

Bakalar v. Vavra

05 Civ. 3037 (WHP S.D.N.Y.)

Defendants' Closing Statement

Defendants' Case

- Declaration of title to the 1917 Egon Schiele drawing “Seated Woman With Bent Left Leg (Torso) – “The Drawing”
- Replevin
- Conversion

Seated Woman with Bent Left Leg (Torso) - JK 1974



Seated Woman with Bent Left Leg (Torso)

Sitzende mit angezogenem linken Bein (Torso)

Gouache and black crayon. Signed and dated, lower center.
13 7/8 x 10" (35.1 x 25.5 cm) [sight]. Private collection

Provenance: Gutekunst & Klipstein, Bern; Galerie St. Etienne, New York; Norman Granz; Galerie St. Etienne, New York; David Bakalar

Exhibitions: Bern, 1956, no. 51, ill.; New York, 1957, no. 28, ill.; Boston, 1960, no. 63, ill.

Literature: *Kenyon Review*, 1964, facing p. 616

In 1990, Jane Kallir published that the Drawing had been sold by David Bakalar to a "Private collection" (Tr.308:14-22)

- K 51

Defendants' Case

If Defendants have established

- Legal heirs of Fritz Grunbaum
- Drawing was part of Fritz Grunbaum's estate

Defendants are entitled to a declaration of title and replevin.

Defendants' Burden of Proof

If Defendants have established:

- Preponderance of the evidence Fritz Grunbaum owned Drawing when shipped to Dachau Concentration Camp;
- Fritz Grunbaum did not abandon Drawing;
- Drawing never returned to Grunbaum or court-designated heir

Defendants are entitled to a declaration of title and replevin.

Menzel v. List, 267 N.Y.2d 804, 819 (Sup. Ct. N.Y. Co. 1966) modified 279 N.Y.S.2d 608 (1st Dept. 1967) modified and aff'd 24 N.Y.2d 91 (1969).

Defendants' Conversion Claim

Elements of Conversion:

- Defendants' superior right to possess the Drawing;
- After learning of Defendants' superior right to possession, Plaintiff retained possession.

Conversion encompasses both wrongful takings and wrongful detention. Nat Koslow, Inc. v. Bletterman, 197 N.Y.S.2d 583, 586 (N.Y.Sup.1960)

Conversion requires neither bad faith, e.g., Nat Koslow, Inc., 197 N.Y.S.2d at 586; Parker v. P & N Recovery of N.Y., Inc., 697 N.Y.S.2d 462, 467 (N.Y.Civ.Ct., 1999), nor wrongful intent, e.g., Spodek v. Liberty Mut. Ins. Co., 547 N.Y.S.2d 100, 102 (2d Dep't 1989)

Defendants' Conversion Claim

If Defendants have established

- Bakalar or agent informed of heir's ownership
- Bakalar refused to return Drawing

Defendants are entitled to damages for the costs of recovery.

No need to show Bakalar bad faith

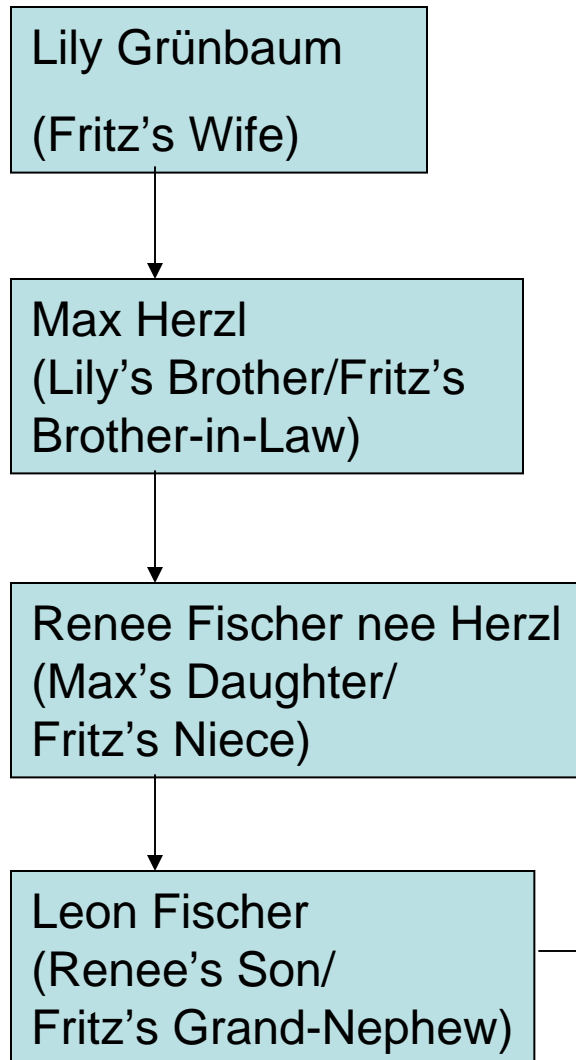
Defendants' Claim to Title: Heirs of Fritz Grunbaum

- Co-heirs each take 50% under 2003 Estate Assignment Certificate (Probate Decree)

