it over and then subsequently seeks damages from a seller in Europe, the buyer may find recovery of damages elusive because European courts will likely have a different understanding of the underlying facts and applicable law. This was in fact the case when Richard Feigen brought suit against Lempertz to recover the purchase price of a piece he relinquished to the Estate of Dr. Max Stern. He alleged the auction house misrepresented the provenance of a piece he purchased from it only to have his case dismissed. Of course, professional buyers of artwork cannot all credibly say they had no idea there might be a problem with a particular piece. One critical lesson from these cases is that any work of art that was sold at auction in the late 1930s should be viewed with extreme care.

Section A of this Article analyzes *Vineberg v. Bissonnette*, a case in which the United States District Court for the District of Rhode Island awarded recovery to the estate of a Jewish art dealer who was forced by the National Socialist government in Germany to liquidate his gallery's inventory to Lempertz, an auction house in Cologne, Germany, in 1937. **Section B** offers an independent analysis of the *Bissonnette* judgment. Commentators in both the United States and Germany have been critical of the court's opinion in the case and that criticism provides the impetus for testing the court's rationale in this section. Finally, **Section C** explores the criticism leveled at the *Bissonnette* decision by various sources in

5. *Bissonnette*, 529 F. Supp. 2d at 302.
6. *Id.*

Germany, most notably the above-referenced judgment a Cologne appellate court issued in 2016. **Section C** also looks at the opinions of commentators in Germany who either generally agree with the German judgment or offer additional arguments as to why *Bissonnette* should be viewed with caution. **Section D** contains a brief analysis of German criticism and conclusion.

II. VINEBERG V. BISSONNETTE

A. Introduction

Attempts to recover artwork looted by the Nazis in the 1930s and 1940s have seen only limited success in United States courts.[7] Those who seek recovery of artwork are typically the heirs of Jews who the National Socialist government of Adolf Hitler forced to alienate or otherwise relinquish their most valuable property. Those seeking recovery have had to overcome several difficult hurdles: they have had to find the property and establish their superior title to it; they have had to prevail against defenses based on statutes of limitations; and, they often have had to refute allegations that they were not diligent in searching for the art. Opposing parties who allege lack of diligence claim such delay unfairly prejudices them. What's more, those seeking recovery have needed to understand and navigate conflict-of-laws rules that United States courts inconsistently apply and that can often be outcome determinative. Congress and several state legislatures have taken steps to try to alleviate these burdens for those affected by the Holocaust. Those efforts include Congressional creation in 2016 of a statute of limitations under which "a civil claim or cause of action against a defendant to recover any artwork that was lost during [the period between 1933 and 1945] because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant."[8] The Holocaust Expropriated Art Recovery Act ("HEAR Act") effectively codified the principles set forth in the Washington Principles on Nazi-Confiscated Art. The principles were agreed at a 1998 conference hosted by the United States Holocaust Memorial Museum aimed at easing the procedural burdens associated with recovering looted art from the Nazi era.[9] Notwithstanding these measures, the path to restitution for the heirs of those victimized by the Nazis is still replete with obstacles.

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7. Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75 (2012).

8. *Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186, 195 (2d. Cir. 2019) (citing the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526-28).

9. Bret Demarsin, *Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 137 (2011).

Recently, a unanimous panel in *Zuckerberg v. Metropolitan Museum of Art* held that the HEAR Act does not preclude defendants from asserting the equitable doctrine of laches in the types of cases subject to the 2016 Congressional legislation. [10] In so doing, the United States Circuit Court of Appeals for the Second Circuit ("Second Circuit") upheld the United States District Court for the Southern District of New York's ("Southern District of New York's") dismissal of a claim brought by the heir of German Jews against the Metropolitan Museum of Art that sought damages in conversion and replevin of a painting.[11] As will be discussed below, overcoming a laches defense, in particular persuading a court that the delay in bringing the claim was not prejudicial to the defendant, can be difficult when pursuing a claim to recover property that was wrongfully taken over a half a century ago.

There have indeed been successful restitution claims. The 2015 motion picture "Woman in Gold" told the story of Maria Altmann, a refugee Jew, who successfully pursued a claim to Klimt's "Adele Bloch-Bauer I," among other works.[12] The Supreme Court of the United States ruled in 2004 that Altmann could sue the Austrian government, but the matter was ultimately settled in her favor in binding arbitration, not in a court of ordinary jurisdiction.[13] More recently in 2019, a New York appeals court upheld a lower court's order to return two paintings to the estate of a Jewish artist.[14] But while a modest number of other settlements have been entered into in the United States in favor of those who have sought restitution of works of art forcibly taken by the Nazis, the majority of cases brought by the heirs of Jews have been dismissed by courts, largely on the bases of defenses in law and equity, such as statutes of limitations and laches.[15] Moreover, museums and other public institutions have often been successful in preemptively asserting their own ownership claims in particular pieces of art.[16]

The 2008 case of *Vineberg v. Bissonnette*[17] was thought to

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10. *Zuckerberg*, 928 F.3d at 197.

11. *Id.*

12. *See Woman in Gold*, IMDB (June 27, 2020), www.imdb.com/title/tt2404425/ (providing synopsis and background on the movie).

13. Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015). www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html; Republic of Austria v. Altmann, 541 U.S. 677 (2004).

14. Reif v. Nagy, 175 A.D.3d 107, 132 (N.Y. App. Div. 2019).

15. Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 BOSTON C. L. REV. 473 489 (2010).

16. *See e.g.* Museum of Fine Arts, Boston v. Seger-Thomschitz, No. 08-10097-RWZ, 2009 WL 6506658 (D. Mass. June 12, 2009), *aff'd*, 623 F.3d 1 (1st Cir. 2010) (granting summary judgment in favor of the Museum of Fine Arts on the basis of the applicable statute of limitations); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 806 (N.D. Ohio 2006) (ruling that the statute of limitations barred recovery by the heirs).

17. *See supra* note 1.

represent somewhat of a breakthrough, however, for those seeking recovery of Nazi-looted art in a United States federal court. Until recently, it was the only final judgment upheld on appeal in the United States that ordered restitution to a plaintiff for artwork expropriated in Nazi Germany.[18] *Bissonnette*[19] is not without its critics, however, and the criticism is not insignificant. Defense counsel in *Bissonnette* failed to properly plead many of its defenses and failed to raise triable issues of fact to the court.[20] This has prompted many to ask what the outcome might have been had defense counsel prepared a better defense, including a respected litigator in the field who has warned that citing *Bissonnette* as a precedent should be done with caution.[21] Furthermore, commentators in Germany have questioned both the factual and legal bases for the court's ruling, and in 2016 the Cologne High Regional Court issued a judgment that goes to great lengths to contradict many of the factual premises underlying *Bissonnette*.[22] That High Regional Court judgment will be discussed in depth in Section C.

B. Background and Procedural History

In May of 2006, the Estate of Dr. Max Stern ("Estate") filed a complaint in the United States District Court for the District of Rhode Island ("District of Rhode Island") seeking, *inter alia*, recovery of an oil painting on canvas entitled "Girl from the Sabine Mountains."[23] The Estate had discovered the painting when it was consigned to an art dealer in Rhode Island to be sold.[24] The Estate claimed that the painting had belonged to Dr. Stern prior to its being auctioned off in 1937 in Germany pursuant to orders Dr.

18. For a comprehensive table of cases litigated in this area of the law, see Kreder, *supra* note 7, at 133-37.

19. I have chosen to disregard the normal convention in the United States of referring shorthand to a case by the name of the plaintiff, partly because much of the literature in Germany discusses the case by reference to the defendant, Maria Louise Bissonnette and her family. Vineberg was an attorney and fiduciary for the Stern estate, and the case was captioned accordingly. But Vineberg himself laid no claim to an interest in the property in dispute.

20. *See* Gold, *supra* note 2 at 20 ("Another speculative explanation for her weak and fluctuating legal arguments may be that Bissonnette was focused predominately on the restoration of her family name rather than possession of the painting . . .").

21. *See* Burris, *supra* note 2, at 412 (Footnotes appended to *Bissonnette* decision serve as "admonitions to counsel who might otherwise be tempted to overstate the precedent.").

22. Oberlandesgericht Köln, *supra* note 3. *See* also Klaus Schurig, *Nazi-beflecktes Kunsteigentum und die USA*, *in* EIN MENSCHENGERECHTES STRAFRECHT ALS LEBENSAUFGABE 1329, 1332 (2015) (accusing the District of Rhode Island of bending the facts in order to obtain a certain result).

23. *Bissonnette*, 529 F. Supp. 2d at 303.

24. *Id.* at 304.

Stern received at that time from Nazi officials.

Dr. Stern was well known in his day as an art collector and dealer in Germany and works that were in his collection are still exhibited to this day.[25] Dr. Stern was the sole owner of an art gallery he had inherited from his father called the *Galerie Stern* in Dusseldorf.[26] The Complaint filed by the Estate in Rhode Island alleged that the Reich Chamber for Visual Arts forcibly took the painting from Dr. Stern around 1937.[27] Specifically, the Complaint alleged that the Reich Chamber for Visual Arts ordered Dr. Stern to sell or liquidate his inventory in 1935 and that, because he was a Jew, he was prohibited from further operating his art gallery.[28] The order left Dr. Stern with no choice but to relinquish his inventory, including the painting in question, to Lempertz.[29] Lempertz sold much of Dr. Stern's inventory in November of 1937.[30] According to the Complaint, many of the pieces were sold at prices below the market value at the time.[31] Further, the German government froze Dr. Stern's assets upon learning that he had left Germany; thus, he never received the proceeds of the sale by Lempertz.[32]

The defendant in the case, Rhode Island resident Maria Louise Bissonnette, inherited the painting from her mother, whose husband (Bissonnette's stepfather) purchased it in 1937 from Lempertz.[33] The painting had been in Bissonnette's possession in Providence, Rhode Island, since 1959.[34] Once the painting was consigned to an art dealer, the Estate learned of the painting's location and filed a claim with the Holocaust Claims Processing Office in New York ("HCPO") in the same year.[35] The HCPO, acting on behalf of the Estate, sent a demand letter to Bissonnette seeking restitution of the painting.[36] After negotiations between HCPO and Bissonnette broke down and Bissonnette refused to return the painting, the Estate learned in 2006 that Bissonnette had shipped the painting to Germany in order to establish its legal title.[37]

During the discovery phase of the litigation, Bissonnette did not dispute any of the basic facts the Estate asserted as it related to

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25. Angelina Giovani, *Max Stern: His Art Legacy and an Abruptly Cancelled Exhibition of Works from the Galerie Stern in Dusseldorf*, ASS'N FOR RESEARCH INTO CRIMES AGAINST ART BLOG (June 27, 2020), www.art-crime.blogspot.com/2017/11/max-stern-his-art-legacy-and-abruptly.html.

