

*Cassirer v. Thyssen-Bornemisza Collection Foundation: Nazi Art Crimes Are Still Relevant in the Twenty-First Century*

I. OVERVIEW ..... 445  
II. BACKGROUND ..... 446  
III. THE COURT’S DECISION ..... 451  
IV. ANALYSIS ..... 457  
V. CONCLUSION ..... 457

I. OVERVIEW

Lilly Neubaur was coerced into selling a Camille Pissarro painting to art dealer Jakob Scheidwimmer as part of the “Aryanization” of the property of German Jews in 1939.<sup>1</sup> The painting was sold for a mere \$360.00 in Reichsmarks, but Lilly had feared (for good reason) that if she refused to sell it to Scheidwimmer she would not be allowed to flee Germany.<sup>2</sup> In 1958, assuming that the painting had been lost in World War II, Lilly accepted a settlement agreement with Germany for the wrongful taking of the painting.<sup>3</sup> The painting was not destroyed, but rather sold at an auction in Berlin, Germany, in 1951 and later passed through many people before ending up in the Villahermosa Palace Museum in Madrid, Spain, in 1989.<sup>4</sup> The museum had purchased the painting as part of the Thyssen-Bornemisza Collection (TBC) for \$350 million (estimated value between \$1 and \$2 billion).<sup>5</sup> Years later, in 2000, a descendent of Lilly, named Claude Cassirer, learned that the painting was in that museum, and in 2001, his family filed a petition in Spain seeking the return of the painting.<sup>6</sup> After the petition was denied, Cassirer filed an action in the U.S. District Court for the Central District of California for the return of the painting.<sup>7</sup>

This decision is the third appeal of this case to this court.<sup>8</sup> Here, the court decided the merits of the following appeals:

---

1. Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 955 (9th Cir. 2017).  
2. *Id.*  
3. *Id.* at 956.  
4. *Id.* at 956-57.  
5. *Id.*  
6. *Id.* at 957.  
7. *Id.*  
8. *Id.*

(1) the Cassirers' appeal of the order which granted summary judgment in favor of TBC on the grounds that under applicable Spanish law, TBC acquired title to the painting by prescriptive acquisition (usucaption), (2) TBC's appeal of the order which denied TBC's motion for summary adjudication based on the assertion that Lilly waived her ownership rights to the painting pursuant to the 1958 Settlement Agreement and that the district court lacked jurisdiction under the FSIA, (3) TBC's cross-appeal of the summary judgment order in its favor, for failure to consider and rule upon its claim under Swiss law and its defense of laches.<sup>9</sup>

The U.S. Court of Appeals for the Ninth Circuit *held* that Spanish substantive law determines whether TBC can claim title to the painting via acquisitive prescription and that there is a genuine issue of material fact surrounding whether TBC knew the painting had been stolen when TBC acquired the painting. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 981(9th Cir. 2017).

## II. BACKGROUND

The Holocaust Expropriated Art Recovery (HEAR) Act was enacted in 2016.<sup>10</sup> It is the most recent U.S. legislation to deal with Holocaust restitution.<sup>11</sup> Previously, Congress enacted the Holocaust Victims Redress Act in 1998 (1998 Act), which stated:

all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.<sup>12</sup>

The 1998 Act was a direct response to a conference that produced Principles on Nazi-Confiscated Art.<sup>13</sup> Despite these early actions, Congress saw the need for a federal law regarding Nazi-looted art, as victims have brought such actions in the United States only to have them face obstacles, such as state statutes of limitations.<sup>14</sup> As a result, some claims had expired before World War II had even ended.<sup>15</sup> Given the sensitive nature of the Holocaust and the unique circumstances

---

9. *Id.* at 959.

10. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat 1524 (2016).