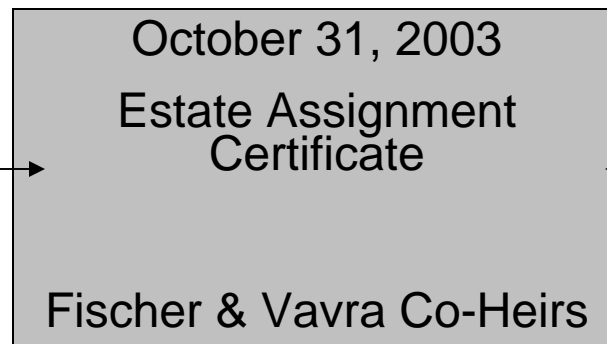
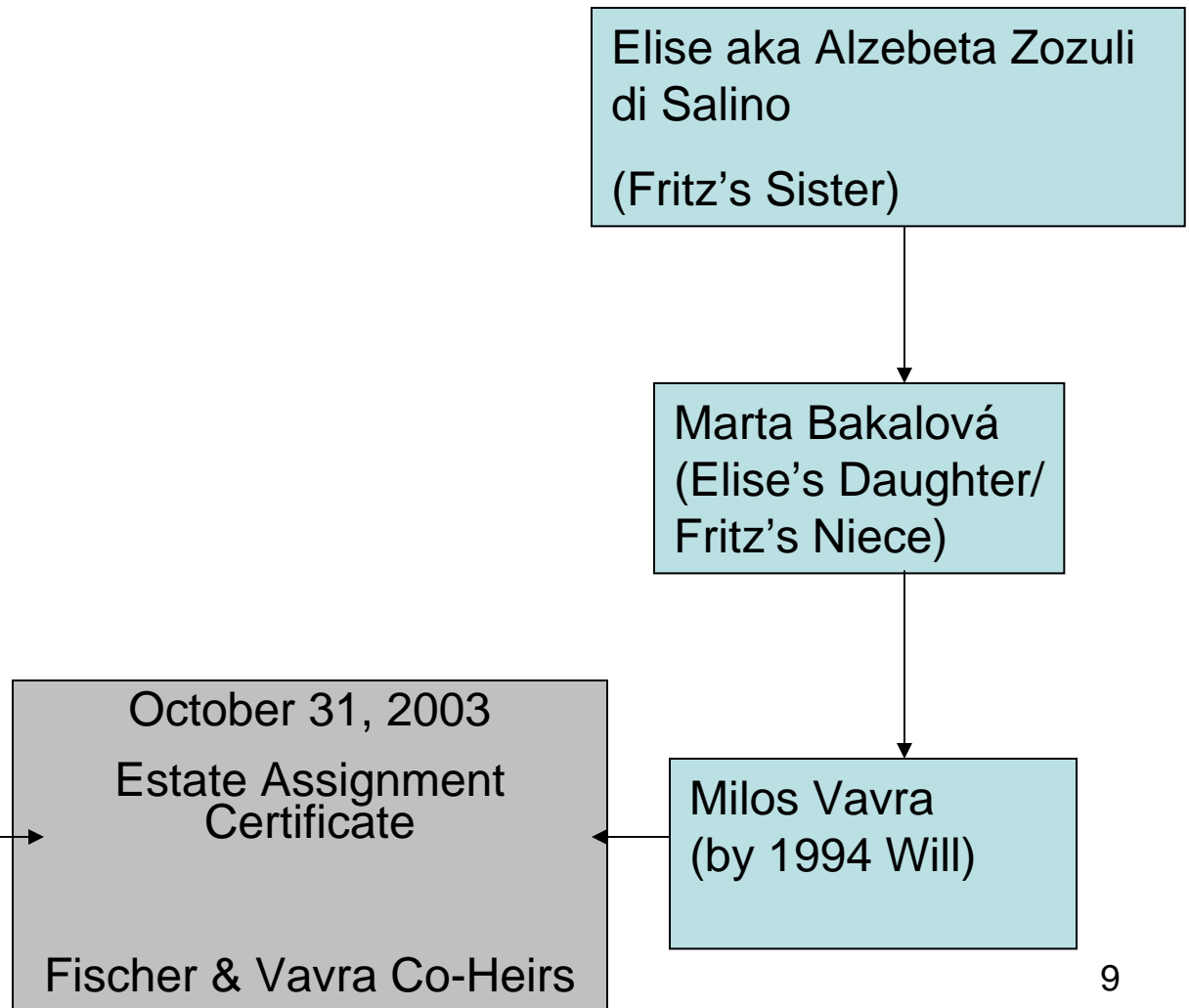
(Def. Ex. H4)

- Defendants proved by Austrian probate decree that they are Fritz Grunbaum's heirs entitled to undivided 50% shares in Fritz's property (Hoefler, Def. Ex. Y4 at D&M2436)

Lily Grünbaum to Leon Fischer (50%)



Elise aka Alzebeta Zozuli di Salino to Milos Vavra (50%)



Summary - Evidence FG Owned the Drawing

- Judicial Admission (Cplt. ¶15) admitting Grunbaum owned Drawing
- Sotheby's provenance research, catalog and testimony concludes that Grunbaum owned Drawing (P. Ex. 90; Tr. 454:6-8)
- Jane Kallir testified Grunbaum owned Drawing (Tr. 414:18-20)
- Eberhard Kornfeld writings and testimony claiming he acquired 78 Grunbaum Schieles including the Drawing (EK Tr. 112:6-18)
- Jewish Property Declaration showing FG owned 81 Schieles as of June 30, 1939 (P. Ex. 105)
- Documents and circumstances showing Drawing was bundled and sold with other Grunbaum artworks through 1956

Kieslinger Inventory: July 20, 1938

- Nazi art historian Franz Kieslinger inventories Fritz Grunbaum's art collection while Fritz is in Dachau on July 20, 1938 (P. Ex. 105; Def. Ex. D at DBM 13-15)
- Identifies 5 Schiele oils, including *Dead City*
- 55 Schiele Color drawings
- 20 Schiele Sketches
- 1 Lithograph
- The Drawing is a Schiele Color drawing matching the description in the Kieslinger Inventory
- Kieslinger Inventoried Art Collection at 5,791 Reichsmarks
- Circumstantial evidence that Grunbaum owned Drawing

Schenker Inventory – Sept 8, 1938

- Stamped with Swastikas by Nazi functionary Otto Demus on or around September 8, 1938 (P. Ex. 25)
- Roughly same number of artworks as Kieslinger Inventory (three envelopes of graphics)
- Export license expired December 8, 1938
- No customs stamps indicating collection left Vienna during WWII
- No BDA export licenses during Nazi era, indicating collection did not leave Austria during WW II
- Circumstantial evidence Fritz Grunbaum art collection remained intact and that *Dead City* and the Drawing remained with other Fritz Grunbaum artworks

Dead City's Provenance Published in '56 Kornfed Catalog Shows: 1925 Wurthle Exhibition, 1928 Hagenbund Exhibition and Fritz Grunbaum's Ownership



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Dead City III (City on the Blue River III)

Tote Stadt III (Stadt am blauen Fluss III)

Nirenstein 94 Kallir 140 Leopold 182

Oil and gouache on wood. Signed and dated, upper right. Inscribed "Tote Stadt" by another hand, verso. 14 3/8 x 11 3/8" (37.1 x 29.9 cm). Rudolf Leopold

Provenance: *Acquired from the artist; Arthur Roessler; Alfred Spitzer; Fritz Grunbaum; Gutekunst & Klipstein, Bern; Galerie St. Etienne, New York

Exhibitions: Vienna, 1912, no. 236; Galerie Würthle, Vienna, 1925, no. 11; Hagenbund/Neue Galerie, Vienna, 1928, no. 20; Bern, 1956, no. 1, ill.; Innsbruck, 1963, no. 4; London, 1964, no. 12, ill.; Guggenheim Museum, New York, 1965, no. 14, ill.; Österreichische Galerie, Vienna, 1968, no. 28, ill.; Munich, 1975, no. 34, ill.; Venice, 1984, no. 1177; Tokyo, 1986, no. 10, ill.; Zurich, 1988, no. 21, ill.