26. *Bissonnette*, 529 F. Supp. 2d at 302.

27. *Id.*

28. *Id.*

29. *Id.* at 303.

30. *Id.* at 303.

31. Complaint ¶ 22, *Bissonnette*, 529 F. Supp. 2d 300 (No. 1:06-cv-00211-ML-LDA).

32. *Bissonnette*, 529 F. Supp. 2d at 303.

33. *Id.*

34. *Id.*

35. *Id.* at 304.

36. *Id.*

37. *Id.*

the forced sale of the painting or her stepfather's purchase of the work, though she did dispute many others.[38] The District of Rhode Island consequently entered judgment in favor of the Estate at the summary judgment phase of the proceedings.[39]

1. The Court's Judgment in Bissonnette

During the discovery stage of the proceedings, the defendant had either agreed to the most important facts the Estate pleaded or failed to plead its defenses properly.[40] The Estate succeeded at the summary judgment stage because the defendant failed to produce specific facts, in suitable evidentiary form, that would have established issues that could be presented to a jury for trial.[41] Thus, pursuant to the well-settled summary judgment standard utilized by United States courts, the court granted the Estate's summary judgment motion.[42] The defendant further acquiesced to Rhode Island law as governing the dispute.[43] This, coupled with the failure of Bissonnette's defense counsel to plead her case properly and present her defenses, paved the way for the court to rule in favor of the Estate's replevin claim.

a. Jurisdiction and Choice of Law

Before the District of Rhode Island ruled on the substantive claim the Estate lodged, it had to resolve several threshold matters. It determined that it had subject matter jurisdiction over the case through diversity jurisdiction because the litigants were from different states and the amount in controversy also met the statutory minimum.[44] The court also briefly discussed the law applicable to the dispute, ruling that Rhode Island law governed all of the issues presented by the parties.[45] The defendant argued in one of her earlier pleadings in a Rule 12(b) motion to dismiss that the case ought to be tried in Germany and not in Rhode Island.[46] However, she ultimately did not dispute the application of Rhode

38. Defendant's Opposition to Plaintiff's Statement of Undisputed Facts at 1, *Bissonnette*, 529 F. Supp. 2d 300 (No. 1:06-cv-00211-ML-LDA).

39. *Bissonnette*, 529 F. Supp. 2d at 308.

40. *Id.* at 305.

41. *Id.*

42. *Id.* at 303 (citing FED. R. CIV. P. 56(c)).

43. *Id.* at 305 ("Defendant does not address the Stern Estate's choice of law argument . . .").

44. *Id.* at 304. Personal jurisdiction was not an issue. According to the Complaint, the Estate was a citizen and domiciliary of Canada, while Ms. Bissonnette was a citizen and domiciliary of Rhode Island. Complaint ¶¶ 2-3, *supra* note 31.

45. *Id.* at 304-05.

46. Defendant's Motion to Dismiss at 3-11, *Bissonnette*, 529 F. Supp. 2d 300 (No. 1:06-cv-00211-ML-LDA).

Island law in her motion opposing summary judgment.[47] This omission on the part of the defendant led the court to find that the defendant had agreed with the Estate's choice of Rhode Island law as providing the basis for a successful replevin action in the case.[48] The court, citing case law authority, explained that the parties must elaborate a choice of law argument at the summary judgment stage, and if they do not do so the court considers a choice-of-law argument waived.[49] When a choice-of-law argument is waived, courts apply the law of the forum – here, the law of the state of Rhode Island.[50] For this reason, the court did not engage in a lengthy discussion of the issue or bring up international private law rules.

b. The Estate's Replevin Claim

The *Bissonnette* decision is remarkable because the court determined that the circumstances surrounding the sale in 1937 of the painting in question constituted a forced sale and equated the sale with theft.[51] Key to any successful claim to recover art looted during the Nazi regime is a basic notion in American property law that not even a good faith purchaser can acquire good title to stolen property.[52] The rule has also been expressed as simply as: a thief cannot pass good title.[53] Rhode Island and New York follow this rule.[54] It is also expressed by the Latin maxim *nemo dat quod non habet* – namely, that one cannot convey more rights than one has.[55] While this maxim generally governs who is the true owner in an ownership dispute in most Western nations, other variables, such as the applicable statute of limitations or the identity of the seller and the type of sale, vary from jurisdiction to jurisdiction and affect

47. Defendant's Motion in Opposition of Summary Judgment, *Bissonnette*, 529 F. Supp. 2d 300 (No. 1:06-cv-00211-ML-LDA);

48. *Bissonnette*, 529 F. Supp. 2d at 305 n.9 ("In fact, it appears that Defendant agrees that Rhode Island law applies to the replevin claim[.]").

49. *Id.* at 305.

50. *Id.*

51. *Id.* at 308. ("The Court concludes that the Painting was taken unlawfully from Dr. Stern.").

52. Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 299 (2001) (citing Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990)).

53. Reif v. Nagy, No. 161799/2015, 2018 WL 1638805 (Sup. Ct. N.Y. County Apr. 5, 2018) (citing Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 320 (1991)). U.C.C. § 2-403(1) (2012) ("A purchaser of goods acquires all title which his transferor had or had power to transfer . . ."); *accord* RESTATEMENT (SECOND) OF TORTS § 229 & cmt. D (1965).

54. As will be discussed below, absent other choice-of-law considerations, a federal court generally applies the substantive law of the state in which it sits when the court has diversity jurisdiction over the case. Erie v. Tompkins, 304 U.S. 64 (1938).

55. Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1335 (2011).

the application of the principle. An original owner may indeed be deemed to retain superior title, as explained below, but these variables often have the effect of weakening the rule in favor of a good faith purchaser.[56]

In this case, the Estate asserted a claim for replevin, which is an action for the repossession of personal property wrongfully taken by the defendant.[57] Replevin is asserted *ex delicto* - that is, it is a tort action.[58] An action for replevin in the state of Rhode Island requires the plaintiff to prove (1) that it is the lawful owner of the property; (2) that the property was taken unlawfully from the plaintiff; and (3) the defendant is in wrongful possession of the property.[59]

The court, in its decision, adopted the Estate's contention that the Lempertz catalog used during the auction of Dr. Stern's gallery inventory had identified the painting in question as part of the auction.[60] To support further the proposition that the painting indeed belonged to Dr. Stern, the court cited a 1964 restitution decision, discussed in greater depth below, by the Regional Court of Dusseldorf that awarded Dr. Stern offset damages.[61] The decision listed the market value of the paintings taken from Dr. Stern; the list included the painting at issue in the case.[62] Based on these findings, as well as the fact that Dr. Stern bequeathed the residue of his property to the Estate, the court held that the Estate was the lawful owner of the painting, thereby satisfying the first prong of a Rhode Island replevin action.[63]

The court next held that the painting was taken unlawfully from Dr. Stern. In so doing, it accepted the assertions made in a report submitted to the court by an expert in the field of World War II history (the so-called "Nicholas Declaration").[64] According to Nicholas, the methods the Gestapo used to force Dr. Stern to sell the painting amounted to theft.[65] The court again cited the Regional Court of Dusseldorf's finding that the Lempertz auction was a "distressed sale" in which Dr. Stern was forced to participate.[66] On this basis, the court, citing New York law, agreed with the proposition that the Nazi party's actions "in this instance are properly classified as looting or stealing."[67] Specifically:

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56. *Id.*

57. *Replevin*, BLACK'S LAW DICTIONARY (10th ed. 2014).

58. *Id.* (citing JOSEPH ELLIOTT COBBEY, A PRACTICAL TREATISE ON THE LAW OF REPLEVIN 3 (2d ed. 1900)).

59. *Bissonnette,* 529 F. Supp. 2d. at 306.

60. *Id.*

61. *Id.*

62. *Id.* at 307.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (citing Menzel v. List, 49 Misc. 2d 300, 306-07, 267 N.Y.S.2d 804, 811

> [the] Nazi party could not convey good title to art taken during war because seizure of art during wartime constituted "pillage, or plunder . . . [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful."[68]

As a result, the court concluded that the painting at issue was unlawfully taken from Dr. Stern, thereby satisfying the second prong of the Estate's replevin claim.[69]

Finally, the court held that Bissonnette was in wrongful possession of the painting. The Estate argued that Bissonnette's stepfather could not be deemed a *bona fide* purchaser of the painting because the Lempertz auction was a result of an order from a regime that persecuted Jews, among others, and forcibly dispossessed Dr. Stern of his property.[70] The court, citing a litany of cases from various United States jurisdictions confirming the basic rule that a thief acquires no title, can therefore not transfer title, and the original owner's title is not extinguished as a result of a pillage, accepted the Plaintiff's assertion in light of the Defendant's failure to plead properly facts to the contrary.[71]

c. Defenses

i. Statute of Limitations

The court quickly disposed of the statute limitations issue. It held that the Estate's claim was not barred by any applicable statute of limitations. This holding was predicated on the fact that the defendant failed to present an adequate argument with respect to the applicable statute of limitations. The result of this omission is that the court considered the defendant to have waived the defense.[72] The court cited a number of well-settled cases setting forth the basic rule that in order to assert a defense properly based on an applicable statute of limitations, it is not enough simply to assert the affirmative defense in an answer to a complaint. Rather, the defense must also be submitted to the court at the appropriate stage of the proceedings (summary judgment), and the defense must be supplemented by a legal argument.[73]

(N.Y. Sup. Ct. 1966), *aff'd,* 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967)).

68. *Id.*

69. *See id.* The court noted that the Defendant had attempted to argue whether the painting in question was in fact stolen and submitted two declarations by German attorneys on the issue, but the court rejected the effort on procedural grounds, stating that the defense failed to make a proper argument in its opposition to summary judgment supporting these assertions. *Id.*

70. *Id.* at 308.

71. *Id.*

72. *Id.* at 305.

73. *See id.* (noting in its discussion of the statute of limitations issue that

ii. Laches

The court rejected the laches defense Bissonnette asserted.[74] Laches requires: (1) that there be negligence on the part of the plaintiff leading to a delay in bringing a claim and (2) that "the delay must prejudice the defendant."[75] Further, the court, citing *Autocephalous Greek Orthodox Church v. Goldberg*,[76] a case from the United States Circuit Court of Appeals for the Seventh Circuit dating back to 1990, reasoned that it *should* determine if the plaintiff's efforts to locate the painting were reasonable in a contextual analysis of the chaotic events of World War II.[77] Using this standard, the *Bissonnette* Court held that under the circumstances present in this case, Dr. Stern's efforts to relocate his paintings were reasonable.[78] It would have been unreasonable, the court explained, to require Dr. Stern, with the benefit of hindsight, to do more than he did in this particular case (his efforts to recover the piece in question will be discussed in more detail in **Sections C and D**).[79]

The doctrine of laches also requires that the plaintiff's negligence prejudiced the defendant. Bissonnette argued that she was prejudiced because she was subjected to protracted litigation over the painting and, as a result, her family name had been disparaged.[80] Bissonnette also complained that she had to change her position because it was likely she would have sold the painting and benefited from the sale.[81] In response, the court did not go into great depths explaining what constitutes prejudice in terms of a laches defense. Rather, citing case law for general propositions, the court reviewed Bissonnette's allegations and ruled that those allegations did not meet the standard for prejudice.[82]

III. ANALYSIS

A. Subject Matter Jurisdiction

As noted at the outset here, two important considerations must be made in adjudicating ownership disputes over works of art that

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the defendant failed to address other important issues and that therefore the defendant waived those arguments).

