

IFAR[®] Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

IFAR JOURNAL

VOLUME 17 NOS. 2 & 3 2016

KNOEDLER/ROSALES AFFAIR

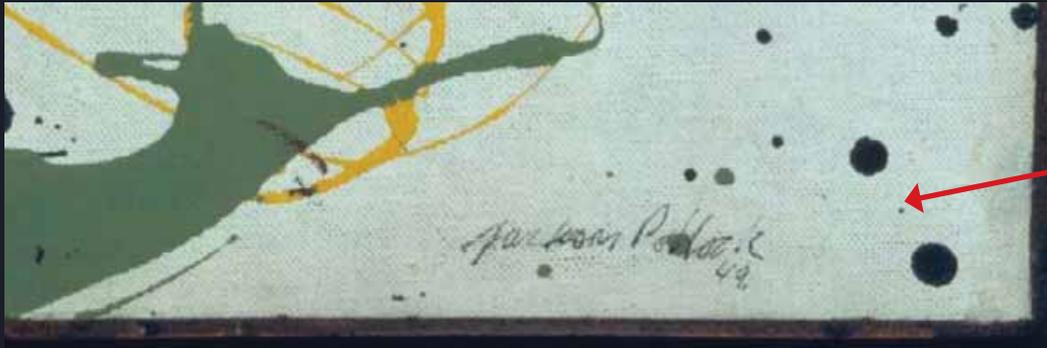
ADAM AND EVE

NEW SWISS LAW

Volume 17 Numbers 2 & 3 2016

In this issue

20/20 Hindsight: Lessons from the Knoedler/Rosales Affair



POLLOCK

NOT



Swiss Cultural Property Law Goes into Effect

Details on Picasso in Limbo in Spain

New Ruling on Adam and Eve

INCORPORATING

STOLEN ART ALERT[®]

IFAR[®]Journal

INTERNATIONAL FOUNDATION FOR ART RESEARCH

2 NEWS & UPDATES

- 2 Avowals and Disavowals: When Can an Artist Say, “It’s Not Mine”
 - 6 Switzerland Gets Tough on Customs Violators
 - 9 Fire Destroys Paintings in Cuzco Church Inventoried by IFAR in 1983
 - 11 Two Bills Affecting Restitution Claims Move Forward in Congress
 - 13 Tough New York Ivory Law Put to the Test
 - 14 Kapoor Redux
-

16 WILL THIRD VISIT TO NINTH CIRCUIT BE DÉJÀ VU ALL OVER AGAIN FOR NORTON SIMON MUSEUM?

Thomas R. Kline

22 THE TANGLED CASE OF PICASSO’S *HEAD OF A YOUNG WOMAN* (1906) — The Tension Between Cultural Heritage Laws and Private Property

Rafael Mateu de Ros

32 20/20 HINDSIGHT: LESSONS FROM THE KNOEDLER/ROSALES AFFAIR

An IFAR Evening, July 12, 2016

33 Introduction

Patricia Cohen

34 An Overview

John Cahill

40 IFAR’s 2003 Report

Sharon Flescher

45 Technical Examination of the Paintings

James Martin

50 The Art Dealers Association of America

Adam Sheffer

52 Some Reflections on Authenticity

Robert Storr

55 Panel Discussion and Q&A

67 STOLEN ART ALERT[®]

COVER: (Top): JACKSON POLLOCK, *No. 23, 1949* (detail);
(Bottom): IFAR #02.04 (detail). See story on p. 40.

This article from *IFAR Journal*, Vol. 17, nos. 2&3 is being distributed by Thomas R. Kline with the permission of the International Foundation for Art Research and cannot be posted or reprinted elsewhere without the permission of IFAR.

WILL THIRD VISIT TO NINTH CIRCUIT BE DÉJÀ VU ALL OVER AGAIN FOR NORTON SIMON MUSEUM?

THOMAS R. KLINE*



FIGURE 1. *Lucas Cranach the Elder, Adam and Eve*, c. 1530. Both, oil on panel, 75 x 27 ½ in. Currently in the collection of the Norton Simon Museum, Pasadena, but claimed by Marei von Saher, heir of Jacques Goudstikker.