Literature: Karpfen, 1921, pl. 24; Mitsch, 1974, pl. 19; Whitford, 1981, fig. 74; Malafarina, 1982, no. 173; Marchetti, 1984, p. 232; Werkner, 1986, pl. XXIV; Nebhay, 1989, fig. 25

Comments: This appears to have been among the paintings sent by Arthur Roessler to Hans Goltz on September 30, 1911 (Nebhay, 1979, #262). **See:** P. 183, 209. **Compare:** P. 134. **Related to:** Sk. 3

- K 01 H DBM(06366) OK30 94

The Drawing's Entry in the '56 Kornfeld Catalog



No provenance

51. Sitzende mit angezogenem linkem Bein. Schwarze Kreide u. Tempera. 35,1:25,5 cm.

Sehr schöne farbige Zeichnung. Auf glattem Maschinenpapier. Voll signiert und «1917» datiert.

Any purchaser from this sale was on inquiry notice due to unusual lack of provenance information

29

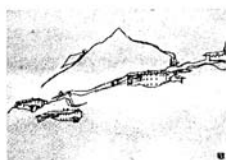
(P. Ex. 2)

No provenances given for the 53 color drawings and sketches that follow the *Dead City* entry



45. Vorstadthaus. Bleistift u. farbige Kreide.
24:36,9 cm.

Lebendiges farbiges Studienblatt auf weissem, aufgezogenem Bütten. Voll signiert und «1916» datiert.



46. Gebirgslandschaft. Schwarze Kreide.
17,6:41,8 cm.

Zeichnerisch interessante, mit sparsamsten Mitteln aufgebaute Skizze einer österreichischen Gebirgslandschaft mit Alphütten und Stadeln. Voll signiert u. «1917» datiert.



47. Dächer von Hinterhäusern. Schwarze Kreide.
25,4:45 cm.

Sehr typische Zeichnung, in der seine zeichnerische Handschrift voll zur Geltung kommt und seine Vorliebe, Landschaften und Modelle häufig aus möglichst hoch gewähltem Blickpunkt in kompliziertesten Perspektiven darzustellen, um so ins Innerste vordringen und ganz neue Aspekte des Gegenstandes aufzeigen zu können. Voll signiert und «1917» datiert. Auf glattem Maschinenpapier.



48. Kniende, vornübergebeugt. Schwarze Kreide.
31,5:41 cm.

Prachtvolle Zeichnung auf Velin. Voll signiert u. «1918» datiert.

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49. Weiblicher Rückenakt. Schwarze Kreide.
38,1:19,1 cm.

Der wunderbare Duktus der Linie und die unvergleichliche zeichnerische Prägnanz kommen in dieser linearen Zeichnung in seltener Weise zum Ausdruck. Voll signiert und «1917» datiert. Auf glattem Maschinenpapier.



50. Halbakt mit grünen Strümpfen, seitlich vom Rücken.
Kreide u. Tempera. 43,4:19,8 cm.

Prachtvolle farbige Zeichnung. Auf glattem Maschinenpapier. Voll signiert und «1917» datiert.



51. Sitzende mit angezogenem linkem Bein. Schwarze Kreide u. Tempera. 35,1:25,5 cm.

Sehr schöne farbige Zeichnung. Auf glattem Maschinenpapier. Voll signiert und «1917» datiert.

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(P. Ex. 2)

Hagenbund/Otto Kallir Documents Independently Confirm Grunbaum Source of Artworks Acquired By Kornfeld on 2/7/56 and 5/22/56

- Otto Kallir 1928 correspondence shows visited Fritz Grunbaum's apartment, viewed Grunbaum's art collection in Grunbaum's absence and selected oils and drawings for Hagenbund/Neue Galerie exhibition (Def. Ex. T4 at DBM 1795)
- Otto Kallir owned Neue Galerie in Vienna (Tr. 286:16)
- Hagenbund correspondence/receipt shows OK's knowledge of FG's art collection and shows many works in Kornfeld '56 catalog belonged to Grunbaum
- Gruber created concordance with '56 Catalog and Hagenbund showing 15 matches (Tr. 691:13-24)
- Jane Kallir confirmed numerous matches (Tr. 397:17-398:12; 404:23-405:10)
- Independent evidentiary confirmation of Grunbaum's ownership of all artworks in '56 Kornfeld Catalog including the Drawing

'56 Catalog Works Appearing in 1928 Hagenbund/Kallir/Grunbaum Correspondence

1. Dead City III	K 01	H
2. Landscape with Trees and Houses	K 03	H
3. Portrait of a Boy/ Two Female Nudes with Drapery	K 07	H 18
4. Town on the Blue River	K 09	H 07
5. Seated Girl	K 11	H 12
6. Girl with Black Hair	K 14	H 06
7. Two Proletarian Children	K 18	H 02
8. I Love Antitheses	K 19	H 03
9. Standing Woman (Prostitute)	K 23	H 16
10. Standing Man Draped in Red Shawl	K 26	H 17
11. Boy In Sailor Suit	K 29	H 11
12. Reclining Female Nude on Red Carpet	K 33	H 04
13. Sunflower	K 41	H 13
14. Chief Inspector Benesh	K 43	H 20
15. Portrait of a Woman	K 44	H 19