11. *Id.*

12. Holocaust Victims Redress Act, Pub. L. 105-158, § 202, 112 Stat. 15 (1998).

13. Holocaust Expropriated Art Recovery Act § 2.

14. *Id.*

15. *See, e.g.,* Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, \*4 (E.D. Mich. Mar. 31, 2007).

surrounding the stolen and confiscated artworks, Congress enacted the Holocaust Expropriated Art Recovery Act in 2016 to try to ensure that these cases are not barred by unfair state statutes of limitations.<sup>16</sup>

The HEAR Act states:

Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of— (1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.<sup>17</sup>

The statute creates a six-year statute of limitations that begins at the actual discovery of the art.<sup>18</sup> This time period applies to any claims that were pending on the date of the HEAR Act's enactment, including those on appeal.<sup>19</sup> The HEAR Act was enacted in December 2016, and as such, there are very few cases that have relied on the act to supply a more generous statute of limitations.<sup>20</sup> However, the U.S. Court of Appeals for the District of Columbia has allowed parties to amend their complaints in light of the passage of the HEAR Act.<sup>21</sup>

While the HEAR Act sets a statute of limitations for these art claims, it does not specify which property law to apply.<sup>22</sup> The Second Restatement of the Conflict of Laws, section 6, does provide such guidance.<sup>23</sup> It first states that a court will follow the statutory directives of its own state on choice of law.<sup>24</sup> If there is no state statute that governs, then there are seven factors that should be considered when deciding choice of law.<sup>25</sup> The seven factors are (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) the certainty, predictability, and uniformity of result; and

---

16. Holocaust Expropriated Art Recovery Act § 3.

17. *Id.* § 5.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See De Csepel v. Republic of Hung.*, 859 F.3d 1094, 1110 (D.C. Cir. 2017).

22. Holocaust Expropriated Art Recovery Act § 4.

23. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

24. *Id.*

25. *Id.*

(7) the ease in the determination and application of the law to be applied.<sup>26</sup>

Generally, statutes that express a choice of law requirement are few in number.<sup>27</sup> This is because legislatures make rules and judges decide cases with the local solution in mind.<sup>28</sup> Even when a statute does not include a choice of law provision, a court will have to determine whether the issue before it falls within the intended purpose to the statute.<sup>29</sup> Therefore, a court must look at the legislative intent behind a statute in order to determine its applicability to out-of-state issues.<sup>30</sup>

If the legislative intent is purely local, courts must then look to the seven factors listed above to determine whose law should govern an issue.<sup>31</sup> The factors are not listed in order of importance, instead they must be given weight depending on the issue at hand.<sup>32</sup> One of the most important of the above factors to consider is the needs of interstate and international systems.<sup>33</sup> This factor ensures that interstate commerce runs smoothly and facilitates positive international relations.<sup>34</sup> Another important factor is the relevant policies of the state of the forum.<sup>35</sup> The application of this factor differs in two situations: (1) where the forum has an interest in the case outside of it simply being the forum, and (2) where it does not.<sup>36</sup> In the first situation, the state must then again look to legislative intent of in-state statutes to see if there is any sort of justifiable extraterritorial application.<sup>37</sup> In the second situation, the only in-state statutes that are applicable are those related to trial procedure.<sup>38</sup>

In property cases, section 222 of the Second Restatement of Conflict of Laws applies.<sup>39</sup> It states:

The interests of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which,

---

26. *Id.*  
27. *Id.* cmt. a.  
28. *Id.*  
29. *Id.*  
30. *Id.*  
31. *Id.*  
32. *Id.* cmt. c.  
33. *Id.* cmt. d.  
34. *Id.*  
35. *Id.* cmt. e.  
36. *Id.*  
37. *Id.*  
38. *Id.*  
39. *Id.* § 222.

with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.<sup>40</sup>

This is, of course, a test of who has the most significant relationship with the property.<sup>41</sup> The Restatement further clarifies by devoting sections to both immovable property (sections 223-243) and movable property (sections 244-266).<sup>42</sup> In property especially, the expectations of the parties must be weighed accordingly as it is an important factor.<sup>43</sup> This idea governs the Restatement's views on adverse possession.<sup>44</sup> Specifically, section 246 states, "Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place."<sup>45</sup> The comments of the Restatement further clarify by noting that the state "where the chattel is situated has the dominant interest in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription."<sup>46</sup>

The U.S. Court of Appeals for the Ninth Circuit uses the Second Restatement's approach when determining choice of law.<sup>47</sup> Notably, precedent requires the Ninth Circuit to apply the "more significant relationship" test to the section 6 factors.<sup>48</sup> Although the precedential case, *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, is a wrongful death case and not a property case, the Second Restatement factors in section 6 encompass many areas of law.<sup>49</sup> Furthermore, neither this court nor the Supreme Court has overruled *Schoenberg* so it still must be followed by lower courts.<sup>50</sup>

Article 1955 of the Spanish Civil Code states, "Ownership of movable property prescribes by three years of uninterrupted possession in good faith."<sup>51</sup> Ownership of movable property also prescribes by six

---

40. *Id.*

41. *Id.*

42. *Id.* §§ 223-43; 244-66.