The storied and soon-to-be-legendary Holocaust art recovery lawsuit – brought by Marei von Saher against the Norton Simon Museum of Art at Pasadena over twin paintings *Adam* and *Eve* by Lucas Cranach the Elder – has been dismissed for a third time in a narrow and technical decision by the U.S. District Court for the Central District of California.¹ The case will, therefore, be making its third trip to the U.S. Court of Appeals for the Ninth Circuit. Reversal and remand, which were the result of the two previous appeals by von Saher, seem at least more likely than not to be repeated.

As has been discussed previously in this Journal,² the case concerns a claim by Marei von Saher, sole heir of renowned Dutch art dealer Jacques Goudstikker, to recover two Cranachs which the Goudstikker Firm had sold to Nazis under pressure during the German occupation of the Netherlands. After World War II, the Allies returned the paintings to the Dutch who did not restitute them to the Goudstikker heirs. Rather, since the Goudstikker heirs failed to claim the Cranachs under the procedures available post-War in The Netherlands, the

¹ *Marei von Saher v. Norton Simon Museum of Art at Pasadena*, Civ. Act. No. CV 07-2866-JFW (C.D. Calif. August 9, 2016), *appeal filed*, *Marei von Saher v. Norton Simon Museum of Art at Pasadena and Norton Simon Foundation*, No. 16-56308 (9th Cir. Sept. 9, 2016). (“*von Saher 5*”).

² See *IFAR Journal*, Vol. 10, no. 2, 2008, pp. 21-32; Vol. 11, no. 2, 2009, pp. 10-11; Vol. 13, nos. 1&2, 2012, pp. 8-9; Vol. 15, no. 2, 2014, pp. 23-28; Vol. 16, nos. 1&2, 2015, pp. 16-19.

* Thomas R. Kline, Esq., is an art law attorney and a Partner at Cultural Heritage Partners, PLLC in Washington DC.

Dutch took possession and control of the paintings and transferred them in 1966 to Prince George Stroganoff-Scherbatoff, an American naval officer who was heir to the aristocratic Stroganoff art collection, from which he believed the works had been confiscated during the Russian revolution. He, in turn, sold the paintings in 1970-71 to the Norton Simon, where they remain today.

When von Saher located the Cranachs at the Norton Simon and made claim, the parties tried to negotiate an amicable resolution. Negotiations broke down in 2007, and von Saher filed suit to recover the Cranachs.

The case was previously decided twice by the federal district court in California, each time in favor of the Norton Simon; the Ninth Circuit reversed each decision and remanded the case to the district court. Von Saher is appealing the district court's August decision to reject her claim for the third time, so the case will be going back to the Ninth Circuit again on appeal.

The district court's decision relies exclusively on Dutch law with virtually no reference to U.S. legal principles that have guided most Holocaust/World War II art restitution cases. The district court ruled this time that von Saher's claim must fail because her predecessors-in-interest made an educated and informed decision not to pursue these paintings after the War, thus waiving the claim and surrendering title to the Dutch government.³

If the court is correct, an election not to pursue a known and available right would be troubling in our legal system and would require detailed analysis under applicable U.S. law to see if a waiver had occurred. The court, however, analyzed the case under the very strict and legalistic Dutch post-War Royal Decrees — decrees that have now been discredited in The Netherlands — leading to a problematic and unsettling result.

³ *Id.* at 10.

BACKGROUND OF THE GOUDSTIKKER STORY

One of the first to flee Nazi Germany's invasion of The Netherlands in May 1940, eminent Dutch art dealer Jacques Goudstikker left behind some 1,200 artworks in his home country. Jacques, however, did not even make it as far as England. He fell to his death down an open hatch while onboard the ship that was supposed to deliver him to safety. His wife Desi and one-year-old son Edo managed to escape to the U.S., but Jacques' mother, left behind, and his former colleagues also still in The Netherlands, were forced to deal with the devil in the form of Alois Miedl, notorious henchman for high-level Nazi leader and art thief Hermann Goering ("I intend to plunder and to do it thoroughly"⁴); Miedl took over the Goudstikker Firm, running it for his own and his master's benefit throughout the occupation.

