

49 Misc.2d 300, 267 N.Y.S.2d 804  
 (Cite as: 49 Misc.2d 300, 267 N.Y.S.2d 804)



Supreme Court, New York County, New York,  
 Special and Trial Term, Part II.  
 Erna MENZEL, Plaintiff,

v.

Albert A. LIST, Defendant.  
 Albert A. LIST, Third-Party Plaintiff,

v.

Klaus G. PERLS and Amelia B. Perls, trading under  
 the name of Perls Galleries, Third-Party Defendants.  
 Feb. 10, 1966.

ARTHUR G. KLEIN, Justice.

This action in replevin was tried to the court and a jury. Plaintiff sought to recover a painting by Marc Chagall, which she and her husband had left in their apartment in Brussels when they fled in March, 1941, before the oncoming Nazis.

Treated by the Nazis as 'decadent Jewish art', the painting was seized by the 'Einsatzstab der Dienststellen des Reichsleiters Rosenberg' on or about March 31, 1941, and a certification or receipt left, indicating that the painting, among other works of art, had been taken into 'safekeeping.'

The Menzels were among the more fortunate who were able to escape. They settled in the United States and lived here since 1941. Mr. Menzel died in 1960.

Search had been made by Mr. and Mrs. Menzel for the painting ever since the end of the war, but they were unable to locate it, until in 1962, it was discovered in the possession of defendant Albert A. List.

Demand, refusal, and this action followed.

List, a well-known art collector, defending, brought in as third-party defendants the proprietors of the gallery from which he purchased the painting, Klaus G. Perls and Amelia B. Perls, doing business as Perls Galleries. Perls likewise is a well-known art gallery.

Plaintiff in her complaint alleges that she is and at all

times since 1932 has been the lawful owner of the painting, entitled 'Le Paysan a L'echelle' [The Peasant and the Ladder] and has been and now is entitled to immediate possession of the painting.

On or about March 31, 1941, the complaint alleges, the painting was 'wrongfully and illegally looted and stolen from her former residence by the Nazi Goering-Rosenberg Group'; and 'at no time has any compensation been paid for same by the German or Belgian governments or received by plaintiff from any other source'.

Discovery in November 1962, and demand and refusal, are then alleged; and plaintiff's prayer for relief is in the form customary in replevin actions, praying for possession or, in the alternative, for the value, which the complaint alleged to be \$25,000.

The answer, denying knowledge or information as to the material allegations of the complaint, set up as an affirmative defense that the cause is barred by the New York Statute of Limitations.

In his third-party complaint, List alleges that he purchased the painting from defendants Perls, whose galleries are located at 1016 Madison Avenue, on or about October 14, 1955, for \$4,000; that the painting was entitled 'L'echelle de Jacob [Jacob's Ladder]'; that in the purchase Perls Galleries warranted and represented that their title was valid and that they were empowered to sell the painting to List.

...

It appears from the record that the Menzels bought the painting in 1932 from the collection of Walter Schwarzenberg through Galerie Georges Giroux, in Brussels, and paid for it 3800 Belgian francs, the equivalent of \$150. The painting remained in the Menzels' Brussels home until they fled in 1941.

The whereabouts of the painting between 1941 and 1955 are unknown.

Perls testified that he bought the painting in July 1955 from Galerie Art Moderne in Paris for \$2800 in

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French francs.

He further stated that title was not warranted in writing or orally to third-party defendants; that Galerie Art Moderne is one of the leading, most representative, reputable galleries in Paris, as is Perls Galleries in New York; and amongst such galleries the offer of sale of any painting is in and of itself, in the custom of the trade as between galleries, warranty of title. Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title.

The defense also urged before the jury that since the painting was described in the receipt as an oil, but in fact was a gouache, it was not the same painting which the Menzels had left in their apartment....

The jury by its verdict for the plaintiff has established the identity of the painting, by whatever name, and whatever description; Mrs. Menzel's unqualified ownership of the painting; that the painting was looted and stolen from her apartment, as alleged in the complaint, and that the painting, or its value, which the jury fixed at \$22,500, be awarded to Mrs. Menzel; and that List upon delivery of the painting to Mrs. Menzel recover the \$22,500 from Perls Galleries.