74. *Id.* at 310.

75. *Id.* at 309 (citing Fitzgerald v. O'Connell, 120 R.I. 240, 386 A.2d 1384 (1978)).

76. Autocephalous Greek Orthodox Church v. Goldberg, 917 F.2d 278, 289 (7th Cir. 1990).

77. *Bissonnette*, 529 F. Supp. 2d at 309.

78. *Id.* at 310.

79. *Id.*

80. *Id.* at 311.

81. *Id.*

82. *Id.*

were purportedly stolen by the Nazis in the period surrounding and during World War II. They are: (1) the venue chosen by the plaintiff and (2) the choice of law applicable to the dispute. The Estate was a domiciliary of Canada.[83] The defendant was a citizen of Rhode Island, and the property at issue in the case had been located in Rhode Island for a number of years.[84] At a minimum, the Estate had two choices for judicial venue: the Superior Court of Rhode Island, the court of first instance on the state level in Rhode Island, and the District of Rhode Island, a federal court. Congress, by enacting 28 U.S.C. § 1332, implemented Article III, § 2 of the United States Constitution and granted jurisdiction to federal courts to hear cases between citizens of a state and citizens of a foreign state as long as the amount in controversy exceeds $75,000.00.[85] This is known as "diversity jurisdiction." Part of the rationale for this grant of original jurisdiction to federal courts, which otherwise may only hear claims involving a federal question,[86] referred to as "federal-question jurisdiction," was that out-of-state litigants should not be subjected to a defendant's "home court advantage." In other words, it allows litigants who are not citizens of the state in which they bring suit to have access to an impartial forum.[87] On account of its foreign citizenship, the Estate was therefore entitled pursuant to 28 U.S.C. § 1332 (a)(2) to bring suit in federal court and ultimately chose to file its Complaint there rather than in Rhode Island state court.

B. Choice of Law

While the court in *Bissonnette* did not engage in a choice-of-law analysis, we can consider here what the outcome might have been had the Defendant argued, for example, that German law ought to be applied in the case. We can also look to other United States jurisdictions that have dealt with similar art restitution cases for insight into how these analyses have been undertaken by the courts there. These cases share similarities with *Bissonnette* but also are distinguishable enough that they must be evaluated with caution in drawing any conclusions as to the consistent and uniform application of choice-of-law principles in cases of disputed artwork. That being said, based on the factors listed above, the *Bissonnette* court would have applied Rhode Island law in the event a choice-of-law argument had been put forward by the parties.

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83. *Id.* at 305.

84. *Id.* at 303.

85. 28 U.S.C. § 1332 (a)(2) (2018).

86. 28 U.S.C. § 1331 (2018).

87. *See e.g.* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) ("The power of Congress to confer such jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts [that are] free from susceptibility to potential local bias.").

1. Erie and its Progeny

In *Erie Railroad v. Tompkins,* a seminal case handed down in 1938, the United States Supreme Court held that the federal courts sitting in diversity do not have the power to create "federal common law."[88] The result of *Erie*, therefore, was that on remand the Southern District of New York, sitting in diversity jurisdiction was required to follow the law of Pennsylvania in deciding the plaintiff's tort claim.[89] In so holding, the *Erie* court established the rule that federal courts sitting in diversity jurisdiction must not only apply the positive statutory law of the states, but also the common (or decisional) law as state courts create and interpret. *Erie* enshrined the rule that federal courts generally must apply state substantive law and federal procedural law.[90]

But *Erie* itself left a number of questions unanswered. The substantive versus procedural distinction was gradually sharpened in a number of cases creating a general doctrine governing choice-of-law issues in diversity jurisdiction situations, referred to often as "*Erie* and its progeny."[91] An early case after *Erie* established the rule that a federal court sitting in diversity jurisdiction generally must apply the choice-of-law rules of the state in which it sits.[92] For example, the United States District Court for the Eastern District of New York sitting in Brooklyn must apply the choice-of-law rules of the State of New York.

Every state has its own substantive choice-of-law rules. The litigants before a federal court sitting in diversity jurisdiction bear the responsibility to plead properly to the court, in accordance with the state's choice-of-law rules, which law should apply in resolving the dispute before it. Should the parties fail to do so properly, a choice-of-law argument is deemed waived by the court and the law of the forum state will apply.[93] United States courts do not generally operate according to the maxim *iura novit curia* – the court knows the law. Rather, it is incumbent on the parties to plead and argue their cases in order to avoid risking a determination by the court that a particular argument or defense has been waived. It is not a foregone conclusion, therefore, that, because a case is brought in the District of Rhode Island that the law of the State of Rhode Island should or will apply in resolving the dispute. Each state applies its

88. Adam N. Steinman, *What is the Erie Doctrine (and What Does it Mean for the Contemporary Politics of Judicial Federalism)*, 84 NOTRE DAME L. REV. 245, 247-48 (2008).

89. *Erie*, 304 U.S. at 80.

90. Steinman, *supra* note 88, at 258 (citing *Erie*, 304 U.S. at 80).

91. *See e.g.* Hanna v. Plumer, 380 U.S. 460, 466 (1965).

92. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Hall v. Eklof Marine Corp., 339 F. Supp. 2d 369 (D.R.I. 2004).

93. *Bissonnette,* 529 F. Supp. 2d at 305 (citing Bergin v. Dartmouth Pharm., Inc., 326 F. Supp. 2d 179, 180 n.1 (D. Mass. 2004)).

own choice of law rules – the same way a German court applies its own choice-of-law rules in multi-jurisdictional cases.[94] In accordance with the state's choice-of-law rules, the parties may argue that a law other than that of the state in which the court sits must apply to the dispute. The default rule in Rhode Island, like most states, is that the law of the forum applies unless the parties argue otherwise.[95]

In this case, the trial court ruled that the law of the State of Rhode Island applied to the Estate's replevin claim.[96] The choice-of-law issue was not significantly contested in the district court, nor did the Defendant challenge the district court's choice-of-law determination on appeal. Therefore, the district court simply applied the law of the state of Rhode Island, and this determination was left undisturbed on appeal. Had the defendant properly asserted at the correct stage of the lower court proceedings, for example, that German law should apply to the dispute, she would have had to argue that German law must apply to the estate's claim in accordance with the Rhode Island conflicts-of-law rules. As further explained below, the court at that point would review the applicable German law and apply Rhode Island's choice-of-law rules in light of its German-law review.

As discussed above, a replevin action is a tort action. European jurisdictions, like American jurisdictions, emphasize the nature of the claim, the location and domicile of the respective parties, and the place where a transaction or injury occurred (e.g. contract, delict, criminal, proprietary (*dingliche Rechte* in Germany)),[97] in order to distinguish applicable choice-of-law rules (e.g. *forum delicti, forum rei sitae, forum contractus*). Therefore, it is necessary to ascertain which of the various conflicts-of-law analyses has been

94. Heinz-Peter Mansel, *Die Bedeutung des internationalen Privatrechts in Bezug auf das Herausgabeverlangen des Eigentümers bei abhanden gekommenen Kulturgütern*, in KOORDINIERUNGSSTELLE FÜR KULTURGÜTERVERLUSTE MAGDEBURG UND BEAUFTRAGTER DER BUNDESREGIERUNG FÜR KULTUR UND MEDIEN (HRSG), IM LABYRINTH DES RECHTS? WEGE ZUM KULTURGÜTERSCHUTZ 139 (2007) ("In the event the complaint seeking recovery of property is lodged with a court of international jurisdiction, the court applies the international private law of the state in which the court is located in order to ascertain the applicable law.").

95. Nat'l Refrigeration, Inc. v. Standen Contracting Co., 942 A.2d 968, 973 (R.I. 2008) ("[A court] need not engage in a choice-of-law analysis when no conflict-of-law issue is presented to the court.").

96. *Bissonnette,* 529 F. Supp. 2d at 304. I should also note here that, when Rhode Island law itself does not appear to provide a definitive answer to a question of law, I have included legal analysis from other jurisdictions, most notably New York – a major marketplace for famous works of art. These other jurisdictions have dealt with the issues raised in *Bissonnette* since they are both marketplaces for these works and are hosts to cultural institutions that are likely to be affected by these types of claims. Moreover, the *Bissonnette* Court itself cited New York law to support its holding.

97. Heinz-Peter Mansel, *supra* note 94, at 135.

adopted by the respective forum. Five states, including Rhode Island to some extent, use the so-called "Leflar" approach, based on a seminal 1966 law review article by Professor Robert Leflar.[98] Some states, such as New York, engage in an interest analysis. Others follow the Second Restatement of Conflicts of Law, which sets forth an analysis based on which forum has the most significant relationship to the facts of the case. Many follow a combination of the various approaches, making it difficult to say definitively which approach is controlling in the jurisdiction.

2. Moving from Lex Loci Delicti to Leflar and the Second Restatement of Conflicts of Laws

Most states, including Rhode Island, have departed from applying a pure *lex loci delicti* analysis[99] for tort claims. They now engage in an analysis of interests or apply the law of the forum with the most significant relationship to the claim.[100] This most popular conflicts-of-law approach is reflected in the Second Restatement of Conflict of Laws and favors application of the law of the jurisdiction that has the most significant relationship or most significant contacts to the facts of the case.[101] Rhode Island, however, follows both an interest-analysis approach, also addressed as the Leflar or "better law" approach, and the Restatement's "most significant relationship" approach for tort claims.[102] This means a Rhode Island court weighs the following considerations:

(1) predictability of result;

(2) maintenance of interstate and international order;

(3) simplification of the judicial task;

(4) advancement of the forum's governmental interest; and

(5) application of the better rule of law.[103]

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98. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966); Mark Thomson, *Method or Madness: The Leflar Approach to Choice of Law as Practiced in Five States*, 66 RUTGERS L. REV. 81, 86 (2013).

99. *See e.g.* Ingram v. Davol, Inc., C.A. No. PC 07-4701, 2011 R.I. Super. LEXIS 17 (Feb. 9, 2011) ("The Rhode Island Supreme Court abandoned the doctrine of *lex loci delicti* because 'the interest-weighing approach to conflict of law cases is indeed the better rule, and justice will be more equitably administered if the Rhode Island courts apply that rule to tort conflicts cases coming before them.'" (quoting Woodward v. Stewart 104 R.I. 299, 243 A.2d 923 (1968))).