While Miedl and Goering drained the Goudstikker Firm assets, the Nazis committed countless similar depredations in occupied lands. As a result, the governments-in-exile of various occupied countries (including Poland, The Netherlands and Czechoslovakia), along with the Allied nations, issued the London Declaration warning that they "reserved their rights" to revisit the lawfulness of such transactions after the Nazis' self-indulgent rampage ended.⁵ Other restitution efforts, such as the now-famed Monuments Men, returned looted artworks to the countries from which they were taken with at least the notion, if not always the explicit direction, that the artworks be restituted to the victims of Nazism.

The Dutch, however, set short statutes of limitations and established other technical rules after the War that they now recognize to have been "legalistic, bureaucratic, cold and often even callous."⁶

⁴ William L. Shirer, Ron Rosenbaum, *The Rise and Fall of the Third Reich: A History of Nazi Germany*, (New York: Simon & Shuster, 2011), p. 942.

⁵ Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control, January 5, 1943, <http://uscbs.org/assets/inter-allied-declaration.pdf>.

⁶ *Von Saher* 5 p. 8 quoting Ekkart Committee Report, 2001.

For example, many nations misunderstood the nature of coerced sales and sales under duress that Jews had been forced to make, with the Dutch viewing even transactions with the dreaded art looting task force of chief Nazi ideologue Alfred Rosenberg (Einsatzstab Reichsleiter Rosenberg or “ERR”) as voluntary. The Dutch post-War government decided that “sales made in 1941 and in the first quarter of 1942 could not have been forced sales.”⁷ Even in later occupation-era transactions, the claimant still had to prove direct or indirect coercion or force by the buyer, not just the special circumstances of the occupation.⁸

Immediately post-War, the Dutch did not restitute works to Jacques’ successors, Desi and Edo. Rather, *via* three Royal Decrees, discussed exhaustively by the district court, the Dutch set up a complicated claims process governed by a strict interpretation of what constituted a forced sale.

The district court considered that, at the urging of her legal and financial advisors, Desi made a calculated, tactical decision not to pursue certain remedies available under the post-War decrees in The Netherlands, including the claim for return of these paintings, while pursuing other claims.⁹ The district court concluded, in particular, that Desi’s decision not to go after the Cranachs seemed to be based on advice that *Adam* and *Eve* could be difficult to sell and that accepting restitution would mean that the firm would have to repay the Dutch for funds received from Goering in the forced sale transaction.¹⁰ Von Saher’s justification for Desi’s failure to make such a claim does not appear in the decision.

In the absence of a timely claim, the Dutch government took possession and control of the Cranachs and, in 1966, transferred *Adam* and *Eve* (along with another work) to Stroganoff-Scherbatoff in exchange for the waiver of certain claims against

a Rembrandt painting and payment to the Dutch State of 60,000 guilders. Stroganoff-Scherbatoff, as already noted, later sold the Cranachs to Norton Simon. Desi and Edo are now deceased. Von Saher is Edo’s widow (and the mother of Jacques’ grandchildren), and has been pursuing Goudstikker claims as Jacques’ sole heir.

The 1998 Washington Conference on Holocaust Assets generated the Washington Conference Principles calling for the prompt, just and fair — not legalistic — resolution of claims based on Nazi art looting.¹¹ In 2002, the Dutch followed the Washington Conference Principles by instituting a new “lenient,” “liberal,” and “more generous art restitutions policy”¹² for considering claims on paintings returned to The Netherlands after the War and retained in the Dutch national collection. New claims can now be made on artwork not restituted after the War, and review will be based on ethical/moral considerations, not just legal ones. Under this new policy, transactions by Dutch Jews beginning May 10, 1940, the first day of the German invasion, are viewed as forced, unless there is evidence to the contrary.¹³ Under the new restitution policy, which did away with reliance on a “purely legal approach,”¹⁴ in 2006 the Dutch returned to von Saher about 200 works which were not restituted after the War, but whose loss, although not legally a confiscation under Dutch law, “can be considered involuntary under the current restitution policy.”¹⁵