43. *Id.* § 222 cmt. b.

44. *Id.* § 246.

45. *Id.*

46. *Id.*

47. *See* *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782-83 (9th Cir. 1991).

48. *Id.* at 783.

49. *Id.*

50. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017).

51. CÓDIGO CIVIL [C.C.] art. 1955 (Spain).

years of uninterrupted possession, without any other condition.”<sup>52</sup> Possession is defined in article 1941 of the Code, which states, “Possession must be in the capacity of the owner, and must be public, peaceful, and uninterrupted.”<sup>53</sup> Taken alone, article 1955 seems to vest title to anybody who possesses property for six years, so long as it is public, peaceful, and uninterrupted with no good-faith requirement.<sup>54</sup> However, article 1956 of the Spanish Civil Code modifies this, as it states:

Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories [*encubridores*], until the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.<sup>55</sup>

This adds a good-faith requirement to the six-year period prescribed in article 1955.<sup>56</sup> It extends the length of time a bad-faith title holder must hold on to a property to an expiration of the statute of limitations for the particular crime that resulted in the passage of a bad-faith title, plus the six years prescribed in 1955.<sup>57</sup> Article 1956 applies to property stolen from its original owner held by principals, accomplices, or “*encubridores*” with actual knowledge of the crime.<sup>58</sup>

The definition of “*encubridor*” has changed over time.<sup>59</sup> Article 16 of the 1870 Spanish Penal Code states that “*encubridores*” are:

[t]hose who, with knowledge of the perpetration of the felony, and not having participated in it as perpetrators or accomplices, intervene after its execution in any of the following modes, are guilty of concealment: . . .

(2) By obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime.<sup>60</sup>

However, the later 1973 version of the Spanish Penal Code only defined an “*encubridor*” as one who acts in a manner to aid those who committed the crimes in avoiding penalties or prosecution.<sup>61</sup> Notably, the earlier version encompasses those who passively benefit from crimes, not just

---

52. *Id.*

53. *Id.* art. 1941.

54. *See id.*

55. *Id.* art. 1956.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See* CÓDIGO PENAL [C.P.] art. 16 (Spain 1870) (English translation); CÓDIGO PENAL [C.P.] (Spain 1973) (English translation).

60. C.P. art. 16 (Spain 1870) (English translation).

61. C.P. art. 17 (Spain 1973) (English translation).

those who act in aid of perpetrators.<sup>62</sup> In order to reconcile these two versions of the code, it is important to look to article 3.1 of the Spanish Civil Code, which states that “[r]ules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose.”<sup>63</sup>

### III. THE COURT’S DECISION

In the noted case, the U.S. Court of Appeals for the Ninth Circuit relied on the *Schoenberg* decision to allow it to delve into the Second Restatement of Conflict of Laws. They performed a choice of law analysis, resulting in their decision to apply Spanish law and subsequent efforts to interpret it through its historical and legislative background.

The Cassirers acquired actual knowledge of the painting’s location in 2000.<sup>64</sup> In the noted case, the Cassirers filed an action in May 2005.<sup>65</sup> The court looked at the HEAR Act to determine whether the Cassirers’ action was timely.<sup>66</sup> The HEAR Act creates a six-year statute of limitations that begins at the time of actual discovery of the missing artwork.<sup>67</sup> It was enacted while this appeal was pending, and as the HEAR Act applies to any cases pending at the date of enactment, the Cassirers’ claims are covered under the HEAR Act.<sup>68</sup> Once the court decided that the HEAR Act could apply to the noted case, it had to make sure that the Cassirers’ claim was filed timely under the HEAR Act.<sup>69</sup> The claim was filed five years after the actual discovery of the painting and, thus, fell within the six-year statute of limitations period.<sup>70</sup>

After the court determined that HEAR Act applied, it then had to determine which law to apply: California or Spain.<sup>71</sup> The HEAR Act does not specify any sort of choice of law; it is concerned solely with statutes of limitations.<sup>72</sup> Had the court been able to apply California law, the result would be rather straightforward, as, in California, thieves

---

62. C.P. art. 16 (Spain 1870) (English translation).

63. C.C. art. 3.1 (Spain).

64. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 960 (9th Cir. 2017).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 959-60.

