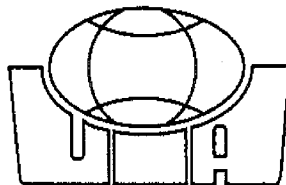


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STOLEN ART: HOW EXTENSIVE IS THE PROBLEM?

WHOSE MONET

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WHOSE MONET

Provenance

This is the story of a painting by one of France's great painters, Claude Monet. The painting is entitled "Champs de Blé à Vétheuil" (Champs de Blé or the "Monet") in oil, painted in 1879 (it is signed and dated) in Vétheuil in the Seine Valley when Monet was living there with his family from 1878 to 1883. It is 65 by 81 centimeters, a nice size for a living room. Many paintings by Monet of the same valley exist, where the church tower of Vétheuil rises above the river, and fields of wheat surround the town, with the church steeple seen from different perspectives. This particular painting was purchased from Monet by the great art dealer Durand-Ruel, whose gallery in Paris was one of the most prosperous in pre-World War I France. In 1908, Karl von der Heydt, a prominent banker from Bad Godesberg, Germany purchased the painting, and it remained in his house until he died in 1922. Champs de Blé and some other works of art, including a small Rodin table sculpture which would play an important role in the legal action, were inherited by his niece, Gerda de Weerth. It hung for about twenty years on the wall over the Rodin sculpture in her residence in Wuppertal-Elberfeld. As the war closed in on the inhabitants of Europe, Mrs. DeWeerth became concerned for the safety of her property, and in August 1943 she moved the painting and other properties to a large schloss owned by her sister, Gisela von Palm, in Oberbalzheim, in Southern Germany. However, a short while before she was able to reclaim possession of her schloss, Mrs. von Palm had had to yield it to quarter American Army soldiers for several weeks. In the fall of 1945, after the American troops had moved on to Berlin and the war was over, Mrs. von Palm was devastated to discover that the painting, carefully stored in a closet of her castle, was no longer there. She discovered the painting was missing after the soldiers left. Distraught, she told her sister that the painting was missing and probably had been taken. Mrs. De Weerth was about 50 years old at the time, living in Bonn, and she reported the loss of the painting to the American military government then administering the Bonn-Cologne area. She also enlisted the assistance of her lawyer, Dr. Heinz Frowein, to recover it. Years passed without success but she remained persistent, and in 1957 she reported the missing Monet to the Bundeskriminalamt (the West German F.B.I.). But the painting by now proved to be unlocatable. As we can imagine, records after the war were often impossible to trace.

However, unknown to Mrs. De Weerth, and indeed unknowable to anyone but those who had the painting after 1943, the Monet had arrived in the United States. It had been purchased, from someone still unknown, by a gallery in Geneva, Switzerland, owned by one François Reichenbach. In New York City it appeared in the possession of The Wildenstein Gallery on Madison Avenue in about 1957. Records found during the course of the lawsuit established that Wildenstein finally purchased the painting from Reichenbach in 1962. Wildenstein had delivered the painting to a lady named Baldinger who lived at 710 Park Avenue, New York City. Records showed that she purchased the painting from Wildenstein in June 1957. Of course Mrs. DeWeerth had no possible way of knowing the route her painting had taken since it left her sister's schloss in 1945.

Mrs. Baldinger was very fond of the Monet and she publicly exhibited it on only two occasions. The first was a benefit held at the Waldorf-Astoria Hotel in New York City from October 29 to November 1, 1957. Some years later, she loaned it to Wildenstein for its

exhibition entitled "One Hundred Years of Impressionism" from April 2 to May 9, 1970, at its gallery in New York City. This was a very important exhibition for Wildenstein, and for the development of the market for Impressionist painters in the United States. Except for these two displays, the painting remained exclusively in Mrs. Baldinger's Park Avenue residence from June 1957.

In 1974 the Wildenstein Foundation published "Claude Monet: Bibliographie et Catalogue Raisonné, Tome I, 1840-1881, Peintures. In this volume a photograph of Mrs. DeWeerth's painting appeared at No. 595. The provenance was not accurately stated, as it did not reflect the sale from Durand-Ruel to Mr. von der Heydt. Nor did it include Mr. Reichenbach as a prior owner.