1925 Wurthle Catalog Documents
Independently Confirm Grunbaum
Provenance of Additional '56 Kornfeld
Catalog Works

- Comparison of 1925 Wurthle catalog with '56 Kornfeld Catalog shows 14 additional Grunbaum works by title, year and description (Tr. 692:18-693:3) compare (Tr. 397:17-398:12; 404:23-405:10)
- Wurthle concordance is circumstantial evidence the Drawing was in Grunbaum's collection

'56 Kornfeld Catalog Works Appearing in 1925 Wurthle Catalog

1. Portrait of a Boy/ Two Female Nude with Drapery	K 7	W 52
2. Town on the Blue River	K 9	W 51
3. Seated Girl	K 11	W 63
4. Girl with Black Hair	K 14	W 60
5. Two Proletarian Children	K 18	W 47
6. Standing Woman (Prostitute)	K 23	W 73
7. Standing Man Draped in Red Shawl	K 26	W 78
8. Boy in Sailor Suit	K 29	W 84
9. Reclining Female Nude on Red Carpet	K 33	W 86
10. Aunt and Nephew	K 37	W 112
11. Russian Prisoner of War / Standing Nude Couple.	K 39	W 117
12. Sunflower	K 41	W 98
13. Portrait of a Man	K 42	W 118
14. Mountain Landscape	K 46	W 119

Kornfeld's Business Records Show *Dead City* and Many Other Grunbaum Schiele's Acquired For Cash From Un-named Source

- Kornfeld kept ink inventory records (P.Ex. 84 at P0048, P0049)
- Usually recorded name of seller in ink
- Each artwork assigned unique inventory number
- Inventory records show May 22, 1956 large acquisition of Grunbaum Schieles including *Dead City* and the Drawing from a single source

2/7/56

Bound Inventory Volume

36762 etc.
36228 etc.

Exh. 36762 etc.

Cash (Lukacs) 5050.00

108.	1956	auth 36762 etc auth 36228 etc.	auth 36762 etc.
Feb. 7.		<u>Bar (Lukacs) 5050.-</u>	
36508	×	Schiele. Mädchen. Aque.	825.-
36509	·	- Landschaft. Aque.	300.-
36510	·	- Akt. Zeichen.	200.-
36511	·	- Portrait. Zeichen.	200.-
36512	×	- Amokkub. ungelude. Aque.	325.-
36513	×	- Zwei ungeschl. Akte. Aque.	300.-
36514	×	- Naineude. Aque.	300.-
36515	×	- Vorstadtstudie. Aque.	200.-
36516	×	- Pflanz. Aque.	250.-
36517	·	- Sitzende. Aque.	300.-
36518	·	- Stehende. Aque.	300.-
36519	×	- Liegende mit grossem roten Hut. Aque.	300.-
36520	×	- Sitzende mit entbl. Oberkörper. Aque.	350.-
36521	×	- Stehende Akt mit Vorhang. Aque.	300.-
36522	×	- Sitzende mit aufgest. Händen. Aque.	300.-
36523	·	- Landschaft. Zeichen.	160.-
36524	×	- Mönch. Zeichen.	160.-
36525	×	- Akt von hinten. Zeichen.	160.-
36526	×	- Lieg. Akt. Zeichen.	160.-
36527	×	- Brustbild Frau. Zeichen.	160.-
Feb. 7.		<u>J. Nite</u>	
36528	×	A. Jewlensky. Kopf. bel. (1100.-)	500.-
Feb. 7.		<u>Quoritch, London</u>	
36529	×	by. Geneva to Offitan. ca. Fr. 300.-	300.-
Feb. 11.		<u>Ar. Parkov, Anks.</u>	
36530	×	Gosseus. D. Nitebooms. Antwerpen, 1954. ca.	40.-
Feb. 12.		<u>Savankauf (Zelanka)</u>	
36531	×	H. S. Scham. Leijer. Rat. Fuh. du Rad.	100.-
36532	×	Reinhardt. Selbstbildnis. B. H.	250.-
Feb. 12.		<u>Savankauf 270.-</u>	
36533	×	Schiele. Expressionsplakat.	50.-

Schiele

Girl, watercolor	325
Landscape, watercolor	300
Nude, drawing	200
Portrait, drawing	200
Female fixing shoe, watercolor	325
Two nudes, embracing, watercolor	300
Female weeping, watercolor	300
Suburban study, watercolor	200
Plants, watercolor	250
Female sitting, watercolor	300
Female standing, watercolor	300
Female lying with large red hat, waterc.	300
Female sitting with bare upper body watercolor	350
Nude standing with curtain, watercolor	300
Female sitting with hands propped, waterc.	300
Landscape, drawing	160
Monk, drawing	160
Nude, rear view, drawing	160
Nude lying, drawing	160
Portrait of woman, drawing	160

5/22/56 Bound Inventory Volume

Cash / Check 10,050

(Sale Lukacs)

118.	1956		
May 22.	36759	H. Lauer Benesch, Rembrandt.	110.-
May 22.	36760	Frankf. Kunstkal. Janstausky. Prof. Rad.	70.-
May 22.	36761	Bas Duvet. Kupferstich.	400.-
May 22.	36762	Bas / Check. 10,050 - Aufkauf Lukacs	100.-
	36763	Schick. Landschaft. Del. 1914.	2300.-
	36764	Atte Tote Stadt. Del. 1911.	250.-
	36765	Schiffstille zw. Aqu. Zeichen. 1910.	350.-
	36766	Jefangener Kosak. Aqu. Zeichen.	300.-
	36767	Kuabambildnis. Aqu. Zeichen.	400.-
	36768	Selbstbildnis im Gefangenen. Aqu.	375.-
	36769	Selbstbildnis. 1910. Aqu.	325.-
	36770	Männl. Portrat. 1917.	275.-
	36771	best. Bildnis. 1917.	350.-
	36772	Portrat eines Jungen. 1914.	200.-
	36773	Männl. Bildnis. 1917. Zeichen.	225.-
	36774	Bildnis Roessler. 1914. Zeichen.	200.-
	36775	Verhüllte Gestalt. Zeichen.	300.-
	36776	Zwei Kinder. Aquatell.	350.-
	36777	Stehendes Mann. Aquatell. 1913.	300.-
	36778	Landschaft. Aqu. 1917.	200.-
	36779	Leichenakt. Aqu. Zeichen. 1912.	200.-
	36780	Rote Bluse. Aquatell.	150.-
	36781	Rote Strümpfe. Aqu. 1913.	375.-
	36782	Sitzendes Mädchen von vorn. Aqu.	200.-
	36783	Schlafendes Kind. Aqu. 1911	475.-
	36784	Skizze zur Stadt am Bl. Fluss. 1910. Aqu.	150.-
	36785	Orangeneibalen. Frost. 1909. Zeichen	300.-
	36786	Landschaft. Farb. Zeichen. 1915.	150.-
	36787	Sitzendes Mädchen. Zeichen.	

