

Observations on the lawsuit brought against the Fundación Colección Thyssen-Bornemisza in California by the Cassirer family



On 4 December a California court will hear the lawsuit brought by Claude Cassirer's heirs against the Fundación Thyssen-Bornemisza over the ownership of Camille Pissarro's *Rue Saint-Honoré, après midi, effet de pluie*, which belonged to Mr Cassirer's grandmother and was looted by the German state during the Second World War.

The Foundation believes that the suit stands no chance of success and is confident that the court will again dismiss the case, as it previously did in 2012 and 2015 (though on both occasions the Court of Appeals ordered it to review its rulings on the basis of technicalities, without prejudging the substance of the matter).

The Foundation acquired the painting from Baron Thyssen-Bornemisza in 1993 as part of the Thyssen-Bornemisza Collection, and is convinced of the legitimacy of its ownership.

The Foundation is therefore convinced that the District Court will dismiss the only claim the plaintiffs currently maintain, namely that the Foundation may have knowingly acquired stolen property – a claim that is factually and legally unfounded.

The sale of the Thyssen-Bornemisza Collection took place in 1993 with maximum publicity and public repercussions. The Baron had acquired the painting in 1976 from a prestigious New York art gallery and had not only kept it on display in his museum in Lugano (Switzerland) but had also featured it in temporary exhibitions with huge international resonance. The Foundation has placed the picture on view continuously since 1992 as part of the Thyssen-Bornemisza Collection, and it has appeared in various publications and catalogues. This publicity is further evidence that both the Baron and the Foundation have acted in good faith. Their behaviour is evidently out of keeping with someone who could have committed a criminal offence.

Illustration: Camille Pissarro. *Rue Saint-Honoré, après midi, effet de pluie*, 1897. Museo Thyssen-Bornemisza, Madrid

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As the Foundation has maintained throughout the proceedings:

1. The Foundation acquired the picture in a fully valid and effective transaction

The Fundación purchased the picture in 1993 from its lawful owner at the time, a company belonging to Baron Thyssen-Bornemisza. At the time of the purchase of the Thyssen-Bornemisza Collection, the Spanish government commissioned the most prestigious international legal advisors to conduct a due diligence investigation on the legitimacy of the vendors' ownership. The due diligence report concluded there were no irregularities in the vendors' ownership.

Aside from the fact that neither the Baron nor the Foundation were ever accused of any crimes, there is no indication of bad faith and less still of bad faith implying they may be considered principals, accomplices or accessories (*encubridores*) to a crime.

2. The Cassirer family received monetary compensation from the German government in 1958

The Cassirer family already received compensation for the loss of this work. After the Second World War, Mrs Cassirer filed a restitution claim with the German government for the loss of the painting. This procedure ended in 1958 with a settlement whereby Mrs Cassirer received a sum equivalent to what she acknowledged the picture's market value to be, and she stated that the compensation satisfied any claim deriving from its loss.

3. Even if the Baron's acquisition by purchase had not been fully valid – which it was – the Foundation would have acquired ownership anyway by means of prescriptive acquisition (usucaption)

Indeed, even if the plaintiffs were to successfully challenge the Baron's entitlement to sell the painting – which they cannot, because the Baron was the legitimate owner of the work – the Foundation would have acquired ownership via acquisitive prescription, after three years' peaceful and uninterrupted possession in good faith and with valid title, or six years' possession if any of these requisites were lacking. The Foundation was not aware that the picture had been looted by the Nazis until Lilly Cassirer's heirs contacted the Foundation in 2001. By then more than eight years had passed since the Foundation had purchased the Thyssen-Bornemisza Collection in 1993. The Collection, and specifically the Pissarro painting, had been publicly displayed by Baron Thyssen since 1979 and by the Foundation at the Museo Thyssen-Bornemisza since 1992, without the slightest objection being made until then.

The plaintiffs claim that the Foundation may not have acquired ownership. They argue that, according to article 1956 of the Spanish Civil Code, if, when it acquired the painting in 1993, the Foundation was an accomplice or accessory after the fact to the theft, it could not have acquired it by usucaption. In the Foundation's opinion, this argument is untenable, as neither the Baron nor the Foundation have ever been accused, let alone convicted, of such a crime, and therefore article 1956 of the Civil Code could never apply to the present case. But aside from this, the plaintiffs have not provided the slightest proof of the existence of such crimes or even of bad faith on the part of the Baron or the Foundation.

The Foundation is confident that the District Court will reject the unfounded claim that the Foundation may have been an accomplice or accessory after the fact to a crime and, for the third time, will dismiss the lawsuit and confirm its legitimate title to the painting.

Timeline:

1939: Lilly Cassirer Neubauer sells the painting for less than its market value to Jakob Scheidwimmer, a dealer and member of the Nazi party, to obtain a visa to flee from Germany and avoid being sent to an extermination camp. The picture is subsequently acquired by Julius Sulzbacher, from whom it is later confiscated by the Gestapo.

1950: Lilly Cassirer Neubauer files a restitution claim in Germany to get back the painting, whose whereabouts is unknown to her.

1951: The painting is sold to the collector Sydney Brody at the Frank Perls gallery in Beverly Hills (United States).