69. *Id.* at 960.

70. *Id.*

71. *Id.*

72. *Id.*

cannot pass good title to anyone, even good faith purchasers.<sup>73</sup> However, the court looked to the *Schoenberg* decision for guidance about choice of law, specifically to where it states “federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws.”<sup>74</sup>

Once the court determined that it should follow the Restatement, the court looked to the section 6 factors to determine which state has the most significant relationship to the case.<sup>75</sup> The court decided that Spanish law should apply because Spain has the most significant relationship to the painting and an important Spanish interest would be served by applying Spanish law.<sup>76</sup> Spain’s interest is significant because the sale of the painting was highly publicized, subsidized by public funds, and the painting had been possessed by Spain for over twenty years.<sup>77</sup> Spain’s interest is predicated on the facts that the painting was bought in and remains in Spain.<sup>78</sup> The court did not only look at Spain’s interest, as it had to compare it to California’s.<sup>79</sup> California’s positive factors include that it is the forum and has a “strong interest in protecting the rightful owners of fine arts who are dispossessed of their property.”<sup>80</sup> California law would also be much easier for the court to apply, as it is much more acquainted with it.<sup>81</sup>

There were also factors that the court weighed that were inconclusive as to whose law the court favors.<sup>82</sup> For example, factor 6(e) requires courts to consider the basic policies underlying property law.<sup>83</sup> In the noted case, the factor was neutral, as the property laws of both Spain and California try to “create certainty of title [to] discourage theft and encourage owners of stolen property to seek return of their property in a timely fashion.”<sup>84</sup> Ultimately, however, the court decided that Spain’s interests outweighed California’s and chose to apply Spanish property law to the noted case.<sup>85</sup>

---

73. *Id.* (citing *Crocker Nat’l Bank v. Byrne & McDonnell*, 173 P. 752 (Cal. 1918)).

74. *Cassirer*, 862 F.3d 951 at 961 (citing *Schoenberg v. Exportadora de Sal S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991)).

75. *Id.* at 962.

76. *Id.* at 963.

77. *Id.*

78. *Id.*

79. *Id.* at 963-64.

80. *Id.* at 963.

81. *Id.*

82. *Id.* at 964.

83. *Id.*

84. *Id.*

85. *Id.*



After the court chose Spanish law, it then had to apply it.<sup>86</sup> The lower court also determined that Spanish substantive law should apply, and it granted summary judgment in favor of TBC based on their analysis of the Spanish law of acquisitive prescription.<sup>87</sup> The court, in the noted case, analyzed the lower court's decision to grant summary judgment.<sup>88</sup> Ultimately, they concluded that the district court erred in granting it because, viewing the evidence in the light most favorable to the Cassirers, there was a triable issue of fact of whether TBC knew that the painting had been stolen from Lilly during World War II.<sup>89</sup>

To arrive at this conclusion, the court performed an in-depth analysis of articles 1955 and 1956 of the Spanish Civil Code.<sup>90</sup> First, the court had to reconcile article 1955 with the HEAR Act because the Cassirers argued that the Act precluded TBC from recovering based on acquisitive prescription.<sup>91</sup> The court concluded that the HEAR Act solely deals with the length of time one has to bring an action for the return of artwork and that it does not bar claims based on substantive issues of law.<sup>92</sup> Therefore, HEAR allowed the Cassirers to bring this action into court, but it does not necessarily mean that the Cassirers would win on the merits.<sup>93</sup>

Looking at article 1955 alone, it appeared that TBC would hold good title to the painting after a period of six years, so long as its possession was public, peaceful, and uninterrupted.<sup>94</sup> In the noted case, TBC acquired the painting in 1993 and its possession of it was not challenged until 2001, far after the six-year requirement stated in article 1955.<sup>95</sup> If Article 1955 stood alone, TBC would have achieved good title to the painting regardless of whether it was a good faith or a bad faith purchase.<sup>96</sup> However, Article 1955 does not stand alone; it is clarified by article 1956.<sup>97</sup>

Article 1956 extends the period of time required for continuous possession to any principals, accessories, or encubridores to a theft.<sup>98</sup>

---

86. *Id.*

87. *Id.* at 964-65.

88. *Id.* at 973.

89. *Id.*

90. *Id.* at 964-73.

91. *Id.* at 965.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 965-66.

98. *Id.* at 966.