The result reached is amply supported by the record, and the motion to set aside the verdict as contrary to the weight of the evidence is denied.

There remain for disposition, on the motion to set aside, numerous questions of law which have been earnestly and forcefully pressed by able counsel for the defense and vigorously opposed by learned counsel for plaintiff.

These include:

(I) the defense of the Statutes of Limitations of New York and Belgium;

(II) the plaintiff having fled Belgium, abandoned everything in her apartment;

(III) the painting was captured by occupying land forces on land and title accordingly passed to the nation prosecuting the war;

(IV) the painting was lawfully requisitioned by German authority, as an occupying power in the prosecution of the law and as confiscation of the property of its nationals;

(V) that the defendants are bona fide purchasers of the painting for value.

In their supplemental brief, the third-party defendants, planting themselves upon [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 \(1964\)](#), urge with respect to IV, above, the applicability of the Act of State Doctrine; they assert that this Court should not 'assume jurisdiction to determine title as of 1941 to the property seized, requisitioned, confiscated or expropriated by duly authorized German officers from one of its own nationals, blacklisted as an enemy of the State' because of the 'fortuitous' circumstance that the property was found here.

The court will treat these grounds *seriatim*. The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.

## I

The defense of the Statute of Limitations appears to be based on the lapse of time since 1941 when the painting is asserted to have been stolen from the plaintiff, or since 1955 when List bought the painting from Perls.

[1] This defense, however, has been held unavailable to the defendants in this action, by the decision of Streit, J., February 7, 1964, *affd.* [22 A.D.2d 647, 253 N.Y.S.2d 43 \(October 6, 1964\)](#). In replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand.

## II

[2] Abandonment is defined as a voluntary relinquishment of a known right, ... with no intent to reclaim. ... see, particularly, *Collac c. Etat Serbe-croate-slovene* [Yugoslavia], IX *Recueil des Deci-*

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sions des Tribunaux Arbitraux Mixtes, 195 (Tribunal Arbitral Mixte hungaro-serbe-croate-slovene, 15 Mai 1929).

[3] In *Collac*, it was held that personal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited.

[4] The relinquishment here by the *Menzels* in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup ... and from the history of their search for the painting, there was obviously a continuing intent to reclaim.

The court finds, accordingly, as a matter of law, that there was here no abandonment.

### III

[5] Nor may this seizure be treated as lawful booty of war by conquering armies.

If the seizure is to be classified at all, it is to be classified as plunder and pillage, as those terms are understood in international and military law.

#### A.

[6] *Booty* is defined as property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication; and is lawfully taken. ....

Booty is described in the Annex to the Hague Convention of 1907 'between the United States and other Powers relative to the Opening of Hostilities', October 18, 1907, proclaimed February 28, 1910, 36 U.S.Stat. at L. 2259, Art. 53, at 2308: 'An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.'<sup>1</sup>

[FN1](#). Cf. Rules of Land Warfare, War Department of the United States:

'321. Two classes of movable property.-All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

'329. Pillage is formally forbidden.

...

The Hitler Government's definition was somewhat broader, but even that definition did not include works of art. ...

#### B.

[7] *Pillage*, or *plunder*, on the other hand, is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful. VI Hackworth, *op. cit. supra*, at 403.

Where pillage has taken place, the title of the original owner is not extinguished. *Mazzoni v. Finanze dello Stato*, LII Il Foro Italiano 960 (Tribunale di Venezia, 1927); *Collac c. Etat Serbe-Croate-Slovene Yugoslavia*, *supra*, IX Recueil des Decisions des Tribunaux Arbitraux Mixtes 195; VI Hackworth, *supra*, at 403.