100. Thomson, *supra* note 98, at 86.

101. *Id.*

102. *Id.* at 112 (discussing how most conflicts-of-law analysts agree that Rhode Island heavily relies on a significant contacts approach in resolving conflicts-of-law questions).

103. Najaran v. Nat'l Amusements, Inc., 768 A.2d 1253, 1255 (R.I. 2001) (quoting Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1351 (R.I. 1986)).

> In addition, in a Rhode Island tort case, determining the forum with the most significant relationship to the claim (the "Restatement standard" or "significant contacts" test) requires the court to assess the following contacts:
>
> (1) the place where the injury occurred;
>
> (2) the place where the conduct causing the injury occurred;
>
> (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
>
> (4) the place where the relationship, if any, between the parties is centered.[104]

3. Application of the Leflar and the Restatement Standards in Rhode Island

Rhode Island courts would analyze the tort-specific factors outlined above – that is, the Restatement "most significant relationship" analysis. As will be discussed below in greater detail, the *Bissonnette* court found that the Estate had shown that it was the lawful owner of the painting and that Bissonnette was wrongfully in possession of it.[105] The court had also equated the forced sale of the painting in dispute with theft.[106] It is, therefore, more than reasonable to assume that, had the *Bissonnette* court been faced with a properly pleaded dispute over the law applicable to the disposition of the case, it would have reviewed the German law and decided that Rhode Island law should apply to the case. A review of the foreign law argued by one of the parties is generally a component of a choice-of-law determination.[107] However, a review of foreign law does not necessarily mean that a United States court will select such law as controlling. One New York court held, for example:

> After a review of Swiss law, this Court holds that it need not consider those laws during the pendency of this action as New York has a stronger interest in protecting its valuable art market from plundered

104. Brown v. Church of the Holy Name of Jesus, 105 R.I. 322, 326-27, 252 A.2d 176, 179 (1969) (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1968)).

105. *Bissonnette,* 529 F. Supp. 2d at 308 ("This Court concludes, therefore, that Defendant is in wrongful possession of the Painting.").

106. *Id.* (holding that the Painting was taken unlawfully from Dr. Stern after discussion of expert opinion that had concluded: "the 'methods used by the Gestapo and the Nazis to force Dr. Max Stern to sell the [P]ainting . . . amount to theft'").

107. Indeed, one might ask why a court would need to review foreign law at all in order to conclude, for example, that states such as New York or Rhode Island have the greater interest in applying their law to the case at hand. It appears that the decision as to which law should be applied depends to some extent on the outcome the court establishes would be reached by applying the various laws as pleaded by the parties.

goods.[108]

A New York court would apply the law of New York to these set of facts on the grounds, among others, that it has an interest in protecting its valuable market from plundered goods.[109] Rhode Island could rest, however, on additional reasons to find the application of Rhode Island law in harmony with its choice-of-law rules. In Rhode Island, the Restatement "significant contacts" standard is an important element in evaluating the first Leflar criterion.[110] This element, however, does not always play a significant role in unplanned torts or in situations where the parties have not had any particular relationship. "Predictability of result" generally refers to the ability of parties to a transaction to plan a desired result, such as where a lawsuit might be brought in relation to a transaction.[111] Choosing the applicable law based on predictability promotes planning and reliance and discourages forum shopping.[112] This consideration is of less importance in tort cases, where the location of an accident or tortious action is not typically planned. In tort cases, predictability can be promoted by looking to the place where the tortious conduct occurred in order to choose the applicable law. The application of this element is further supported by consideration of the first two prongs of the Restatement "significant relationship" test: (a) the place where the injury occurred and (b) the place where the conduct causing the injury occurred.[113]

In this case, the injury can be said to have both occurred in Germany and Rhode Island. The theft that the court found took place occurred in Germany.[114] The sale and transfer to Bissonnette's stepfather took place in Germany. Bissonnette's unlawful possession of the piece, however, persisted for decades in Rhode Island. In *Charash v. Oberlin College,*[115] a case involving a dispute over the law applicable to a conversion[116] claim for misappropriated drawings, the United States Circuit Court of Appeals for the Sixth Circuit, applying the same Restatement analysis, held that if a conversion has been committed, "the resulting rights and liabilities of the parties will be determined by the local law of the state . . . [that] has the most significant relationship to the occurrence, the

108. Gowen v. Helly Nahmad Gallery, Inc., 60 Misc. 3d 963, 992 (N.Y. Sup. Ct. 2018) (citing Bakalar v. Vavra, 619 F.3d 136, 143 (2d Cir. 2010)).

109. *See e.g. Bakalar*, 619 F.3d 136, 141 ("The manner in which the New York rule is applied reflects overarching concern that New York not become a marketplace for stolen goods and, in particular, for stolen artwork.").

110. *See* Thomson, *supra* note 98, at 114.

111. *Id.* at 87

112. *Id.* at 87.

113. *Id.* at 98.

114. *Bissonnette,* 529 F. Supp. 2d at 307.

115. Charash v. Oberlin Coll., 14 F.3d 291 (6th Cir. 1994).

116. Conversion is "the wrongful possession or disposition of another's property as if it were one's own." Black's Law Dictionary, 356 (8th ed. 2004).

chattels and the parties."[117] The court went on to explain that a conversion does not only occur when there is a taking, but also when someone exercises dominion over the property without the owner's consent.[118] The law of Rhode Island is the same:

> Replevin is a statutory action in [Rhode Island] . . . . It is available to persons claiming possession of goods or chattels either wrongfully taken **or wrongfully detained**. **Nothing more than the right of present possession**, founded upon a general or special ownership of the goods or chattels, **is necessary to enable a plaintiff to maintain the action**.[119]

We can say, therefore, that while the actual theft of the Dr. Stern painting occurred in Germany, the place of injury was also in Rhode Island. The painting had been kept in Rhode Island for decades, and, consequently, conversion of the painting had occurred there on an ongoing basis. As for the remaining two Restatement factors, (c) the domicile, residence, nationality, place of incorporation, and place of business of the parties and (d) the place where the relationship, if any, between the parties is centered, a Rhode Island court would find the defendant's Rhode Island residency as an additional factor weighing in favor of the application of Rhode Island law. The court would likely find it within the reasonable expectation of the parties that personal property subject to a lawsuit on the basis of conversion be governed by the law of the jurisdiction where the property had been located for over forty years.[120]

With regard to the remaining *Leflar* standards, the forum's governmental interest factor is given the most attention by Rhode Island courts.[121] Conversely, the simplification of the judicial task factor is almost never significantly addressed in Rhode Island conflict-of-law decisions.[122] It is plausible to infer that Rhode Island courts would view the governmental interest of the State of Rhode Island as outweighing the selection of German law to apply to the case, much in the same way this has been done by courts in New York. In *Kunstsammlungen Zu Weimar v. Elicofon*, the defendant in that case had also purchased and had been in unlawful possession of stolen artwork in New York, with the theft having

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117. *Charash*, 14 F.3d 291 at 296 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW §147).

118. *Id.*

119. Brunswick Corp. v. Sposato, 389 A.2d 1251, 1253 (R.I. 1978) (citing Clyde Dye & Print Works, Inc. v. Craig, 157 A. 425, 426 (1931) (emphasis added) (citations omitted).

120. *See e.g. Najarian*, 768 A.2d at 1255 (reciting the contacts to be considered in determining which law applies, such as "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence . . . of the parties, and (d) the place where the relationship, if any, between the parties is centered").

121. Thomson, *supra* note 98, at 117.

122. *Id.*

occurred in Germany.[123] The court wrote:

> The fact that the theft of the paintings did not occur in New York is of no relevance. In 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.[124]

The court in *Kunstsammlung* further explained that while New York courts follow an interest analysis in resolving conflict-of-law questions, the result would not have changed had the court followed the Restatement "significant relationship" test.[125] The Rhode Island Supreme Court, as well, has emphasized the place of injury as being a significant factor in its choice of law analysis.[126] In fact, in personal injury cases Rhode Island courts often employ a presumption that the law of the place where an injury was sustained controls.[127] It is, therefore, likely the *Bissonnette* court would have reached the same decision in the event the parties had contested the choice-of-law issue.

On the other hand, there have been cases where courts have applied the law of a foreign nation in cases involving Nazi-looted art. In *Schoeps v. Museum of Modern Art*, the Southern District of New York, applying a New York choice-of-law analysis, held that German law applied to the issue of duress applicable to forced sales in 1933 of Picasso paintings Paul von Mendelssohn-Bartholdy owned.[128] The court applied New York's governmental interest analysis to what it categorized as a contract issue, deciding that the factors used in that choice-of-law analysis clearly supported the application of German law to the question of duress.[129] The court's analysis did not end there, however. Because the paintings were then resold in 1936 from Switzerland to a resident of New York (a Mr. William Paley) who ultimately willed it to the Museum of Modern Art, the museum had a good-faith-purchaser defense.[130] Here, the choice was between Swiss law and New York law. The Southern District of New York applied an interest analysis but also invoked the Restatement significant relationship test and decided

123. Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981).

124. *Id.* at 846 (emphasis added).

125. *Id.*

126. *Najarian*, 768 A.2d at 1255.

127. Thomson, *supra* note 98, at 113 (citing Blais v. Aetna Cas. & Sur. Co., 526 A.2d 854, 856-57 (R.I. 1987)).

128. Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461, 465 (S.D.N.Y. 2009).

129. *Id.*

130. *Id.* at 467.

in favor of New York law with respect to the issue of the sale to Paley.[131] Among the reasons cited by the court, one of the most pertinent was that the painting had been immediately shipped from Switzerland to New York upon its purchase and then remained in New York for over seventy years after its arrival.[132]

Therefore, as in *Bissonnette*, we see that the place where the artwork in dispute has resided, particularly if it has been more than a few decades, can weigh heavily in favor of choosing the law of the forum applying a significant relationship test. As a general rule, therefore, the *situs* of the *res* will be found to be significantly connected to the dispute, which means the law most often chosen in such cases is in fact the law of the forum.[133] In this case, the District of Rhode Island, if presented properly with the choice of law issue, would have chosen the law of the State of Rhode Island to apply to the action for replevin.

C. Defenses of Statute of Limitations / Laches

1. Statute of Limitations

a. Procedural versus Substantive Right

While a statute of limitations was traditionally viewed as substantive law for *Erie* purposes, its effect is largely procedural – that is to say, the underlying substantive claim does not necessarily extinguish.[134] New York courts, for example, follow this approach with respect to the question of superior title to a chattel that is possessed by a good faith purchaser.[135] Statutes of limitations in New York have long been considered part of New York's procedural law because "they are deemed as pertaining to the remedy rather than the right."[136] New York courts have described New York's procedural characterization of statutes of limitation as follows:

> [t]he theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out a substantive right; it merely suspends the remedy.[137]

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131. *Id.* at 468.