Von Saher’s case against the Norton Simon thus concerns two paintings taken by the Nazis in forced sales that were returned to The Netherlands after the War but not restituted to the Goudstik-

⁷ Dutch Restitutions Committee, Ekkart Committee Recommendations, “Forced Sale” (http://www.restitutiecommissie.nl/en/4_forced_sale.html).

⁸ *Id.*

⁹ *Von Saher* 5, pp. 4-6.

¹⁰ *Von Saher* 5, p. 5.

¹¹ <http://www.state.gov/p/eur/rt/hlct/122038.htm> (Washington Conference Principles on Nazi-Confiscated Art).

¹² Dutch Restitutions Committee, “The Restitutions Committee’s history in brief.” http://www.restitutiecommissie.nl/en/the_restitutions_committees_history_in_brief.html.

¹³ *Id.*

¹⁴ *Von Saher* 5, p. 8.

¹⁵ Dutch Restitutions Committee, Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (http://www.restitutiecommissie.nl/en/recommendations/recommendation_115.html); see *Von Saher* 5, p. 8.

ker heirs. Instead, they were transferred to a third party, Stroganoff-Scherbatoff, by the Dutch and found their way to the Norton Simon. Since they are no longer under the control of the Dutch, they could not be restituted to von Saher under the new Dutch policy which the district court declined to apply.¹⁶ In response to an inquiry from the Norton Simon, in fact, the Dutch government refrained from expressing any opinion about ownership of the Cranachs.¹⁷

THE TWO PRIOR APPEALS

In its first decision in 2010, the district court dismissed von Saher's case as time-barred, finding the California statute of limitations for Holocaust-related property claims to be unconstitutional as a violation of the foreign affairs doctrine.¹⁸ The Ninth Circuit U.S. Court of Appeals agreed with the district court's analysis, but nonetheless remanded the case to the district court because von Saher's claim might be timely under some other California statute of limitations.¹⁹

By the time of the second go-round, the California legislature had created a broader and therefore constitutional statute of limitations pertaining to all property recovery claims, removing any question about the timeliness of von Saher's claim. Nevertheless, the district court dismissed the case in 2014 on the grounds that von Saher's claims, if not the California statute, conflicted with U.S. restitution policy because the Dutch had resolved the case and the U.S. government honors post-War restitution decisions.²⁰ Again, the court of appeals reversed, concluding that *Adam* and *Eve* were never the subject of post-War restitution proceedings in The Netherlands and, therefore, von Saher's claims

based on forced sales "are in concert with" U.S. restitution policy as embodied in the Washington Principles and the Terezin Declaration.²¹

THE DISTRICT COURT'S THIRD DISMISSAL

On this remand, the Norton Simon presented the district court with numerous arguments to support its claim to title, such as the Act of State Doctrine. The district court, however, ruled only on the argument that the Norton Simon held title due to the heirs' decision not to perfect their claim after the War, even though the Goudstikker Firm was unquestionably coerced into selling the works. The district court held that the Dutch state acquired title, then lawfully transferred title to Stroganoff-Scherbatoff who sold the work to the Norton Simon, thus conveying good title to the museum.

Dutch Post-War Decrees

The district court rests its decision on three interlocking post-War royal decrees governing restitution of property claimed by victims of the Nazis. Under these decrees, Dutch citizens had until 1951 to make their claims. While reasonable people can disagree about a 6-year period for claims, it seems unconscionably short considering the overwhelming loss of life and of records, and the additional burdens survivors faced in putting their lives back together. Although not directly relevant to *von Saher v. Norton Simon*, Congress is today considering a bill that would create a federal statute of limitations for Holocaust-related claims, extending the permissible time period to 6 years after the date of actual discovery of the whereabouts of the object. Congress is apparently animated to act due to the unusual circumstances of the losses, which included genocide of the theft victims, destruction of records coupled with post-War injustices followed by sealing of records.²²

¹⁶ *Von Saher* 5, p. 17.