Mrs. DeWeerth had wearied of her fruitless search for her Monet but her nephew, Peter von der Heydt had become interested, and he set out to find it. In 1981, he learned of the exhibition at the Wildenstein Gallery in New York and found it also in the Catalogue Raisonné. He retained counsel, my partner Joseph Becker and myself, to find out if Wildenstein knew the identity of the present owner and its whereabouts and to pursue the painting. Wildenstein declined to disclose Mrs. Baldinger's identity or whereabouts.

The Legal Action

The story of the painting now becomes a legal tale--one might say a tale of two jurisdictions peculiar to the United States. Without, I hope, miring you in the complexity of our Federal and State jurisdictional edifice, I will take you through this part of the story as an illustration of the pitfalls of our two tier system and of how the common law of property rights, a chattel in this case in the form of a valuable painting, can be misapprehended and misapplied in furtherance of the jurisprudence and practices of the federal courts.

The Monet painting of Mrs. De Weerth was, in 1982 when I came upon it, located in the City and State of New York in Mrs. Baldinger's residence. Therefore, it appeared that the law of New York for the remedy of replevin of property wrongfully held would in all respects govern the case. The law of replevin itself is simple enough: a claimant who wishes to recover a chattel held by another alleges that the chattel is owned by the claimant and wrongfully possessed by the present possessor who refuses to return it upon demand. Mrs. DeWeerth needed only to allege that she was the rightful owner of the Monet and that Mrs. Baldinger was not the owner as a matter of law, and that she has refused to return it. In New York a thief cannot convey good title even to a purchaser in good faith.

But, for the unfortunate Mrs. DeWeerth, it was not quite that simple, as we had to explain. A statute of limitations required the demand for return of the chattel to be made within three years of the time the action had "accrued". What did that mean? The case law seemed clear and over the years the common law cases decided by the courts of New York had determined that a case of replevin "accrued" when a demand was made and refused. The statute of limitations did not even begin to run until Mrs. DeWeerth demanded the return of her painting and Mrs. Baldinger refused. So we were able to assure our client that she was timely in her legal action to recover the painting. A simple application to the court of general jurisdiction, the New

York Supreme Court, resulted in an order requiring Wildenstein to disclose Mrs. Baldinger and her address. Having started in the New York Supreme Court, we then made a fateful decision.

Now the tale of two jurisdictions and the woe of that tale must be told. We advised Mrs. DeWeerth after much thought that we should bring the replevin action in the United States District Court for the Southern District of New York. We told her we could also bring it in the New York Supreme Court for New York County. The federal court was possible here because under a federal statute there was diversity jurisdiction between Mrs. DeWeerth, a citizen of Germany, and Mrs Baldinger, a citizen of New York. We thought that we could get better judicial treatment in the federal court as, in those days, it was widely believed that on the whole there was quicker and better judicial attention available from the federal judges than the state's judges even on matters of New York law. We persuaded ourselves that as we represented a foreign person, from Germany, and the law of replevin being relatively straightforward in the case law development of the one statute that applied, we were safer in the federal court, and our foreign client would get fairer treatment. A good judge would give us relief in about two years.

In February of 1983, we filed our action and the legal odyssey of Champs de Blé à Vétheuil began; it was not to be concluded until 1994 when the final denial of Mrs. DeWeerth's claim to her painting was rendered by the Second Circuit Court of Appeals. Little did we imagine how tortured this journey would be, how the case's final jurisprudential significance is not in the realm of how one recovers stolen or lost works of art, but as part of an obscure doctrine of "finality of judgments," and how once a judgment is rendered and appealed, even if erroneously decided, and unjustly so, it cannot and will not be disturbed.