1952: On the instructions of Sydney Brody, Frank Perls places the painting on sale at the Knoedler Gallery in New York (United States). That year the painting is acquired by an important collector of Missouri (United States), Sydney Schoenberg.

1958: Lilly Cassirer Neubauer reaches an agreement with the German government, the dealer Jakob Scheidwimmer and Julius Sulzbacher whereby she accepts monetary compensation from the German federal government of 120,000 deutschmarks, the market value of the painting at the time. She pays Sulzbacher's heir 14,000 deutschmarks out of this sum. The settlement puts an end to all the parties' claims. From this moment onwards neither Lilly Cassirer Neubauer nor her heirs make any further efforts to locate or recover the painting.

1976: Baron Thyssen-Bornemisza purchases the painting from another reputed gallery, the Stephen Hahn Gallery of New York. During the following years the painting is on show as part of the Thyssen-Bornemisza Collection in Lugano (Switzerland) and until 1990 it takes part in widely publicised temporary exhibitions in seven countries (Australia, Japan, the United Kingdom, Germany, France, Italy and Spain). The Collection receives much publicity, arouses great interest and is featured in publications. The Baron's ownership or good faith in acquiring the painting are never questioned.

1993: The Spanish State agrees to purchase the Thyssen-Bornemisza Collection. The purchase takes place by means of a contract entered into on 21 June 1993 with the Fundación Colección Thyssen-Bornemisza and Favorita Trustees Limited, the legitimate owner of the work with full capacity to transfer ownership. The purchase goes ahead following a due diligence examination of the legitimacy of the vendors' title to sell the Collection. The due diligence examination reveals no irregularities in the vendors' title. The Foundation's acquisition by means of the purchase contract is therefore fully valid, effective and indisputable under Spanish law, which is the law that applies to the purchase.

2002: Forty-four years after the transnational agreement between Lilly Cassirer Neubauer and the German government, twenty-six years after the Baron acquired the painting, and nine years after it was purchased by the Foundation, the Cassirer family make their first claim for the painting to be returned. The Foundation rejects the claim.

2005: Claude Cassirer files a lawsuit in California.

2010: Claude Cassirer dies aged 89. The lawsuit is continued by his children David and Ana with the support of the United Jewish Federation (of San Diego County).

2012 (June): The Court of the Central District of California dismisses the lawsuit brought by the Cassirer family in 2005 against the Spanish government and the Fundación Colección Thyssen-Bornemisza, due to expiry of the statute of limitations.

2014 (July): The Court of Appeals of California reverses the ruling of the District Court and sends it back. The judgement of the Court of Appeals is based on procedural issues and does not prejudge the substance of the matter.

2015 (June): The District Court issues a judgement on the substance of the matter, dismissing the suit on the understanding that the Foundation would, in any event, have acquired the painting by usucaption under the Spanish Civil Code. Claude Cassirer's heirs lodge an appeal with the Court of Appeals for the Ninth Circuit of the United States.

The Jewish Community of Madrid and the Federation of Jewish Communities of Spain join the suit as third parties. In this appeal the plaintiffs introduce for the first time the argument that, if the Baron did not have valid title to sell the painting (which he did in the Foundation's opinion), the Foundation may not have acquired ownership via usucaption if, for the purposes of article 1956 of the Spanish Civil Code, the Foundation, at the time of acquiring the painting in 1993, could be considered to be a principal, accomplice or accessory after the fact to theft. In the Foundation's opinion, the argument is untenable because neither the Baron nor the Foundation have ever been accused, let alone convicted, of such a crime.

2017 (July): The Court of Appeals reverses the ruling and, without prejudging the substance of the matter, orders the District Attorney to review the case to ascertain whether there are any grounds for considering the Foundation to be an accomplice or accessory after the fact to theft. According to the Court of Appeals, Spanish law applies to the Foundation's acquisition of the painting and, pursuant to the Spanish Civil Code, the Foundation is the owner in any event – even in the hypothetical case that the Baron had not been the legitimate owner when he sold it – through usucaption (three years' possession in good faith and with legitimate title, or six years' possession with no other requirement) unless the Foundation could be considered an accomplice or accessory to the abovementioned crime.

(September): The Fundación Thyssen-Bornemisza requests a review of the July decision of the Court of Appeals of the Ninth Circuit and the Spanish State participates as *amicus curiae* (third party not involved in the suit) to support the Fundación Thyssen. The Kingdom of Spain takes part in the proceedings as *amicus curiae* to explain, on the basis of a report drawn up by Spain's State Legal Service, that the interpretation of the Spanish Civil Code upheld by the Cassirer family is untenable because article 1956 of the Civil Code does not apply in the absence of a court judgement declaring that a crime has been committed.

(December): The Court of Appeals turns down the request for review.

2018 (April): The Fundación Colección Thyssen-Bornemisza, backed by the State Legal Service, appeals to the Supreme Court of the United States.

(May): The Supreme Court of the United States declines jurisdiction.

(December): The District Court hearing is scheduled for 4 to 7 December. The Foundation is confident that the District Court will reject the unfounded claim that the Foundation may be an accomplice or accessory after the fact to a crime and will, for the third time, dismiss the case and confirm the Foundation's legitimate title.