¹⁷ *Von Saher* 5, p. 8.

¹⁸ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 959-60 (9th Cir. 2010).

¹⁹ *Id.* at 968.

²⁰ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 719 (9th Cir. 2014); see <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (Washington Conference Principles on Nazi-Confiscated Art); <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (Holocaust Era Assets Conference, Terezin Declaration).

²¹ *Von Saher*, 754 F.3d at 723.

²² Holocaust Expropriated Art Recovery Act of 2016 (S. 2763), available at <https://www.congress.gov/bill/114th-congress/senate-bill/2763>; <https://judiciary.house.gov/press-release/goodlatte-nadler-introduce-legislation-help-recover-art-confiscated-holocaust/> (introduced in House of Representatives).

The district court also ignores a contrary finding by the Dutch Restitutions Committee that the Goudstikker heirs “could have had various reasons at the time for deciding against seeking restoration of rights that in no way suggest the surrender of ownership rights to the Goering collection.”²³

The district court’s decision has a natural tendency to grate on the American consciousness, since we are deeply steeped in the rule that a thief does not acquire and cannot pass good title, even to a good faith purchaser.²⁴ At the same time, Americans do respect the notion that one can make an election not to pursue an available remedy, and must then accept the consequences. Hence, what is troubling about the decision is not necessarily the result, but rather the district court’s strict and exclusive reliance on the arcane and discredited Dutch post-War laws without (1) a detailed choice of law analysis; (2) consideration of Holocaust-related factors that might have contributed to the heirs’ decision not to pursue the claim; or (3) reference to contemporary U.S. restitution decisions in similar cases.²⁵

Choice of Dutch Law

The district court provides scant justification for its exclusive reliance on Dutch law, saying only that the district court agrees with the Norton Simon’s analysis and von Saher did not object.²⁶ Applying Dutch law puts the district court out of step with the most comparable recent decision that rejected the application of Swiss law to a property transfer occurring there in the post-War era. In *Bakalar v.*

²³ Dutch Restitutions Committee, Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection (http://www.restitutiecommissie.nl/en/recommendations/recommendation_115.html).

²⁴ *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982).

²⁵ A small but potentially significant point: the district court notes that under Dutch law a forced sale is considered voidable, meaning the transaction is considered valid until challenged and nullified under the Royal Decrees. *Von Saher* 5, p. 11 & n. 6. In the U.S., we regard forced sales as straight up acts of looting or stealing which are void *ab initio*. *Vineberg v. Bissonnette*, 529 F. Supp. 300, 307-08, *aff’d*, 548 F.3d 50 (1st Cir. 2008).

²⁶ *Von Saher* 5, p.10 n.5.

“The district court’s decision has a natural tendency to grate on the American consciousness, since we are deeply steeped in the rule that a thief does not acquire and cannot pass good title, even to a good faith purchaser. At the same time, Americans do respect the notion that one can make an election not to pursue an available remedy, and must then accept the consequences.”

Vavra,²⁷ which also made multiple trips to a federal court of appeals, the U.S. District Court for the Southern District of New York applied the law of Switzerland to a transfer of property occurring in that country, analyzing the transaction under the principle that the law of the place of the challenged transaction controls.²⁸ On appeal, the U.S. Court of Appeals for the Second Circuit reversed; using the more modern interest analysis, it held that New York had a far greater interest in seeing its laws applied to a painting found within the jurisdiction than did Switzerland.²⁹

In the von Saher case, the district court noted that The Netherlands said that it would offer no opinion about these paintings because they are not in The Netherlands and the dispute is between private parties.³⁰ Yet, the district court’s analysis makes the Dutch interest paramount.³¹ So, almost twenty years after the 1998 Washington Conference on Holocaust-Era Assets and the wide acceptance of a more liberal approach to restitution of Nazi-looted art, the district court

²⁷ *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010), *reversing* 550 F. Supp. 2d 548 (S.D.N.Y. 2008).