Instead of the six-year requirement of article 1955, the possessor must hold the property for six years, plus the length of the statute of limitations for the crime that resulted in the possession.<sup>99</sup> If TBC were an encubridor, under article 1956, then TBC would have needed to possess the painting for twenty-six years (i.e., from 1993 to 2019) to receive the title through acquisitive prescription.<sup>100</sup> Article 1956 has two elements that must be satisfied: (1) that the property was stolen from the proper owner and (2) that the accomplices, principals, and encubridores have actual knowledge of the robbery.<sup>101</sup> The court noted that there was no dispute that the first element was satisfied; the parties agreed that the forced sale of the painting was a theft within the meaning of article 1956.<sup>102</sup>

The real dispute in the noted case was whether TBC was an encubridor, as the term is used in article 1956.<sup>103</sup> If it was, then title had not yet vested with TBC, and the painting could be returned to the Cassirers.<sup>104</sup> The district court decided that the term encubridor should be defined by reference to the Penal Code in effect, in 1993, when TBC acquired the painting.<sup>105</sup> In 1993, the Penal Code in effect (1973) defined an encubridor as one who acted in some manner to aid the criminals in avoiding prosecution or penalties.<sup>106</sup> Under this definition, the district court held that TBC would not be an encubridor, as TBC did not act with the intent of preventing criminal offenses from being discovered.<sup>107</sup> On appeal, the Cassirers argued that the court should have used the definition of encubridor from the 1870 Penal Code as that was the definition that was in effect when article 1956 was enacted in 1889.<sup>108</sup> The earlier Penal Code defined an encubridor as somebody who knowingly receives and benefits from stolen property.<sup>109</sup>

The court, in the noted case, had to choose which definition of encubridor to use in their decision.<sup>110</sup> To do so, they looked at article 3.1 of the Spanish Civil Code in order to ensure that it was applying the

---

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 967.

107. *Id.*

108. *Id.*

109. *Id.* at 967-68.

110. *Id.*

correct Spanish methods of statutory interpretation.<sup>111</sup> Article 3.1 implores a court to look at the proper meaning of the wording in connection with the context, historical and legislative background, and the social reality of the time in which they are applied.<sup>112</sup> The court looked at and analyzed each of these factors separately.<sup>113</sup>

First, the court looked at the proper meaning of the wording.<sup>114</sup> Unfortunately, Spanish dictionaries do not discuss the term “encubridor” as it relates to the law, and the definitions are not clear enough to discern whether an encubridor must have actual knowledge of a crime or if he/she must be motivated by a desire to help others or only himself/herself.<sup>115</sup> This uncertainty required the court to move down the list and consider the second factor: the context.<sup>116</sup> This factor was not very helpful to the court because there are two different, equally valid definitions of encubridor found in the 1870 and 1973 Penal Code.<sup>117</sup> The court was then required to go to the third factor: considering the historical and legislative background.<sup>118</sup>

Here, the court decided that encubridor should be determined using the 1870 version of the Penal Code.<sup>119</sup> The court noted that the 1870 Penal Code was in effect when article 1956 of the Civil Code was enacted, so it was likely that the 1870 definition was what the legislature had in mind when writing article 1956.<sup>120</sup> While the Penal Code and the definition of encubridor were later modified, article 1956 of the Civil Code has remained unchanged since 1889.<sup>121</sup> The court noted that article 3.1’s instruction to look at the historical and legislative background of a statute referred to the history that led up to the enactment of the statute in question, not to any subsequent developments.<sup>122</sup> The court also argued that even if the later version of the Penal Code applied, it did not change the definition of encubridor substantially enough to make a difference in the noted case.<sup>123</sup>

---

111. *Id.* at 968.

112. *Id.*

113. *Id.* at 968-73.

114. *Id.* at 968.