132. *Id.*

133. Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L .J. 955, 1037 (2001).

134. S*ee e.g.* Jinks v. Richland Cnty., 538 U.S. 456, 465 (2003) (Scalia, J.) ("For purposes of *Erie* . . . for example, statutes of limitations are treated as substantive." (citing *Guaranty Trust Co. v. York,* 326 U. S. 99 (1945)).

135. Tanges v. Heidelberg N. Am., 93 N.Y.2d 48, 55 (1999).

136. 2138747 *Ontario, Inc. v. Samsung C&T Corp*., 103 N.E.3d 774, 777 (N.Y. 2018) (quoting Portfolio Recovery Assoc., LLC v King, 14 N.Y.3d 410, 416 (2010)).

137. *Ontario, Inc. v. Samsung C&T Corp*., 2016 NY Slip Op 06671, 144

Statutes of limitations applicable to claims for replevin or conversion are typically three years. The important question, however, is when the statute of limitations begins to run. In some jurisdictions the statute may run as soon as the theft occurs. In others, it may begin to run when the wrongful possession is discovered, or when a demand for return of the item is made and the wrongful possessor refuses. Additionally, in order to toll the statute of limitations after the theft, many jurisdictions require a level of reasonable diligence on the part of the alleged owner in attempting to locate the missing or stolen property.

b. Demand/Refusal Rule & Discovery Rule

The limitations law of most states in replevin actions, including Rhode Island, requires application of the "discovery rule" when determining when the statute of limitations begins to run. The discovery rule limits tort or contract actions, as well as actions for replevin, to three years after the cause of action accrues.[138] Courts have held that an action accrues using a reasonableness test – that is when the person bringing suit should have reasonably discovered the basis for their claim.[139] States applying the discovery rule in lost art cases generally impose a burden on the plaintiff to show: (1) it lacked actual knowledge of the basis for its claim and (2) that its lack of knowledge was objectionably reasonable.[140] Another approach, such as that of New York, the statute of limitations does not begin to run until a demand is made by a purported owner of a chattel and the possessor refuses to hand it over.[141] Not until the refusal is expressed by the current, allegedly unlawful possessor, does the statute of limitations clock begin.[142]

The trial court in *Bissonnette* held that the demand-and-refusal rule does not apply to replevin actions.[143] Thus, in order to commence a replevin action, the plaintiff need not first show it made a demand and it was refused. However, the court did not address whether demand and refusal were necessary to commence the statute of limitations. The existing case law in Rhode Island reveals that it generally follows the discovery rule in tort cases, as opposed

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A.D.3d 122, 39 N.Y.S.3d 10 (App. Div.) (citing *Tanges v Heidelberg N. Am., Inc.* (93 N.Y.2d 48, 55 (1999)). As a consequence, application of the statute of limitations may preclude an original owner from recovering a chattel from a good faith purchaser but applying New York's statute of limitations does not extinguish the original owner's superior title. This effectively renders the item unmarketable.

138. *See e.g.* Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1, 5 (1st Cir. 2010) (citing Mass. Gen. Laws ch. 260, 2A).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Bissonnette*, 529 F. Supp. 2d at 302 n.3.

to the demand-and-refusal rule.[144] But the Rhode Island Supreme Court has held in certain types of tort cases, including conversion, that a demand/refusal rule applies.[145] Nevertheless, the discovery rule states that the statute of limitations does not begin to run until the plaintiff discovers, or with reasonable diligence, should have discovered, the wrongful conduct of the defendant.[146] This rule, as pointed out by commentators, is highly fact specific.[147] The rule requires plaintiffs to show when it discovered the wrong and that such point in time was reasonable to begin running the statute of limitations. What is reasonable depends on the ability of the plaintiff to ascertain in the first place at what point it was wronged by the defendant. In this case, it is likely that the trial court would have ruled that the Estate's claim would not be barred by the statute of limitations for reasons explained below.

2. The Statute of Limitations and Application of Laches are Interwoven

In cases where property has been converted and the original owner seeks recovery of it, the equitable doctrine of laches may affect whether a statute of limitations is imposed in order to bar the claim. The doctrine is invoked in both demand/refusal and discovery rule jurisdictions. Laches generally requires a reasonable amount of diligence on the part of someone bringing a claim so that when the claim is finally brought it does not unreasonably prejudice the opposing party. At the very least, therefore, its application may frustrate a court's finding that the statute of applications does not bar the replevin claim.

The United States Court of Appeals for the First Circuit discussed laches in-depth when affirming the District of Rhode Island's judgment in *Bissonnette*.[148] The doctrine of laches asks whether a person bringing a claim to recover property unreasonably delayed pursuing the claim and whether such delay unduly prejudiced the defendant.[149] If the court finds in the affirmative on both of these points, it will rule that the claim is barred under the

144. *See e.g. Anthony v. Abbott Labs*., 490 A.2d 43, 46-47 (R.I. 1985) (holding that the discovery rule applies to drug products liability cases); *see also Lee v. Morin*, 469 A.2d 358, 361 (R.I. 1983) (extending discovery rule to latent construction defects).

145. Fuscellaro v. Indus. Nat'l Corp., 368 A.2d 1227, 1230 (R.I. 1977) ("It is well-established that a demand and refusal are usually required before an action for conversion can be brought against the possessor of a chattel who has rightfully obtained possession from one not its owner." (internal citations omitted).).

146. Mills v. Toselli, 819 A.2d 202, 205 (R.I. 2003) (citing Supreme Bakery, Inc. v. Bagley, 742 A.2d 1202, 1204 (R.I, 2000)).

147. *See e.g.* Kreder, *supra* note 7, at 103.

148. *Bissonnette*, 548 F.3d at 57

149. *Bissonnette*, 529 F. Supp. 2d at 309.

doctrine.[150] In *Bissonnette*, the court rejected the Defendant's laches argument. It found that Dr. Stern's efforts to relocate his paintings after the war were reasonable on the basis of a "contextual analysis" of the chaotic events of World War II.[151] As discussed below, some German commentators and the High Regional Court of Cologne hold the view still, however, that the Estate unreasonably delayed its pursuit of "Girl from the Sabine Mountains."[152]

The defense could have, and did, argue that the Estate knew or should have known that the painting was misappropriated in the 1930s and that the delay in bringing its claim prejudiced the Defendant. This argument has been instrumental in other American cases, where courts applying the discovery rule have held that the statute of limitations expired well before litigation related to the artwork commenced.[153] In *Toledo Museum of Art v. Ullin*,[154] for example, the federal court in the Northern District of Ohio barred the plaintiff's claim pursuing restitution and damages for property she lost as a result of Nazi persecution.[155] According to the court, the plaintiff in that case did not timely file a claim for the painting that was in the possession of the Toledo Museum of Art ("TMA").[156] The court stated, among other things, that the plaintiff's delay in filing a claim was unreasonable because TMA's ownership and possession of the painting was public knowledge and easily discoverable.[157] The court based this ruling simply on the application of the discovery rule and did not rest its decision on the application of the laches doctrine.

The defense in *Bissonnette* not only failed to properly raise the issue of the statute of limitations and laches, it failed to satisfy the prejudice standard required under the laches doctrine by pointing to acceptable evidence of prejudice, such as the unavailability of witness testimony as a result of the delay.[158] Defendant Bissonnette also failed to proffer any potential evidence that would be favorable to its case and that had been lost as a result of the Estate's delay.[159] As a result, the Court of Appeals found that the Defendant in

150. *Id.* at 57 (citing *Kunstsammlungen Zu Weimar,* 536 F. Supp. at 849–52) (concluding on motion for summary judgment that plaintiff had not unreasonably delayed pursuit of claims for paintings stolen during World War II and, thus, his claims were not barred by statute of limitations), *aff'd,* 678 F.2d 1150, 1165 (2d Cir. 1982)).

151. *Bissonnette*, 529 F. Supp. 2d at 309.

152. Oberlandesgericht Köln, *supra* note 3 ¶40.

153. Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 804 (N.D. Ohio 2006); The Detroit Institute of Arts v. Ullin, 2007 WL 1016996, at 4 (E.D. Mich. 2007); Museum of Fine Arts, Boston v. Seger-Thomschitz, 2009 WL 6506658, at 9 (D.Mass. 2009).

154. *Toledo Museum of Art*, 477 F. Supp. 2d 802, 807 (N.D. Ohio 2006).

155. *Id.*

156. *Id.*

157. *Id.* at 808.

158. *Bissonnette*, 548 F.3d at 58.

159. *Id.* at 57.

Bissonnette had not been prejudiced within the meaning of the laches doctrine and therefore refrained from even examining the reasonableness of the Plaintiff's delay.[160]

These cases invoking the doctrine of laches were distinguishable from the facts in *Bissonnette* in a number of significant ways. The Estate had no idea of the painting's whereabouts until, as occurred in 2005, it was transferred from private display to an art dealer for sale. And the court agreed, finding that, unlike in other cases, the painting was not readily "susceptible to discovery," nor was it "drifting in the . . . art community."[161] Moreover, the Estate supplemented its argument with testimony that many of the records related to art transactions stored at Lempertz were destroyed during the course of Allied bombing making it difficult to ascertain which transactions involved work belonging to Dr. Stern.[162] We shall compare the *Bissonnette's* court treatment of the laches issue to the High Regional Court's assertion, discussed in depth below, that the Estate was not at all diligent in searching for much of the inventory in Dr. Stern's gallery.

IV. GERMAN CRITICISM OF BISSONNETTE

A. The High Regional Court of Cologne Disregards the Bissonnette Decision

In 2016, the High Regional Court of Cologne ("High Regional Court" or "court") handed down a judgment in a case that conflicts to a large extent with the decision in *Bissonnette*.[163] The case in Cologne involved the claim of Richard Feigen, an art dealer in New York, who in 2000 purchased a painting by Ludovico Carracci entitled "Saint Hieronymus with the Lions and two Angels," at an auction held by Lempertz in Cologne.[164] Feigen subsequently filed suit in Cologne against Lempertz for compensatory damages when he learned that the painting was listed on the Art Loss Register and had belonged to Dr. Stern.[165] The painting was eventually returned to the Estate by the U.S. Department of Homeland Security with Feigen's acquiescence.

Feigen's complaint alleged, among other things, that he was due just compensation for the painting because it was encumbered with a legal defect pursuant to §434 BGB (German Civil Code) when

160. *Id.*

161. *Bissonnette*, 529 F. Supp. 2d at 309 (citing Erisoty v. Rizik, 1995 WL 91406 (E.D. Pa. 1995)).

162. Complaint at 6, *Bissonnette*, 529 F. Supp. 2d 300.

163. Oberlandesgericht Köln, *supra* note 3.

164. *Id.* at ¶ 1.