²⁸ *Id.*

²⁹ *Id.* (“By contrast, the resolution of an ownership dispute in the Drawing between parties who otherwise have no connection to Switzerland does not implicate any Swiss interest simply because the Drawing passed through there”). A contrasting (and also long-running) case is *Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No. CV 05-3459-JFW-E (C.D. Cal. June 4, 2015). In *Cassirer*, the district court applied Spanish — not California — law of adverse possession/prescription in dismissing a Holocaust-related claim to a painting. The court reasoned that Spain had the most significant relationship to the painting, which was located in Spain and possessed by a Spanish party, and the allegedly unlawful taking did not occur in California.

³⁰ *Von Saher* 5, pp. 8-9.

³¹ *Id.*

acknowledges that it is following the Dutch post-War “strictly legal” approach, thus ignoring the policy and moral considerations that the Dutch now take into account under the Washington Principles and the Terezin Declaration.³²

Viewed through the lens of the Washington Principles and the new Dutch approach, the Goudstikker Firm and family rank squarely amongst the collectors and dealers most put upon by the rapacious legions of Nazi art looters, as well as one of the most ill-served by the lack of understanding and legalisms of post-War procedures.

By basing its decision entirely on post-War decrees that the Dutch now recognize to have been “legalistic,” the district court never considers whether Desi’s decision not to make a claim on *Adam and Eve* could be justified under the current ethics-based Dutch restitution principles or the possibly more forgiving American waiver standards. The district court has left this analysis for the appeal.

CONCLUSION

What, then, does *von Saher v. Norton Simon* tell us about the current level of contentiousness in Holocaust-related art claims? Some claims are being quietly settled; Christie’s, for example, has handled over 200 claims in the past decade.³³ Likewise, over the past five years the Museum of Fine Arts, Boston, has settled Holocaust-related looting claims with the heirs of Jakob and Rosa Oppenheimer (*Four Tapestries from the Life of Urban VIII Series*)

³² See <http://www.state.gov/p/eur/rt/hlct/122038.htm> (Washington Conference Principles on Nazi-Confiscated Art); <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (Holocaust Era Assets Conference, Terezin Declaration).

³³ Monica Dugot, Senior Vice President and International Director of Restitution, Christie’s, Congressional Panel Testimony before the Senate Judiciary Committee on June 7, 2016. <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Dugot%20Testimony1.pdf>.

and with the heirs and estate of Walter Westfeld (Eglon van der Neer, *Portrait of a Man and Woman in an Interior*) (<http://www.mfa.org/collections/provenance/ownership-resolutions>). Von Saher, herself, has settled fifty claims.

“The parties tried to settle this case and, when such efforts fail, it is impossible to know if one party is more at fault.”

On the other hand, cases like *von Saher* (individual heir vs. American museum), *Cassirer v. Thyssen-Bornemisza* (individual heirs vs. Spanish museum) and *Bakalar v. Vavra* (individual heirs vs. individual collector) have taken or are taking more than one trip to a federal appellate court. These cases at least suggest that there is a hardening of attitudes and an increasing level of disputatousness among some museums and collectors undermining the promise of the Washington Principles and Terezin Declaration that litigation can be avoided or minimized through the amicable and expeditious search for a “just and fair solution” to claims for unrestituted Nazi-looted art.³⁴ The parties tried to settle this case and, when such efforts fail, it is impossible to know if one party is more at fault. However, the fact that von Saher and the Norton Simon, after ten years of litigation, have not been able to avoid or contain this dumpster fire of a litigation suggests that many parties still lack the tools or the will to approach Holocaust-related art restitution cases rationally and in a cost-effective and humane manner.

³⁴ See <http://www.state.gov/p/eur/rt/hlct/122038.htm> (Washington Conference Principles on Nazi-Confiscated Art); <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (Holocaust Era Assets Conference, Terezin Declaration).

• • •