Said the Venetian Court in *Mazzoni*, as translated and digested in Annual Digest of Public International Law Cases, 1927-1928 (London, 1931) at 564-565:

'The argument that the property of citizens absent from occupied territory is to be considered *res nullius*, or war booty, cannot be admitted. \* \* \*

'The principle based upon the Roman Law according to which property seized during a war is put on an equal footing with the property seized in the air, in the sea or in the earth, and which in a similar way becomes the property of the captor-since the right of war constitutes a just cause of acquisition-may be applicable to things liable or apt to be used for the needs of the army and belonging to the other bellig-

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erent. But it cannot be applied to private property which, if it has not become the object of requisition or sequestration, must be restored or compensated. The objects involved in the present case are private property which had not been requisitioned or sequestrated as it could not be used for the needs of the army. Their seizure must therefore be considered as having been effected by pillage.”

[8] Similarly, in *Collac* (supra), it was held that personal property left behind at the approach of the enemy cannot automatically be considered as war booty; but it must be ascertained whether they belonged to a private person who, having *temporarily abandoned them*, has not relinquished his rights of ownership in such property.

Indeed, the very description of the acts of *Einsatzstab Rosenberg*, in *United States et al. v. Goering et al.*, infra, is entitled ‘Pillage of Public and Private Property’. [6 F.R.D. at 69, 120.](#)

And in the first order issued by the 21st Army Group, July, 1944, upon the return of Allied Forces to the French beachhead, where the question arose what German property was booty (‘butin de guerre’), under the general principles of the laws of war, it was provided: ‘The Germans have acquired no title to private movable property \* \* \* which has been acquired by theft, looting, or pillage.’ Note to Article by Dr. Smith, supra, 23 *Brit. Y.B. Intl. L.* at 238-239 (1946).

#### IV.

We come now to the assertion that the Act of State Doctrine precludes any inquiry by this Court into the validity of the acts of the Nazis.

[9] The Doctrine states, in terms of the most recent opinion on the subject by the Supreme Court of the United States, that ‘the Judicial Branch [of the government] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law’. [Banco Nacional de Cuba v. Sabbatino](#), supra, 376 U.S. 398 (1964), at 428, [84 S.Ct. 923](#), at 940.

In *Sabbatino*, the Supreme Court held that the United States District Court was without power to inquire into the validity of a decree of the Cuban [Castro] Government expropriating sugar which had belonged to a Cuban corporation whose stock was principally owned by United States residents, the effect being that the District Court was compelled to take the Cuban decree at face value.

Analysis of the Doctrine, as thus stated by the Supreme Court, indicates that invocation of the Doctrine rests upon the confluence of four factors:

(A) the taking must be by a foreign sovereign government;

(B) the taking must be within the territorial limitations of that government;

(C) the foreign government must be extant and recognized by this country at the time of suit;

(D) the taking must not be violative of a treaty obligation.

Analysis of the facts in the case at bar and the Court’s own research into controlling principles lead inexorably to the conclusion that of these four factors, not one has been met.

#### A.

*The taking was not by a foreign sovereign government.*

The receipt in evidence, dated March 31, 1941, was given on the stationery of the ‘*Militärbefehlshaber in Belgien und Nordfrankreich, Militärverwaltungschef, Einsatzstab der Dienststellen des Reichsleiters Rosenberg.*’

While the testimony and depositions before the Court are not clear as to the place of the *Einsatzstab* and the *Reichsleiters Rosenberg* as within or without the German Government, the Court has, in the course of its own research, come upon the nub of the relationship.

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In the opinion and judgment of the International Military Tribunal in United States, French Republic, United Kingdom and U.S.S.R. v. Goering, Hess, Von Ribbentrop, Ley, Keitel, Kaltenbrunner, Rosenberg, et al., commonly called The Nurnberg Trial, International Military Trials, Nazi Conspiracy and Aggression, office of United States Chief Counsel for prosecution of Axis Criminality (United States Government Printing Office, 1947), likewise reported at [6 F.R.D. 69 \(1946\)](#), the following lucid description of the activities of the 'Einsatzstab \* \* \* des Reichsleiters Rosenberg' is found ([6 F.R.D. at 122-123](#)):