165. *Id.*

he purchased it from Lempertz.[166] The High Regional Court upheld on appeal a local court's dismissal of Feigen's complaint.[167] It did so on the basis of a judgment grounded entirely on conventional doctrinal legal analysis, what Germans would refer to as *rechtsdogmatische Analyse*.[168] It should be noted that the court did not dismiss Feigen's case on procedural grounds, but substantively addressed the legal issues surrounding the Carracci work.

The judgment, while acknowledging that the actions by the Gestapo resulting in the forced auction of Dr. Stern's gallery were tantamount to theft at that time, nevertheless held that Feigen was a good faith purchaser under German law.[169] Among other things, the court found that the painting at issue could no longer be considered stolen under German law, and called into question some of the factual assertions contained in the *Bissonnette* decision as they related to Dr. Stern's interactions with the Nazi regime.[170] The court acknowledged various commitments agreed to internationally after the war, such as the Washington Conference Principles on Nazi-Confiscated Art, but it declined to apply them.[171]

1. The High Regional Court's Analysis: Feigen Was a Good Faith Purchaser Under German Law

In holding that Feigen was a good faith purchaser of the painting,[172] the court first turned to an analysis of choice-of-law principles and found that German law applied to the transfer of title resulting from the 2000 Lempertz auction since the property was located in Germany at that time (*lex rei sitae*).[173] The court then turned to an analysis of the German Civil Code's provision on legal defects in things, §434 BGB in its prior version (§435 today). In one simple sentence, section 434 BGB required property sold by a seller to a buyer to be "free of rights that could be asserted by third parties against the buyer."[174] Feigen relied on this provision to claim that Lempertz failed to deliver the painting free from potential claims that could be raised against him by third parties – this despite reassurances from Lempertz that the provenance of the painting

166. *Id.* ¶ 32.

167. *Id.* at ¶ 1.

168. CREIFELDS RECHTSWÖRTERBUCH 1063 (18th ed. 2004).

169. Oberlandesgericht Köln, *supra* note 3 at ¶ 33.

170. *Id.* ¶ 45. (disagreeing with the District of Rhode Island, for example, that Dr. Stern left Germany before receiving the proceeds of the Lempertz auction.) *Id*.

171. *Id.* ¶ 34. ("Restitution conventions such as the Washington Principles of 1998 are, independent of their applicability, legally non-binding and do not lay the basis for individual claims for recovery".) *Id.* ¶ 34. (Translations of German sources are those of the author).

172. *Id.* ¶ 33.

173. *Id.* ¶ 33.

174. *Id.* ¶ 32.

was "clean."[175] The court acknowledged that such claims are not limited to private-law property claims, or claims under the law of obligations, but also include those pursuant to public law authority (*öffentlich-rechtliche Befugnisse*).[176] According to the court, the confiscation by a government authority, however, only constitutes a material defect within the meaning of §434 BGB if it results in the "forfeiture or seizure" of the property.[177] The court noted that Feigen entered into a stipulation with the Department of Homeland Security ("DHS") to turn over the painting, rather than DHS forcibly taking it from him.[178] The court offered no further explanation as to why the threat of seizure by DHS was not sufficient to constitute a legal defect under the German Civil Code, even if an actual seizure was not carried out. However, the lower court did. It explained that there was no legal equivalent in German law, and Feigen had voluntarily exported the painting in the first place.[179] In essence, the court said tough luck and held:

> No legal defect exists based on the purported confiscation in the United States. Generally, while foreign rights may constitute a legal defect, this requires that there be an equivalent [legal action] in the German legal order. Otherwise claims for damages might arise against a seller doing business in Germany that he or she could not have predicted based on German law. Expanding this type of liability would be unjust. A buyer who voluntarily exports his purchase is not deserving of protection in this respect.[180]

In order to conclude its application of §434 BGB, the court asked whether a replevin claim lodged by the Estate under New York law would have been successful.[181] As is customary in German litigation, the High Regional Court commissioned an expert legal opinion on the law of New York, where Feigen operated his business.[182] The expert opinion, adopted by the court, concluded that a replevin claim pursued by the Estate in New York would have been unsuccessful.[183] If a replevin claim lodged by the Estate would have been unsuccessful in New York, then no legal encumbrance

175. *Id.* ¶¶ 14, 17.

176. *Id.* ¶ 32.

177. *Id.* ¶ 18.

178. *Id.* ¶ 55.

179. Landesgericht [LG Köln] [Regional Court of Cologne], Apr. 24, 2013, 23 O 266/12

180. *Id.* ¶ 27. (Translation by the author).

181. Oberlandesgericht Köln, *supra* note 3 ¶ 42. ("In particular, no replevin claim exists . . .").

182. In analyzing the elements of a successful replevin claim in New York, the High Regional Court adopted the expert's finding that a New York court engaging in an interest analysis would hold that New York law applies to a theoretical replevin claim from the Estate. *Id.*

183. Oberlandesgericht Köln, *supra* note 3 ¶ 37. ("Under U.S. law, according to the laches doctrine a replevin claim would have failed due to the insufficient attempts to find and seek restitution [of the painting in question] on the part of [Stern] and his heirs.") *Id.*

would have attached to the painting pursuant to §434 BGB. Therefore the court held that Feigen acquired good title in 2000.

Based on its expert's report, the High Regional Court set forth several reasons why a replevin claim would indeed have failed in New York. Citing *U.S. v. Portrait of Wally*[184] the court pointed out that property is no longer considered stolen in New York when it is returned to its owner or his representative, though it is unclear, according to the court's expert, whether a forced sale would be deemed a "theft" if payment of the purchase price flowed to the seller.[185] Having claimed that the *Bissonnette* court failed to mention Dr. Stern's compensation in 1964 by the Dusseldorf court, the Cologne High Regional Court said its expert was also unable to determine whether restitution in the form of damages is sufficient to effectively cleanse an object's characterization as stolen under New York law.[186] The High Regional Court's American-law expert opined that had the District of Rhode Island known that "the purchase price" was paid, it might have been precluded from characterizing the forced sale of the painting in question as a "theft."[187] At the same time, the High Regional Court acknowledged that receiving compensation for artwork forcibly auctioned would not necessarily alter a piece's characterization as stolen or confiscated.[188] The court explained that a forced auction would be characterized as an unlawful taking in light of the pressure exerted by the National Socialists.[189] The effects of this pressure would persist even if an original owner – a collector, for example, who never intended to resell the piece – received a reasonable price for his stolen artwork.[190] In such a case, the court continued, a certain sentimental value might attach to a piece, or a cultural or historical interest may exist that requires a piece's return, and these types of facts could affect a piece's characterization as stolen.[191] The High Regional Court ultimately viewed the painting as a piece that belonged to the inventory of an art gallery and was intended for sale anyway.[192] This, coupled with Dr. Stern's compensation by the Regional Court of Dusseldorf in 1964, made it impossible to continue to characterize the piece purchased by Feigen as stolen.[193]

In upholding the lower court's dismissal of Feigen's suit

184. United States v. Portrait of Wally, 663 F. Supp. 2d 232, 261 (S.D.N.Y. 2009).

185. Oberlandesgericht Köln, *supra* note 3 ¶ 46.

186. *Id.*

187. *Id.*

188. *Id.* ¶ 47.

189. *Id.*

190. *Id.*

191. *Id.* ¶ 47. The High Regional Court explains that this would apply, in particular, to works of art that had belonged to private households, museums or other collections. *Id.*

192. *Id.* ¶ 48.

193. *Id.* ¶ 48.

against Lempertz, the High Regional Court found that nothing surrounding the circumstances of the 2000 Lempertz auction precluded Feigen from having acquired lawful title to the painting under German law.[194] The court additionally noted that even if the painting were to be considered "lost or disappeared" (*abhanden gekommen*) under German law, Feigen acquired title in good faith because the piece had been sold at a public auction.[195]

2. Disagreement with the Bissonnette Court Regarding the Underlying Facts

The District of Rhode Island began its opinion by stating that "the majority of the salient facts are undisputed."[196] It turns out, however, that the salient facts are anything *but* undisputed. Instead, a German court, the High Regional Court of Cologne, applied its understanding of the law of New York and relied on its own and quite different understanding of the facts, disregarding the facts as determined by the District of Rhode Island in *Bissonnette*. The court flatly disagreed with the way the *Bissonnette* court characterized some of the facts surrounding the 1937 auction of Dr. Stern's inventory. It found that no valid claim under American law would have required Feigen to return the painting to the Estate, thus failing to satisfy the legal defect provisions of the German Civil Code and thereby making Feign a good faith purchaser.

a. The Proceeds from the Lempertz Auction of Dr. Stern's Gallery Inventory

The High Regional Court in Cologne disputed the *Bissonnette* court's finding that Dr. Stern fled Germany prior to collecting the proceeds from the 1937 auction at Lempertz.[197] The Estate, in its complaint before the District of Rhode Island, had claimed that Dr. Stern received none of the proceeds from the sales of the various works of art in his inventory or otherwise when he fled Germany.[198] It did so, incidentally, under an obligation to the court in the Federal Rules of Civil Procedure to make only those factual assertions for which there exists or is likely to exist evidentiary support.[199] The High Regional Court nevertheless dismissed this

194. *Id*. ¶ 33. "Nothing indicates that the plaintiff did not obtain title under German law."

195. *Id.* ¶ 33.

196. *Bissonnette*, 529 F. Supp 2d. at 302.

197. Oberlandesgericht Köln, *supra* note 3 ¶ 45. *See Bissonnette*, 529 F. Supp 2d. at 303. The *Bissonnette* court claims that once Dr. Stern left Germany, the German government issued an order freezing his assets. It supports that claim on the basis of a commentator from Concordia writing about the case in a piece entitled "Auktion 392 Reclaiming the Galerie Stern, Dusseldorf." *Id*.