May 22			
36762	Schick	Landscape, Belgium 1914	1,500
36763	"	Old Dead City Belgium 1911	2,300
36764	"	Author Zorn, watercolor drawing 1910	250
36765	"	Captured Cossack, watercolor drawing	350
36766	"	Boy, watercolor drawing	300
36767	"	Self-portrait in prison, watercolor	400
36768	"	Self-portrait 1910, watercolor	375
36769	"	Male Portrait, 1917	325
36770	"	Woiman, 1917	275
36771	"	Portrait of a boy, 1914	350
36772	"	Man 1917, drawing	200
36773	"	Portrait, Roessler 1914, drawing	225
36774	"	Shrouded figure, drawing	200
36775	"	Two children, watercolor	300
36776	"	Man standing, watercolor, 1913	350
36777	"	Woman crouching, watercolor 1917	300
36778	"	Nude, rear view, watercolor drawing, 1912	200
36779	"	Red blouse, watercolor	200
36780	"	Red stockings, watercolor 1913	315
36781	"	Girl sitting, front view, watercolor	375
36782	"	Child asleep, watercolor 1911	300
36783	"	Sketch for City on Blue River, 1910, waterc	475
36784	"	Bale of oranges, Trieste 1909, drawing	50
36785	"	Landscape, colored drawing, 1915	300
36786	"	Girl sitting, drawing	150

Kornfeld's Testimony the Drawing Was Grunbaum's

- Supported by contemporaneous business records showing that Kornfeld acquired the Drawing on the same day he acquired *Dead City* and 23 other Schieles
- Kornfeld based his deposition testimony that the Drawing was Grunbaum's on a comparison of the works he claimed to have received from Lukacs with the Kieslinger inventory (EK Tr. 114:4-115:10)
- This comparison confirms Grunbaum provenance of many other Schieles
- Kornfeld's confirmation of the Grunbaum source of many other Schieles acquired on 2/7/56 and 5/22/56 and independent confirmation of Grunbaum provenance of other works is strong circumstantial evidence that Kornfeld obtained such artworks from a "single source" and thus is strong circumstantial evidence that Grunbaum owned the Drawing

Jane Kallir's "Rosetta Stone"

- At trial, Jane Kallir testified that she could only determine the works from the 1956 Kornfeld catalog were originally owned by Grunbaum around 1998 when she learned of the "Lukacs" story. (Kallir 395:12-16)

12 A. Well, again, based on the information we now have, one
13 would say, you know -- again in the assumption which I believe
14 Kornfeld has now verified -- that everything in the '56
15 exhibition did come from Mathilde Lukacs, then we would trace
16 the provenance back through Lukacs to Fritz Grunbaum.

Jane Kallir's Positive Matches To Grunbaum Made at Trial

- JK 213 (Kallir 386:1)
- JK 686 (Kallir 395:9-16)
- JK 705 (Kallir 395:21-396:14)
- JK 475 (Kallir 397:14-16)
- JK 742 (Kallir 397:17-398:15)
- JK 547 (Kallir 398:24-399:19)
- JK 874 (Kallir 400:2-5)
- JK 507 (Kallir 400:6-9)
- JK 861 (Kallir 401:1-17)
- JK 942 (Kallir 401:18-20)
- JK 944 (Kallir 401:21-23)
- JK 799 (Kallir 402:3-5)
- JK 412 (Kallir 402:6-11)
- JK 1187 (Kallir 403:25-405:10)
- JK 769 (Kallir 408:21-409:2)
- JK 888 (Kallir 409:14-22)
- JK 1101 (Kallir 409:23-25)
- JK 1045 (Kallir 410:3-14)
- JK 1974 (Kallir 414:18-415:1)
- JK 2098 (Kallir 415:5-10)

Rosetta Stone

- At trial Jane Kallir indentified 20 works from the 1956 Kornfeld catalog as once belonging to Fritz Grunbaum, but claimed that “without Kornfeld's information, all of those identifications fall apart” (Kallir 402:15)

JK Matched Grunbaum to '56 Catalog Pre-1990

17 Q. Now, Town on the Blue River, (Krumau).
18 Now here we see, I am looking at JK 742, the following
19 slide. The provenance you wrote here has a little star, an
20 asterisk that you explained before, and it says Fritz Grunbaum,
21 Gutenkunst & Klipstein.
22 Now, the catalog raisonne, you wrote it in 1990, and
23 you had this little star next to Fritz Grunbaum's name. Did
24 that mean that you suspected as early as 1990 that Fritz
25 Grunbaum had been the previous owner of this work?

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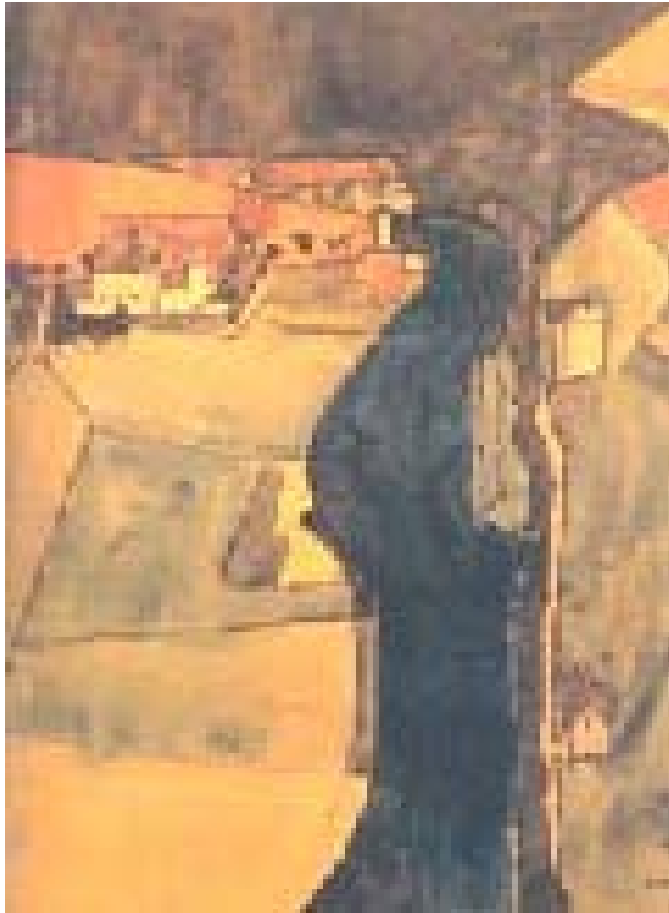
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J. Kallir - cross