115. *Id.*

116. *Id.*

117. *Id.* at 969.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

The court made two main points on this matter.<sup>124</sup> First, it looked at the entirety of the new Penal Code and noted that the preamble of the law specifically states that the legislature does not intend to radically change the law regarding accessories.<sup>125</sup> Second, the court noted that the legislature just moved the 1870 definition of encubridor elsewhere in the statute, still describing it as including acting as an accessory by receiving stolen goods for one's own benefit.<sup>126</sup>

The court also looked at the fourth factor of "social reality at the time of enactment" when solidifying the definition of encubridor.<sup>127</sup> When TBC acquired the painting, the crimes of knowingly receiving stolen property and acting as accessory after the fact by possessing stolen property were interchangeable.<sup>128</sup> The court looked to two Spanish Supreme Court cases where the appellant had been accused of receiving stolen goods but was convicted of being an accessory after the fact.<sup>129</sup> The Spanish Supreme Court recognized the interchangeability of those two crimes, which implies that an encubridor does not have to be an actual accessory after the fact but can simply knowingly possess stolen property.<sup>130</sup>

Given the definition of encubridor that the court elucidated, it followed that TBC had not established, as a matter of law, that it did not have actual knowledge that the painting was stolen property.<sup>131</sup> The Cassirers have created a triable issue of fact of whether TBC had actual knowledge that the painting had been stolen from Lilly when TBC acquired it for its own benefit.<sup>132</sup> The Cassirers brought in an expert in European history, who pointed out some red flags that should have put TBC on notice that the painting could have been stolen.<sup>133</sup> Among the red flags are the facts that there was a gap in provenance information from 1899 to 1976; the painting had a label on the back reading "Berlin," even though there was no documentation that the painting voluntarily left Berlin; and Pissarro paintings were immediately suspect because they were often looted by the Nazis.<sup>134</sup> As such, the court determined that the district court erred in granting summary judgment on the grounds that

---

124. *Id.*

125. *Id.* at 970.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 971.

131. *Id.* at 972.

132. *Id.* at 973.

133. *Id.* at 972.

134. *Id.*

TBC legally acquired the painting through acquisitive prescription.<sup>135</sup> This court reversed the district court's decision and remanded it for trial consistent with their opinion.<sup>136</sup>

#### IV. ANALYSIS

It seems that the court, in the noted case, tried incredibly hard to not only be as fair as possible but to also avoid granting summary judgment to either party.<sup>137</sup> Obviously, the atrocities that occurred during the Holocaust are still a very sensitive topic, and it is clear that this court is trying as hard as possible to ensure that if there is any way for the Cassirers to legally be reunited with their painting, that they will be.<sup>138</sup> The noted case is the third appeal; this time it is the result of TBC's granted motion for summary judgment.<sup>139</sup> The court seems very hesitant to let TBC keep the painting because of how terrible the Nazis were.<sup>140</sup>

The Court's decision is very important given the situation. The facts are extremely complicated and specific to this case.<sup>141</sup> However, given the relatively small number of HEAR Act cases, the eventual outcome of the noted case could serve as precedent for years to come.<sup>142</sup> As such, the court carefully analyzed the relevant laws to ensure accuracy.<sup>143</sup>

The court's decision is also important because of its international nature.<sup>144</sup> The court had to be sure to adjudicate as fairly as possible in order to preserve international relations with Spain.<sup>145</sup> At the same time, the court had to ensure that it was treating the Cassirers fairly because if their Nazi stolen painting was not returned, the legal reasoning behind it needed to be solid and thoroughly researched.<sup>146</sup>

#### V. CONCLUSION

Although the U.S. Court of Appeals for the Ninth Circuit had a difficult case before them, the court elegantly blended a choice of law

---

135. *Id.* at 973.

136. *Id.* at 981.

137. *Id.*

138. *Id.* at 955, 960.

139. *Id.* at 956.

140. *Id.*

141. *Id.*

142. *Id.* at 958.

143. *Id.*

144. *See id.* at 956.

145. *See id.* at 962.

146. *See id.*

problem with the resulting application of Spanish law to the case.<sup>147</sup> Tracing the definition of encubridor throughout the years ensured a fair analysis for both parties involved.<sup>148</sup> While it seems that the court was reluctant to judge this case, as evidenced by the fact that the noted case was the third appeal, the court provided a fair and thorough analysis of the relevant laws and reversed the district court's grant for summary judgment.<sup>149</sup>

Katharine Dye\*

---

147. *Id.* at 955.

148. *Id.* at 968-70.

149. *Id.* at 955-56.

\* © 2018 Katharine Dye. J.D. candidate 2019, Tulane University Law School; B.A. 2015, University of Central Florida. Infinite thanks to Mom, Dad, Grandma, Aunt Carol, Tad, Heather, Yogurt, and my "sisters" Boo and Scout for their love, support, and guidance. I would like to dedicate this Case Note to my Grandpa, who would have been unspeakably proud.