198. Complaint at 6, *Bissonnette*, 529 F. Supp. 2d 300 (D.R.I. 2007).

199. FED. R. CIV. P. 11(a)(3) (2007).

finding by the *Bissonnette* court, pointing to an earlier decision of the Regional Court of Dusseldorf that had awarded Dr. Stern additional compensatory damages as part of a restitution proceeding in 1964.[200] The 1964 decision awarded Dr. Stern the difference between the sale price attained in 1937 and the actual market value of the pieces in 1937.[201] For the High Regional Court, this was persuasive enough to find that Dr. Stern did in fact collect the proceeds of the forced auction in 1937. The notion that Dr. Stern collected the proceeds is evidenced, according to the High Regional Court, by Dr. Stern's pleadings during the 1964 restitution proceedings in Dusseldorf. In those proceedings, according to the High Regional Court of Cologne, Dr. Stern's claim for damages was offset by auction proceeds he is said to have received.[202] The High Regional Court referred to Dr. Stern's own complaint in that case, according to which a remainder of 4,230 *Reichsmark* was paid out to Dr. Stern after commissions were paid to Lempertz once the painting at issue sold.[203] Thus, in the compensation proceedings in Dusseldorf, Dr. Stern only claimed the rest of what he should have received had he received the full market value in 1937 for the piece. The compensation decision of the Regional Court of Dusseldorf confirms, as well, that Dr. Stern had also claimed in 1964 that as a result of the forced auction of his gallery, his income was so high that he was forced to pay an additional 61,577 *Reichsmark* and sought compensation for these expenses accordingly.[204]

The High Regional Court in Cologne finally noted in its ruling that Feigen, in his suit against Lempertz, did not proffer additional evidence to dispute Dr. Stern's pleadings in the 1964 proceeding.[205] As a result, the fact that Dr. Stern received compensation in 1964 removed the taint on the works stolen from him, according to the court, thereby transforming the works of art from pieces considered stolen by the Nazis, to pieces in which Stern no longer had a proprietary interest.[206] The court explained its rationale:

> [A]ccording to the court, in certain cases a piece may no longer be characterized as unlawfully taken if restitution has been made in such a manner that the rightful owner of a piece which, prior to the auction itself was held out for sale, receives the proceeds of the sale and any material damages resulting from the reduced proceeds [as a

200. Oberlandesgericht Köln, *supra* note 3, ¶44. *See also* Klaus Schurig, *Nazi Beflecktes Eigentum und die USA* in: Festschrift für Werner Beulke zum 70. Geburtstag, 1334. C.F. Müller. 2015 at 1333. ("The [Dusseldorf compensation] judgment was even cited by the American court. It must have seen the decision (but perhaps not in translation?)." *Id.*

201. Oberlandesgericht, *supra* note 3, ¶ 45.

202. *Id.*

203. *Id.*

204. Landesgericht Dusseldorf [LG Düsseldorf] [Regional Court of Dusseldorf], judgment dated 24 February 1964 - 26 O 454/62, at p. 3.

205. Oberlandesgericht Köln, *supra* note 3, ¶ 45.

206. *Id.* ¶ 48.

result of a forced auction].[207]

The court found it important that: (1) restitution was made; (2) the painting had been held out for sale as part of the inventory of Dr. Stern's gallery anyway; and (3) Dr. Stern received damages in 1964 as a result of the forced sale, which was tantamount to making him whole.

The High Regional Court further dismissed arguments that the compensation awarded to Dr. Stern in the 1964 proceeding failed to make him whole on account of factors such as inflation, or the development of the art market over the past eighty years. According to the court, the market value of the piece in 1937 controlled – that is, when the conduct causing the injury occurred, plus damages for loss of use up until 1964.[208] The court concluded its line of reasoning as follows:

> The plaintiff legally acquired the painting at the auction in 2000. In any case, at that point in time, acquisition of the piece by the bidder in 1937 no longer was unlawful on account of the fact that the proceeds of the sale from the auction were paid out by the defendant's [Lempertz] legal predecessor, as well as on account of compensatory damages being paid in the 1960's.[209]

The High Regional Court thus concluded that nothing precluded Feigen from becoming a good faith purchaser of the Ludovici painting. In addition to the other reasons laid out by the court, Dr. Stern had been adequately compensated for his loss.

b. The Court Finds Dr. Stern's Efforts to Recover the Painting Insufficient

The High Regional Court in Cologne disagreed with the *Bissonnette* court regarding the efforts Dr. Stern made to recover the painting Feigen bought from Lempertz. It concluded, based on the expert legal opinion on the law of New York it requested that the Common Law doctrine of *laches* in New York would also have precluded a successful claim for replevin in the United States.[210] The High Regional Court adopted Lempertz' argument that in contrast to his private collection, which was confiscated and sold by the Gestapo after he fled Germany, Dr. Stern did not make efforts to find the paintings at issue in the 1937 auction.[211] The High Regional Court did not accept Feigen's attempt to counter the argument by referencing the *Bissonnette* decision.[212] According to the High Regional Court, the *Bissonnette* decision did not

207. Oberlandesgericht Köln, *supra* note 3, ¶ 44.
208. *Id.* ¶ 49.
209. *Id.* ¶ 50.
210. *Id.* ¶ 51.
211. *Id.* ¶ 52.
212. *Id.*

distinguish between general efforts made by Dr. Stern to find works stolen or confiscated from him by the Gestapo and his works that were subject to a forced sale at auction. What's more, according to the High Regional Court, the general reference by Feigen in his complaint to the findings of the *Bissonnette* court that Dr. Stern had indeed looked for his artwork and even traveled to Europe, where he took out advertisements in art magazines publicizing his losses, was not sufficient to overcome the argument put forward by Lempertz that Feigen failed to identify concrete efforts made to find pieces from this particular 1937 auction.[213] In the words of the High Regional Court, "the mere blanket assertion that [Dr. Stern] searched for his works of art after the war is insufficient."[214]

To further support this line of reasoning, the High Regional Court again referred to the 1964 restitution proceedings in Dusseldorf, in which Dr. Stern only sought damages for the difference between the 1937 sale price of his inventory and its market value at that time.[215] According to the court, Dr. Stern's efforts were not aimed at recovering pieces that were taken from him, but in recovering the monetary value of his losses.[216] Dr. Stern, according to the court, claimed offset damages, was awarded them, and did not further appeal the decision of the Dusseldorf court.[217] Finally, while the High Regional Court acknowledged that Dr. Stern's heirs registered the painting at dispute as stolen in the Art Loss Register, this was not done until 2004, nearly 70 years after the theft. The court, therefore, found that the lack of diligence on Dr. Stern's part would seriously prejudice any defendant.[218]

c. No Liability Culpa in Contrahendo (For Fraudulent or Negligent Representation)

The High Regional Court concluded its judgment by dealing with a claim that Feigen failed to assert: the issue of damages based on liability of the other party during the process of entering into the contract, known in Germany by the Roman law institute of *culpa in contrahendo*. A claim such as this can be brought in addition to the § 434 BGB claim.[219] Feigen, though, sought only the full purchase price for the painting as a result of his relinquishment of it to United States authorities; he did not pursue a claim for damages arising from Lempertz' conduct prior to entering into the purchase agreement for the painting. To further impede a possible claim relating to Lempertz' misrepresentation, the High Regional Court

213. Oberlandesgericht Köln, *supra* note 3, ¶ 52.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* ¶ 54.
219. *Id.* ¶ 57.

noted that the applicable statute of limitations of ten years began to run in 2000, when a claim arising out of any potential breach of duty arose, not in 2009 when Feigen turned over the painting.[220]

B. On The Use of Expert Legal Opinions on Foreign Law in German Court Proceedings

The German Code of Civil Procedure authorizes German courts to ascertain foreign law when necessary.[221] This is often done by resorting to an independent legal expert commissioned to write an expert opinion about the foreign law in question based on legal questions posed to the expert by the court. Pursuant to the rules of the German Code of Civil Procedure, the court in this case commissioned an analysis of American law in order to properly apply the material defect provision of §434 BGB. The court needed to know whether the Estate would have been able to lodge a successful replevin claim against Feigen, thus constituting a third-party claim. The expert who was commissioned was a university professor who presumably was an expert in the law of the State of New York. The High Regional Court adopted the expert's findings as set forth in its written opinion.[222] In adopting the findings contained in the expert opinion, the court came to its own conclusion that under New York law there would not have been a valid claim by the Estate against Feigen.[223]

This author has had occasion to draft complex expert legal opinions on United States law for German courts. Expert legal opinions (*Rechtsgutachten*) are certainly helpful to the court, but they can also be problematic. They can be problematic because quite often the independent experts commissioned by German courts are indeed German lawyers whose understanding of the Common Law is one as a system of law foreign to them.[224] Even in cases, such as those the author has participated in, where the expert is an American, the German parties in the case submit their own legal responses and often reveal their Civil Law analysis and legal reasoning.

A German court, steeped by its very nature in the methods of Civil Law reasoning and law finding, may encounter difficulties analyzing the foreign law of another legal system, particularly the Common Law. Quite frequently, the question the court poses to the expert is framed in abstract terms and is done so, of course, in German. This requires a linguistic translation of the question when

220. *Id.* ¶ 58.

221. *See* § 293 ZPO (German Code of Civil Procedure).

222. Oberlandesgericht Köln, *supra* note 3, ¶ 29.

223. *Id.* ¶ 22.

224. Thomas Pfeiffer, *Methoden der Ermittlung ausländischen Rechts*, in: Stuerner, Ralf et al (ed.): Festschrift für Dieter Leipold zum. 70. Geburtstag. Tübingen, 2009, 284. [trans.: "Methods of Ascertaining Foreign Law"].

the expert is an American not completely fluent in German. Furthermore, it oftentimes requires clarification as to what the court is looking for because the German court frames the question while thinking in terms of Civil Law concepts and legal institutes. The parties to the litigation who respond to the expert's opinion often do so in a manner suited more to Civil Law legal methods than those of the Common Law. Citations to hornbooks or Restatements are common in responses. These sources are often expressly prohibited in the United States by various United States Circuit Courts of Appeal across the country that want to see legal sources cited, such as statutes, regulations, or cases. German lawyers, however, are likely to be drawn to United States treatises and restatements of the law that are largely the work of organized committees of law professors, judges, and expert practitioners. After all, a substantial amount of respect and deference is given to commentators of the law in Germany, most of whom are university law professors or scholars at prestigious research organizations – such as any of the legal institutes of the Max Plank Institute. This is evident when reading German legal briefs, where citing a well-known treatise on a particular area of the law to support an asserted legal position is often done prior to citing applicable German case law.

An important task of the court when analyzing foreign law involves distinguishing between questions of law and questions of fact. A question posed by a German court to a foreign-law expert might involve a question of law under German law, but a question of fact under the foreign law to be ascertained. Further, as is the case in litigation in the United States, the use of expert opinions commissioned either by a court or introduced by one of the parties in Germany inevitably can lead to a "battle of the experts." In these cases, it falls on the court to decide between conflicting opinions on what the foreign law actually prescribes. It had to do so in this case, in order to decide whether the Estate would have been able to successfully assert a replevin came against Feigen in New York. Based in large part on the opinion of one expert, it concluded in the negative.

C. Criticism from Commentators in Germany

The way commentators in Germany discuss these two cases may astonish many Americans. The criticism in Germany not only takes issue with the *Bissonnette* court's understanding and recitation of critical facts surrounding Dr. Stern's loss of the pieces in his gallery. Those criticizing the decision put forward justifications that appear to minimize the confiscatory nature of the Gestapo's orders to Dr. Stern – not to mention what will appear to many to be a stunning failure from a historical and social perspective to acknowledge the real danger and oppression felt by

those who were the targets of widespread National Socialist propaganda and persecution. The discussions tend to be heavy in dry technical legal analysis with reasoning that makes the circumstances surrounding what happened to Dr. Stern in the late 1930s appear more like every-day legal transactions than prolonged persecution and theft.