The United States District Court

The first part of the action went smoothly. Wildenstein defended Mrs. Baldinger because if she was in wrongful possession she could claim over against Wildenstein for breach of warranty of title and she sued Wildenstein as a third party defendant. So Wildenstein set out to thwart the proof that Mrs. DeWeerth was the owner. In early 1984 Mrs. DeWeerth was examined and cross-examined in her own house in Bonn and she produced a photograph of the Champs de Blé on her wall with the Rodin sculpture on a table beneath, and showed that she still had the Rodin in her possession. Her story was credible and there was corroborative proof as well. Wildenstein tried to cast doubt on her title but ultimately could only defend by arguing that she had delayed far too long in looking for her painting and had sat on her rights such that she was not timely in bringing this action. They argued that with better effort she could have sooner discovered the painting (she never knew of the catalogue raisonné) and that it was now unfair to Mrs. Baldinger to allow her claim to proceed. But the law of New York at that time did not require an owner to be constantly searching for lost or stolen property. It was enough to have reported it stolen, which Mrs. DeWeerth did, and then to make a timely demand once she did find it.¹ The District Judge, Vincent Broderick, took the case under advisement in mid-1985, and, alas, not until 1987 did he issue his decision of judgment for our client.² The Monet was hers once again. Now four years had passed since the lawsuit had been started, and Mrs.

¹ *Menzel v. List*, 267 N.Y.Supp. 2d 804, 279 N.Y.Supp. 2d 608 (1967); 24 N.Y. 2d 91 (1969).

² *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987).

DeWeerth was about 87. But Wildenstein appealed and here the story becomes more complicated. I will simplify it, I hope, without distorting the legal history.

The United States Court of Appeals

On appeal, Wildenstein pressed its argument that Mrs. DeWeerth had not done enough to recover the painting and that her efforts were too minimal to allow her relief, even if it were shown that the painting was hers by inheritance. Wildenstein disputed her ownership as well. We argued that her efforts were reasonable for a woman in her circumstances under the conditions in post-war Germany, and given the difficulties in those days of tracing property stolen by various armies in the chaos that followed the Allied invasion and the German retreat.

The Court of Appeals for the Second Circuit, with one judge dissenting, voted 2 to 1 that Wildenstein had the better view of New York law and that a New York court, if considering the question, that is, if we had brought the case in the New York Supreme Court, would have decided that the replevin statute required an owner seeking to recover lost or stolen property to exercise a high level of due diligence in seeking the property before its benefits could be invoked. No New York case law supported this holding and the statute itself could not be read to imply such a requirement. The federal court was exercising its prerogative and, as it saw it, its duty, of interpreting New York law in a case before it that turned on New York law. The writer of the majority opinion, Judge Newman, in effect decided that a New York judge, if faced with the facts in this case, would not allow Mrs. DeWeerth to recover her painting because she had not tried hard enough to find it.³ Alas, we could not interest the United States Supreme Court, and the case appeared to end with our client losing her Monet, although she was the proven owner, and although Wildenstein had been shown to have misrepresented the provenance in its Catalogue Raisonné, thus making it more difficult to trace the painting on its path to and through post-war Switzerland.⁴

The New York Courts

The Second Circuit made its decision reversing the trial judge in late 1987. The second part of Mrs. DeWeerth's struggle began soon after. A case involving a small Chagall gouache allegedly stolen from the Guggenheim Museum in New York City was making its way through the New York Supreme Court in 1989. The Guggenheim was claiming against a well known New York City art dealer, the Robert Elkon Gallery, that the Chagall it had bought from another reputable gallery, the Gertrude Stein Gallery, had been stolen from its storage archives by a former employee. The Guggenheim had not been particularly diligent in pursuit of the Chagall but when it appeared in a select exhibition at the Elkon Gallery, it decided to move on its claim. Museum curators said they did not have any idea where the gouache had gone; they just knew it had not been de-accessioned and was missing from its collection. Nor had they done much to find it and several years had passed since it was noted as missing; it was not reported anywhere as stolen.

³ *DeWeerth v. Baldinger*, 836 F. 2d 103 (2d Cir. 1987)

⁴ *Id.*, cert. denied, 486 U.S. 1056 (1988).