1 A. Yes, that was based on the Wurthle catalog. And as with
2 that piece, The Grimacing Man, the title Town on the Blue River
3 is, you know, unlike many other titles, sufficiently
4 distinctive that looking at the Wurthle catalog, and seeing
5 that Fritz Grunbaum is listed as the owner in that catalog, one
6 can make a tentative identification, which is indicated by the
7 asterisk.
8 Q. Now, looking at this provenance, the name Mathilde Lukacs
9 does not appear, is that correct?
10 A. I had never heard of Mathilde Lukacs.
11 Q. You first heard of Mathilde Lukacs in 1998, correct?
12 A. I believe so, yes.

- But, Jane Kallir testified she used the 1925 Wurthle Catalog to determine *Town on the Blue River (Krumau)* (K09) was owned by Grunbaum prior to 1990, years before Kornfeld invented the “Lukacs” story

Town on the Blue River (Krumau) - JK 742



Town on the Blue River (Krumau)

Stadt am blauen Fluss (Krumau)

Gouache, watercolor, and charcoal. Initialed "S" and dated, lower right. 17 ¾ × 12 ¾" (45 × 31.5 cm). Private collection, on extended loan to The Museum of Modern Art, New York; E.L.85.1859

Provenance: *Fritz Grünbaum; Gutekunst & Klipstein, Bern; Galerie St. Etienne, New York; Frederick Gerstel

Exhibitions: *Galerie Würthle, Vienna, 1925, no. 51; Bern, 1956, no. 9, ill.; New York, 1957, no. 1, ill.; Galerie St. Etienne, New York, 1965, no. 13, ill.; New York, 1981, no. 50; Vienna, 1984, no. 21, ill.; Rome, 1984, no. 50, ill.; "Drawings in Austria and Germany," The Museum of Modern Art, New York (May 25–Oct. 29, 1985)

Literature: *L'Arte Moderna*, 1967, p. 80; Kallir, 1981, fig. 38

Comments: The subject is the Moldau Valley as seen from the southwest slope of the Kreuzberg. See: D. 740

- K 09 H7 DBM(06366)
- W 51

Jane Kallir Matches Works to Grunbaum without Kornfeld:

- Jane Kallir also demonstrated at trial that, using the Hagenbund/Otto Kallir documents, she could positively identify Fritz Grunbaum as the owner of *I Love Antitheses* without Kornfeld's "Lukacs" story. (Kallir 405:4-10)

4 A. This is now the Hagenbund you want me to go back to?

5 Q. That's the receipt list, yes.

6 A. Receipt list? Yeah, if I had had this list when I did the

7 catalog raisonne, I would have put Fritz Grunbaum into the

8 provenance at that time, but that is an exact match. This is

9 an example of one of those titles that's so unique that you can

10 match it up.

I Love Antitheses - JK 1187



I Love Antitheses

Ich liebe Gegensätze

Watercolor and pencil. Signed, dated "24.IV.12. M.," and inscribed "Ich liebe Gegensätze," lower right. Numbered "16" by another hand, lower left. ~~18 7/8 x 12 3/4" (48.1 x 31.4 cm)~~. Private collection

Provenance: Collection Lucacs; Kornfeld, June 17, 1987, sal

196, lot 170

Exhibitions: Bern, 1956, no. 19, ill.; "dichtende maler / malende dichter," Kunstmuseum, St. Gallen (Aug. 3–Oct. 20, 1957), no. 684; Brussels, 1961, no. 187; Darmstadt, 1963, ill.; London, 1964, no. 56, ill.; Hamburg, 1981, no. 198, ill.

Literature: Comini, *Albertina-Studien*, 1964, p. 131; Comini, 1973, cover, pl. VIII, fig. 35; Comini, 1974, fig. 90; Nebhay, 1979, fig. 89; Malafarina, 1982, p. 73; Nebhay, 1987, p. 65; *Art: Das Kunstmagazin*, 1987, p. 48

See: D. 1186

I Love Antitheses - JK 1187



- Sold by Kornfeld in 1987 from “Collection Lucacs” (sic)
- Mathilde Lukacs died in 1979 (Def. Ex. S)
- First time JK ever saw name Lukacs (Tr.403:25-404:6)
- Jane Kallir testified she had no idea what “Collection Lucacs” meant (Tr.404:12-21)

Hagenbund/Neue Galerie Documents

- Jane Kallir claims she is one of the world's two Schiele experts (Tr. 414:7-9)
- She spent her whole professional life running the Galerie St. Etienne and collecting provenance information on Schiele (Tr. 252:14-253:6)
- She claims that she never saw Otto Kallir's Hagenbund documents, available to the public in Austria's Belvedere National Gallery, prior to Defendants providing them to her in this litigation (Tr. 370:20-371:11)
- These Hagenbund documents were donated to Austria as part of Otto Kallir's papers and the Neue Galerie's archive for the years prior to 1938 (Tr. 339:8-14)
- This testimony is patently incredible and discredits her testimony that matching Grunbaum works to the '56 catalog depends on the Lukacs story

Evidence Excluding Possibility the Drawing Did Not Come From Grunbaum

- Mathilde Lukacs and husband fled Vienna on August 12, 1938 to Belgium during WW II (JPTO ¶ 22)
- Detailed inventories of belongings show no Schieles (P. Ex. 23)
- Lukacs and husband had only 3 drawings and total of 25 artworks when fled Nazis (P. Ex. 23)
- Lukacs never declared heir of Fritz Grunbaum
- This evidence shows that Lukacs could not have possessed the Drawing before or after World War II
- No Postwar claim to recover stolen art by Lukacs