While incredulity regarding German reaction and commentary may be understandable and justified in some cases, German commentators do ask questions that we in the States ought to think about. Many commentators, as well as the High Regional Court, believe that Dr. Stern was adequately compensated for the loss of his gallery inventory, particularly in the Feigen case, where – as explained above – Dr. Stern purportedly received offset damages from a Dusseldorf court in 1964 for the works he owned and displayed for sale at his gallery. Assuming that this is correct, there is disagreement in the public record – after all, does traditional Common Law analysis address what happens when an original owner is compensated monetarily for his lost or stolen property but the property thereafter resurfaces? An investigation into that doctrinal question of American Common Law here would exceed the scope of this Article. But the High Regional Court had noted that its expert on New York law opined that a stolen item is no longer stolen in New York when it is returned to its true owner. The expert could not offer any answer, however, as to what New York law says about compensation equivalent to some ascertained market value that is paid to the original owner.

Professor Klaus Schurig, in an article entitled, "Nazi Tainted Artwork and the U.S.," acknowledges at the outset what he believes to be an undisputed fact: that no one can rely on his or her good faith when the state had confiscated innumerable quantities of art during a period of Jewish persecution.[225] Schurig criticizes the *Bissonnette* court's version, however, of what happened to Dr. Stern from 1937 onward. He accuses the court of bending the facts to obtain a particular result, writing that the *Bissonnette* court simply painted Lempertz as a willing participant in doing the bidding of the National Socialists.[226] Again, for Schurig, when the state takes art as part of its persecution of Jews and such confiscated art is sold at auction, no one can rely on their good faith. But Schurig says this is not the case when the affected dealer (Dr. Stern), albeit under the pressure of the Nazis, was in-fact allowed to choose any auction house he wanted, and in the case of Lempertz, chose one with which he had maintained a friendly relationship.[227] What's more, according to Schurig, Dr. Stern was able to set minimum prices for each piece, and ultimately got those minimum prices for each piece

225. Klaus Schurig, *Nazi Beflecktes Eigentum und die USA* in: Festschrift für Werner Beulke zum 70. Geburtstag, 1334. C.F. Müller. 2015.

226. *Id.* at 1332, 1333.

227. *Id.* at 1333.

– even getting pieces back that were not auctioned off. To further minimize the severity of the actions taken by the Gestapo against Dr. Stern, Schurig notes that the proprietor of Lempertz himself was jailed in 1942 for being "too friendly to Jews."[228] Schurig acknowledges that Jews were persecuted in the most pernicious manner, but that only after years of historical perspective did the acute threat to life and limb for the Jewish population become clear.[229]

For these reasons, among others, Schurig argues that it is extreme to characterize all dispositions of property belonging to Jews – even those that were forced – as unconscionable in the legal sense (*sittenwidrig*), which would render them void.[230] If this were the case, he goes on to explain, then it would have to apply to all those persecuted, including those who fled the Nazi regime for political reasons.[231] Therefore, according to Schurig, in order to view the transactions related to the forced sale of Dr. Stern's art inventory as invalid, a legal rule must exist in order to do so, and in Schurig's analysis of German law nothing in the law makes those transactions per se invalid.[232] Having concluded that the forced sale of Dr. Stern's gallery can no longer be equated with theft, Schurig's view is that the auction that took place in 2000, where Feigen bought the Carracci painting, was merely a typical resale by the owner.[233]

Milena Reinfandt, general counsel for Lempertz, repeats this view and its reasoning. She acknowledges the disagreement as to whether works of art that were sold as a result of Nazi persecution and pressure should be characterized as stolen. This remains the case when the original owner received a reasonable price for the work even though he had not intended to sell it. Reinfandt argues, however, that the Carracci painting purchased by Feigen in 2000 had belonged to Dr. Stern's gallery inventory and that the minimum price Dr. Stern received was supplemented by the Dusseldorf compensation court in 1964.[234] For Reinfandt, what the High Regional Court of Cologne effectively did in the Feigen case was prevent an award of double damages to Dr. Stern.[235]

Criticism in Germany also takes aim at Dr. Stern's efforts to recover the painting that Feigen eventually purchased. Because, critics allege, Dr. Stern only undertook efforts to recover the works that did not sell at auction and were eventually confiscated by the

228. *Id.*
229. *Id.* at 1336.
230. *Id.*
231. *Id.*
232. *Id.* at 1334.
233. *Id.* at 1339.
234. Milena Reinfandt, Kein doppelter Schadensersatz für ein 1937 bei Lempertz versteigertes und 1964 restituiertes Bild eines jüdischen Kunsthändlers, 19 Kunst und Recht 40, 42 (2017).
235. *Id.*

Gestapo, Dr. Stern's delay in searching for the Carracci painting could not be excused.[236] Reinfandt goes a step further to allege that the Estate actually acted in contradiction to what Dr. Stern wanted – namely, that after Dr. Stern received compensation from the Regional District Court of Dusseldorf in 1964, he no longer pursued the matter any further.[237]

V. ANALYSIS AND CONCLUSION

German criticism raises questions that should be addressed by American commentators and courts. One of the most important is how claims for works of art should be dealt with when compensation had been paid to the victims of Nazi persecution by special courts in Germany. The attorney for Lempertz praised the High Regional Court's 2016 decision against Feigen by saying that what the court did there was to prevent the award of double damages to the Estate since restitution had already been paid to Dr. Stern in 1964 for the works in his gallery that were auctioned by Lempertz.[238] But does such compensation preclude the claims of those forced to sell their property by the Nazis? It is possible, as pointed out by the *Bissonnette* court itself, that the Defendant, Ms. Bissonnette, could have pleaded "claim preclusion" in the District of Rhode Island?[239] And at a broader level, how do the courts in both the United States and Germany go about ascertaining critical facts related to events that took place over seventy years ago? As noted earlier, two courts were applying law from the United States but doing so on the basis of different facts.

With respect to the underlying factual dispute, however, it is likely that Dr. Stern never saw much of any of the proceeds from the forced sale of his inventory. Dr. Stern alleged in the proceeding in Dusseldorf in 1964 that he was forced to pay increased taxes prior to fleeing Germany on account of the sale of his property; the Estate repeated the claim in its complaint in Rhode Island. It is widely known that a confiscatory *Reichsfluchtssteuer* (imperial flight tax) was imposed on Jews who fled Germany. This has been reported in mainstream German media sources.[240] A former New York

236. *Id.* at 42, 43.

237. *Id.* at 43.

238. *Id.* at 40.

239. *Bissonnette*, 548 F.3d at 53.

240. *See e.g.* Sven Felix Kellerhoff, *Ein demokratisches Gesetz plünderte die Juden aus*, WELT (June 5, 2013), www.welt.de/geschichte/zweiter-weltkrieg/article116836031/Ein-demokratisches-Gesetz-pluenderte-die-Juden-aus.html; *Abbas gibt Juden Schuld am Holocaust*, SPIEGEL (May 1, 2018, 6:01 PM), www.spiegel.de/politik/ausland/mahmoud-abbas-gibt-juden-schuld-am-holocaust-a-1205676.html (last accessed October 30, 2018) (stating that "[f]or the majority of roughly 300,000 Jews, in total, who were able to emigrate out of Germany, their exodus was generally associated with significant losses in wealth because the Nazi regime confiscated their property.").

practitioner in the area of art law and expert in the field, Professor Jennifer Kreder, argued in an *amicus curiae* brief to the Second Circuit that works of art sold by Jews in Germany in the 1930s should be defined as "Flight Art."[241]

German commentators may technically be correct when they assert that Dr. Stern received the proceeds of the sale – that is, those proceeds may have been technically deposited to his bank account. The text of the 1964 Dusseldorf decision, not only reveals that Dr. Stern in fact brought a claim for discriminatory taxes levied on him prior to his flight from Germany, but that his efforts in the late 50s and early 60s to recover his property or be compensated for his losses met resistance every step of the way, including from Lempertz.[242] In the 1964 compensation decision, the court recounted Lempertz's argument at that time, as stated in a letter from its director, that all of Dr. Stern's pieces were auctioned at regular prices and that damages on account of the expedited and forced sale of the property were out of the question.[243] Furthermore, Lempertz argued that Dr. Stern dictated his own prices and obtained them.[244]

The compensation court in Dusseldorf ultimately ruled in favor of Dr. Stern. It noted that in art circles it was widely known that Dr. Stern was being forced to liquidate his gallery and that knowledge surely affected the prices Dr. Stern was able to obtain for both the forced auction of his works, as well as the hastily arranged sales of pieces in his gallery.[245] But this small victory for Dr. Stern required years of struggle and resistance.

It is reasonable to conclude the *Bissonnette* lies on a solid substantive foundation, viewed apart from defense counsel's clear errors and omissions. Unlike commentators in Germany, or the High Regional Court of Cologne, the District of Rhode Island did not view what happened to Dr. Stern as a typical and voluntary commercial transaction. It saw the Nazi's treatment of Dr. Stern and the orders imposed on him as tantamount to theft, regardless of whether he was in the art business or not. Even if commentators in Germany believe that because the painting had been auctioned and transferred under German property law rules in Germany, a review of Rhode Island law, as well as other United States choice-of-law decisions, shows that the selection of Rhode Island law to adjudicate the replevin claim was proper and in line with choice-of-law determinations in similar United States cases. The *Bissonnette* court further disagreed regarding how diligent Dr. Stern was in trying to recover the painting at issue in the case. It viewed his

241. Amicus Curiae Brief at 7, Zuckerman v. Metropolitan Museum of Art, 928 F.3d 186 (2d Cir. 2019) (No 18-0634-cv), 2018 WL 3013320.

242. Landesgericht Dusseldorf, *supra* note 200, *passim*.

243. Landesgericht Dusseldorf, supra note 200, at 4.

244. *Id.* at 4.

245. *Id.* at 7-8.

efforts in light of the totality of the circumstances affecting him prior, during and after the war; it did not impose onerous requirements on his search or trivialize the nature of his persecution, which it may seem to many that German criticism has done. And had the District of Rhode Island addressed the statute of limitations issue, it could justifiably have held that the statute did not begin to run until the Estate discovered the whereabouts of the painting.

As long as Americans and Germans disagree over the details and significance of the facts surrounding the forced dispossession of Jewish property in the 1930s and 40s, in an atmosphere where Jews were treated as second-class citizens and millions sent to their death, the international purchase and sale of artwork will continue to be fraught with these problems. The goal of this Article, hopefully achieved, was to help the reader understand the German approach to a case involving looted art and to compare that approach with that of a court in the United States in a specific case.