In the end the Guggenheim prevailed, and the New York Court of Appeals, the state's highest court, in a landmark decision held that New York's replevin statute does not have the due diligence requirement that the Second Circuit had placed on it in the DeWeerth case. It held that when the Guggenheim discovered its lost or stolen painting it had made timely demand for its return and that was all the statute required.⁵

Thus, the Second Circuit in the DeWeerth case had wrongly determined New York law, and had not had a basis in New York law for the decision it had made faulting Mrs. DeWeerth for her efforts to find her Monet. It had just made up what it thought New York law should be, but not based on any New York case law; in fact the jurisprudence that existed clearly went the other way, and no due diligence requirement was even hinted at in the relevant decisions.⁶ Judge Newman, perhaps in sympathy with an innocent purchaser in New York, had found a way to keep the Monet in New York and not send it back to Germany into the hands of a German citizen.

Back to the United States District Court

The New York Court of Appeals decision in Guggenheim v. Lubell came down in 1991. Mrs. DeWeerth was then 91, but still longing for her lost Monet. So she instructed us to go back to the Federal Court and seek to set aside the Second Circuit's decision as wrongly decided under New York law and therefore unjust in the circumstances. Our argument was that a federal court in a diversity case had grossly and unfairly misapplied the law of New York; it should recognize its error and vacate its prior judgment and allow the Monet to return to Germany and its rightful owner. Our first application was to the Second Circuit itself which quickly denied relief without opinion. We went back to Judge Broderick and moved for relief.

Judge Broderick believed he had been right all along and was ready to agree with our application to revise the judgment. He wrote a long and learned opinion about the circumstances that allow a court to refashion a judgment wrongly decided, or to correct a judgment, or to set it aside for reasons of equity and fairness. His decision was made in October 1992, and was based on the Guggenheim case and the correctness of having federal case law about New York conform to the New York case law.⁷

Again Wildenstein and Mrs. Baldinger appealed. She too had advanced to a late age, and she too felt strongly about the Monet she had now possessed for thirty-five years. By now she had possessed "Champs de Blé à Vétheuil" for more years than Mrs. DeWeerth had before it had been moved from her house in 1943.

Return to the United States Court of Appeals

But the story ends here. Alas, the Second Circuit, Judge Newman standing aside and not involved, decided that Judge Broderick was wrong again; that the judgment should not be corrected just because the court had wrongly decided the case in the first instance. The appeal

⁵ Solomon R. Guggenheim Foundation v. Lubell, 550 N.Y.S. 2d 618, aff'd 77 N.Y. 2d 311 (1991).

⁶ Menzel v. List, *supra*.

⁷ See F.R.C.P. 60(b); 804 F.Supp. 539 (S.D.N.Y. 1992)

court was at pains to point out to us that we, Mrs. DeWeerth's lawyers, had chosen the federal court in which to litigate when the state court was available to us. So, it reasoned, we had cast our lot with the federal court, right or wrong, and we had to abide with its wrong decision.⁸

This story has the twin virtue of being interesting in itself as a case of title and possession of a work of art and also telling us much about the particular virtues and faults of American justice in a federal system where the laws of states govern the rights of parties to property, and federal courts are required to apply State laws. If invoked as it was in this story, federal law must accommodate itself to the relief sought in this case under the great precedent of Erie v. Tompkins, 304 U.S. 64 (1938).

Coda

Since the 1994 decision of the DeWeerth case, although unacknowledged explicitly by the Second Circuit, the federal court in New York City has certified a high number of state law questions to the New York Court of Appeals for its opinion. It has not, to my knowledge ventured to interpret a state doctrine or statute as it did in DeWeerth; since DeWeerth it has preferred to ask the highest state court to do it. Thus, unless the state law is settled beyond a doubt, the Second Circuit in New York will defer to the state courts before ruling on a matter of state law in a diversity case pending before it. Once the state court has answered its question, the Second Circuit federal appeals court rules on the appeal before it.

⁸ 38 F 3d 1266 (2d Cir. 1994); cert. denied 513 U.S. 1001 (1994).