'The defendant Rosenberg was designated by Hitler on the 29th January 1940 Head of the Center for National Socialist Ideological and Educational Research, and thereafter the organization known as the 'Einsatzstab Rosenberg' conducted its operations on a very great scale. Originally designed for the establishment of a research library, it developed into a project for the seizure of cultural treasures. On the 1st March 1942, Hitler issued a further decree, authorizing Rosenberg to search libraries, lodges and cultural establishments, to seize material from these establishments, as well as cultural treasures owned by Jews. Similar directions were given where the ownership could not be clearly established. The decree directed the cooperation of the Wehrmacht High Command, and indicated that Rosenberg's activities in the West were to be conducted in his capacity as Reichsleiter, and in the East in his capacity as Reichsminister. Thereafter, Rosenberg's activities were extended to the occupied countries. The report of Robert Scholz, Chief of the special staff for Pictorial Art, stated:

'During the period from March 1941 to July 1944 the special staff for Pictorial Art brought into the Reich 29 large shipments, including 137 freight cars with 4,174 cases of art works.'

'The report of Scholz refers to 25 portfolios of pictures of the most valuable works of the art collection seized in the West, which portfolios were presented to the Fuehrer. Thirty-nine volumes, prepared by the Einsatzstab, contained photographs of paintings, textiles, furniture, candelabra and numerous other objects of art, and illustrated the value and magnitude of the collection which had been made. In many of the occupied countries private collections were robbed, libraries were plundered, and private houses were

pillaged.

'Museums, palaces and libraries in the occupied territories of the USSR were systematically looted. Rosenberg's Einsatzstab, Ribbentrop's special 'Battalion,' the Reichscommissars and representatives of the Military Command seized objects of cultural and historical value belonging to the people of the Soviet Union, which were sent to Germany. Thus, the Reichscommissar of the Ukraine removed paintings and objects of art from Kiev and Kharkov and sent them to East Prussia. Rare volumes and objects of art from the palaces of Peterhof, Tsarskoye Selo, and Pavlovsk were shipped to Germany. In his letter to Rosenberg of the 3rd October 1941 Reichscommissar Kube stated that the value of the objects of art taken from Byelorussia ran into millions of rubles. The scale of this plundering can also be seen in the letter sent from Rosenberg's department to von Milde-Schreden in which it is stated that during the month of October 1943 alone, about 40 box-cars **\*\*815** loaded with objects of cultural value were transported to the Reich.'

The evidence on which this excerpt from the decision is based is clear and free from doubt.

'On 29 January 1940 Hitler issued a decree in the following terms:

'The 'Hohe Schule' is supposed to become the center for national-socialistic ideological and educational research' \* \* \*

'The staff of the Einsatzstab Rosenberg seized not only 'abandoned' art treasures but also treasures which had been hidden, or were left in the custody of depots or warehouses, including art treasures that were already packed for shipment to America.

'In a letter to Goering, 18 June, 1942, Rosenberg voiced the opinion that all art objects and other confiscated items should belong to the National Socialist Party (NSDAP) because the party has been bearing the brunt of the battle against the persons and forces from whom this property was taken.

'The National Socialist Party financed the operations of the Einsatzstab Rosenberg.'

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International Military Trials, Vol. I, Nazi Conspiracy and Aggression, at pages 1097, 1099, 1100 (Office of United States Chief Counsel for Prosecution of Axis Criminality; United States Government Printing Office, 1946).

[10] In the circumstances, the Court finds that this painting was seized not by a foreign sovereign government but rather by 'The Centre for National Socialist Ideological and Educational Research', an organ of the Nazi Party.

B.

*The taking was not within the territory of the foreign government.*

Since, as indicated, the taking was not by a foreign sovereign, the location of the property as within or without its jurisdiction is moot.

[11] However, assuming, arguendo, that the taking had been by the German Government, it would nevertheless be invalid because not within its own territory.

Brussels, the site of the appropriation of the painting, was the territory of Belgium. The government of the Kingdom of Belgium in exile, in March 1941, was the recognized government of Belgium. The governments of Belgium and Holland 'continue to exist as international entities'.

'Military occupation, by itself, does not confer title, nor extinguish a nation.'

'[S]o long as a people do not accept military conquest; so long as they can manifest, in one way or another, their inalterable will to regain their freedom, their sovereignty, even though flouted, restricted, and sent into exile, still persists.' (35 Am.Journ.Int.Law, 666, 667 [October 1941].)