Significance of 81 Schieles in Weighing the Preponderance of Evidence



Egon Schiele's "Dead City" 1911

- Rarity of collection and sheer number of artworks supports conclusion Grunbaum was single source
- JK identifies only 76 Schiele collectors and dealers who knew the artist (X-5 at 684-86)
- JK Identifies only 26 Major collectors and dealers after Schiele's death (including Grunbaum)(X-5 at 684-86)
- Small competitive group of collectors
- Grunbaum ownership of the Drawing only solution consistent with acquisition of Dead City and multiple other Grunbaum works from single source

Evidence Grunbaum's Art Collection Alienated From Him

Jewish Property Declarations (P. Ex.105)(Def. Ex. D)

Signatur: ÖStA, AdR 06, VVSt, VA 44614, Fritz Grünbaum

Vermögensbekenntnis.

Diese Erklärung ist für jene Personen abzugeben (bei Minderjährigen die Eltern, oder deren Rechtsnachfolger) die in den Erfassungstagen fallen, der durch die Kundmachung 102 vom 28. April 1938, betreffend die Anmeldung des jüdischen Vermögens erfüllt wurde. Bei der Ausfertigung des Erkenntnisses hat sich der Meldende genau an die umseitige Erklärung zu halten. Zum Unterschied von der Vermögenssammelung, hat hier in den eingeleisten Nachfragen, nur die Endbeträge des jeweiligen Vermögensbestandes anzugeben.

Vor- und Nachname: Frau Frieda Frau Grünbaum geb. 7.4.1880
 derzeitige Anschrift: 4. Reichsbrunnengasse, städt. Heilman-Buden

	Vom Einreicher anzugeben		Notizen für Steueramt der Dienststelle
	Stand v. 27. April 1938	Stand von heute	
I. Bank- und Sparkassenguthaben	Keines	Keines	113 (aus) 113 (aus) 113 (aus) 113 (aus)
II. Grundvermögen (Grund - Boden Gebäude)	Keines	Keines	
III. Betriebsvermögen	Keines	Keines	
IV. Sonstiges Vermögen (Bauspar, Guthaben, Bauspar, Guthaben, Bauspar, Guthaben)	Ru. 56047,22	Ru. 8.370,-	
(siehe Zusammenfassung)			
V. Schulden und Bauspar	Keine	Keine	
VI. Wertpapiere	Wertpapiere von 1938	Wert in RM	Es befinden sich die Werte:
	Bauspar Wertpapiere sind durch Erklärung bescheinigt, der Bescheinigung gemäß. Wertpapiere darüber nur mit Bescheinigung der Finanzbehörde.		

Ich versichere, die vorstehenden Angaben nach bestem Wissen und Gewissen gemacht zu haben. Von der umseitigen Erklärung ist ich nicht abgewichen.

Ort, am Frii 1939. Frau Frieda Frau Grünbaum
Fritz Grünbaum

- April 26, 1938 Law - penalty imprisonment (JPTO ¶ 11; Def. Ex. O8 at DBM 6008; Def. Ex. JJJ at DBM 412)
- Required for Jews with over 5,000 RM (Def. Ex. P8 at DBM 7305)
- Jewish property liquidated through Aryan trustees (Def. Ex. P8 at DBM 7351-7353)
- Art Collection Category IV "Other Property" (Gruber Tr. 747:19-22; P. Ex. 105 at; Def. Ex. P8 at DBM 7354)

Fritz Grunbaum Jewish Property Declarations

- Filed by Lily under power of attorney, pain of imprisonment (P. Ex. 105, Def. Ex. D)
- Six declarations filed July, 1938 through June 30, 1939
- Contained art collection Kieslinger appraisal at 5,791 RM
- Last time art collection declared was June 30, 1939 for 5,791 RM – almost a year after Mathilde Lukacs left Vienna

Grunbaum's Aryan Trustee – Ludwig Rochlitzer

- By Nazi law of December 3, 1938, Aryan trustees were empowered to transfer and sell Jewish assets and to render proceeds to the Reich to finance the Nazi war machine (Def. Ex. P8 at DBM 7351)
- By letter dated January 31, 1939, Rochlitzer informs Lily he is in charge of her property and demands extortionate fees (Def. Ex. D)
- Rochlitzer's fee and expenses = 6,500 RM

Evidence Lily Grunbaum Did Not Own Drawing/Art Collection

- Art collection listed as Fritz's in Jewish Property Declarations
- Shows spouses kept separate property
- Lily needed power of attorney from Fritz
- Power of attorney executed in Dachau
- Powers of attorney void as a matter of Austrian law - used to force Jews in concentration camps to liquidate property (Def. Ex. N6 at DBM 4524)
- Thus, during Fritz's stay in Dachau, any transfers by illegal power of attorney to Lily were void

Defendants Have Established That Fritz Grunbaum Didn't Abandon the Drawing

- March 22, 1938 arrested by Gestapo and imprisoned until his death January 14, 1941(JPTO ¶ 9)
- Transactions following imprisonment nullified by 1946 Austrian law (Def. Ex. N6 at DBM 4524)
- Elizabeth Grunbaum filed Jewish Property Declarations pursuant to power of attorney executed by Fritz in Dachau (P. Ex. 105; Def. Ex. D)
- Last declaration showing art collection intact June 30, 1939
- Austrian law voids transfers of Jewish Concentration camp inmates pursuant to powers of attorney (Def. Ex. N6 at DBM 4524)
- Since Defendants have established FG's art collection left his legal residence during his imprisonment and came under Nazi control, non-abandonment is established

Defendants Established that the Drawing Was Never Returned To Fritz Grunbaum or His Legal Heirs: Defendants Are Entitled to Declaration of Title and Replevin

- Fritz Grunbaum died in a concentration camp, impossible for him to recover art collection before his death
- Fischer and Vavra first legal heirs appointed by Austrian court in 2002
- Mathilde Lukacs was never declared an heir of Fritz Grunbaum
- Drawing was never returned to Fischer or Vavra;
- Defendants have established all elements entitling them to declaration of title and replevin: ownership, non-abandonment, and non-return. Menzel v. List, 267 N.Y.2d 804, 819 (Sup. Ct. N.Y. Co. 1966) modified 279 N.Y.S.2d 608 (1st Dept. 1967) modified and aff'd 24 N.Y.2d 91 (1969).