C.

*The Third Reich was neither extant nor recognized by the Government of the United States at the time of trial.*

[12] The Third Reich collapsed with the surrender in

1945. See *The Axis in Defeat* [Department of State, Publication 2423] page 45, Declaration regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945.

D.

*The seizure of this painting was in violation of specific treaty obligations to the United States.*

The Constitution of the United States provides:

'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Constitution of the United States, Art. VI.

The Hague Conventions, to which Belgium, Germany, and the United States were parties, provided for 'recourse \* \* \* to the good offices or mediation of one or more friendly Powers \* \* \* before an appeal to arms'. 1899 Convention, Title II, Art. II; 32 Stat. at Large 1779, 1785. A similar clause was inserted in the Convention, for Pacific Settlement of International Disputes, of 1907, Part II, Art. 2; 36 Stat. at L. 2199, 2212.

In the accompanying 1907 Convention Relative to the Opening of Hostilities, Article 1 provided: 'The Contracting Powers recognize that *hostilities* between themselves *must not commence without previous and explicit warning*, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.' 36 Stat. at L. 2271. (Italics supplied.)

Article 56 of the simultaneous Convention respecting the Laws and Customs of War on Land provided as follows: 'The property of municipalities, of religious, charitable, educational, artistic and scientific institutions, although belonging to the State, is to be accorded the same standing as private property. All premeditated seizure, destruction or damage of such institutions, historical monuments, works of art and science, is forbidden \* \* \*.' 36 Stat. at L. 2309; [6 F.R.D. 69, 120](#).

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And Articles 46 and 47 provided as follows:

‘Article 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

‘*Private property cannot be confiscated.*’ 36 Stat. at L. 2306-2307. (Italics supplied.)

‘Article 47. *Pillage is formally forbidden.*<sup>FN3</sup> 36 Stat. at L. 2307. (Italics supplied.)

[FN3](#) The Pact of Paris, also known as the Kellogg-Briand Peace Pact of 1928, was likewise entered into by Belgium, Germany, and the United States. It provided:

‘Outlawry of War.

‘Article I

‘The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

‘Article II

‘The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.’ 46 Stat. at Large 2343 et seq.

Conventions are, of course, treaties and the terms are interchangeably used. V Hackworth, op. cit. supra, p. 3.

The very invasion of Belgium was a violation of these solemn treaty obligations. [United States v. Goering, supra, 6 F.R.D. at 102, 108.](#)<sup>FN4</sup>

[FN4](#) As Henry L. Stimson, the Secretary of State of the United States, said, in 1932:

‘War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world \* \* \* an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law \* \* \*. We denounce them as law breakers.’ Quoted at 6 F.R.D. 108.

The pillage so rampant during Nazi occupation was specifically held to be in violation of Article 56 of the Hague Convention of 1907. [United States v. Goering, supra, 6 F.R.D. at 120-123.](#)

[\[13\]](#) Accordingly, in any view of the case, the Act of State Doctrine has no application.

...

V.

A.

[\[14\]](#) It is of no moment that Perls Galleries may have been a *bona fide* purchaser of the painting, in good faith and for value and without knowledge of the saga of the Menzels. No less is expected of an art gallery of distinction.

Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner. [Silsbury v. McCoon, 3 N.Y. 379, 383-384 \(1850\)](#); II Kent Comm. 14th ed., per Holmes, 324-325.

‘Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.’ Law #59, U. S. Military Government for Germany, 10 Nov. 1947; Military Government Gazette, Amtsblatt der Militärregierung Deutschland, Amerikanisches Kontrollgebiet, Part I, Article 1, Para. 2. Cf. Re, Developments in Sovereign Immunity, 1 N.Y.L.F. 160, 201 (1955).

.....

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#### CONCLUSION

The jury has found plaintiff to be the sole and rightful owner of the painting. The court has found that she never abandoned it but that it was pillaged and plundered by the Nazis. No title could have been conveyed by them as against the rightful owners. The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.

The motion to set aside the verdict is in all respects denied. Judgment may be entered accordingly.