Defendants Have Proven Conversion

Defendants have proven:

- Defendants' superior right to possess the Drawing;
- After learning of Defendants' superior right to possession, Plaintiff retained possession.
- The Complaint concedes that Bakalar and Sotheby's were informed of Defendants' claim to the Drawing (Cplt. ¶ 10)

Thus, Defendants have proven conversion and are entitled to damages for the costs of recovery.

- Sotheby's alleged efforts to research the Drawing's provenance are irrelevant and not a defense to conversion
- Plaintiff's alleged "white heart, empty mind" is not a defense to conversion

Plaintiff's Claim for Declaration of Title

Plaintiff Has Not Established A
Chain of Title

Plaintiff's Burden

- In New York, when a property owner reclaims property, the burden of proof shifts to the holder of the property to prove that the property was acquired lawfully. Guggenheim v. Lubell , 153 A.D.2d 143, 153, 550 N.Y.S.2d 618, 624 (First Dept. 1990) aff'd 77 N.Y.2d 311, 321

Plaintiff's Chain of Title

- Plaintiff sued Defendants claiming the Drawing was Grunbaum's (Cplt. ¶ 5)
- Amended Complaint to allege Lukacs recovered the Drawing after the war on behalf of Grunbaum family. (Am. Cplt ¶ 28)
- Now claims no evidence of the Drawing's whereabouts 1917 until 1956 (Plaintiff's Proposed Facts ¶ 14)

Plaintiff's Burden: Establish Chain of Title



Plaintiff's Claim of Title

- Once Drawing established as part of Fritz Grunbaum's property
- Any transferor who is not a legal heir is a thief in the chain of title (Nazis, Benesch, Lukacs)
- New York law disregards all subsequent "good faith transfers" – such evidence is irrelevant to attack Defendants' title
- Applying Swiss law, Plaintiff's claim

Kornfeld's Claim That No Documentation of His Acquisition of the Drawing Exists

Galerie Kornfeld's February 14, 2005
Letter to Sotheby's Renders All Later-
Produced Documents Suspect

Galerie Kornfeld to Sotheby's Legant February 14, 2005

- Kornfeld claimed no “written”
documentation of Drawing's acquisition

Dear Mr. Legant,

I thank you for your email and herewith confirm that the Schiele water color painting No. 51 from our catalogue of 1956 was acquired by us from Ms. Mathilde Lukcas. Unfortunately, there are no written documents for that, according to Swiss law, documents must be stored only for 10 years.

13

P. Ex. 120 at
DBM 2400

Kornfeld's Fabricated Title Documents

- Thus – any documentation produced at trial was “assembled” after Sotheby’s was informed that no such documentation existed
- Renders all Kornfeld documents highly suspect
- Kornfeld’s concealing documents until after Mathilde Lukacs’ death renders documents even more suspect

Comparison of 5/22/1956
Inventory Entry With 4/24/1956
Cash Receipt

Only Evidence Produced By Kornfeld
Reflecting Acquisition of Drawing Is
Self-Contradictory and Incomplete

5/22/56 Bound Inventory Volume

Cash / Check 10,050 (Sale Lukacs)

Date	Item	Description	Price
May 22	36762	Schiele Landscape, Belgium 1914	1,500
	36763	" Old Dead City Belgium 1911	2,300
	36764	" Author Zorn, watercolor drawing 1910	250
	36765	" Captured Cossack, watercolor drawing	350
	36766	" Boy, watercolor drawing	300
			400
			375
			325
	36770	" Woiman, 1917	275
	36771	" Portrait of a boy, 1914	350
	36772	" Man 1917, drawing	200
	36773	" Portrait, Roessler 1914, drawing	225
	36774	" Shrouded figure, drawing	200
	36775	" Two children, watercolor	300
	36776	" Man standing, watercolor, 1913	350
	36777	" Woman crouching, watercolor 1917	300
	36778	" Nude, rear view, watercolor drawing, 1912	200
	36779	" Red blouse, watercolor	200
	36780	" Red stockings, watercolor 1913	315
	36781	" Girl sitting, front view, watercolor	375
	36782	" Child asleep, watercolor 1911	300
	36783	" Sketch for City on Blue River, 1910, watercolor	475
	36784	" Bale of oranges, Trieste 1909, drawing	50
	36785	" Landscape, colored drawing, 1915	300
	36786	" Girl sitting, drawing	150

No.	Date	Description	Price
118.	1956		
36759	May 22	H. Lauer Benesch, Rembrandt.	110.-
36760	May 22	Frank. Kunstkal. Janowsky, Kopf. Rad.	70.-
36761	May 22	Bas Duvet. Kupferstich.	400.-
36762	May 22	Bas / Check 10,050 - Auf Kauf Lukacs	
36763	X	Schiele. Landschaft. Del. 1914.	150.-
36764	X	Atte Tote Stadt. Del. 1911.	230.-
36765	X	Schoffstella von Aqu. Zeichen. 1910.	250.-
36766	X	Jefungens Krak. Aqu. Zeichen.	350.-
36767	X	-	200.-
36768	X	-	
36769	X	Manuel. Portrait. 1917.	320.-
36770	X	best. Bildnis. 1917.	275.-
36771	X	Portrait eines Jungen. 1914.	350.-
36772	X	Manuel. Bildnis. 1917. Zeichen.	200.-
36773	X	Bildnis Roessler. 1914. Zeichen.	225.-
36774	X	Verhüllte Gestalt. Zeichen.	200.-
36775	X	Zwei Kinder. Aquarell.	300.-
36776	X	Stehendes Mann. Aquarell. 1913.	350.-
36777	X	Kauernde. Aqu. 1917.	300.-
36778	X	Leichnam. Aqu. Zeichen. 1912.	200.-
36779	X	Rote Bluse. Aquarell.	200.-
36780	X	Rote Strümpfe. Aqu. 1913.	315.-
36781	X	Sitzendes Mädchen von vorn. Aqu.	375.-
36782	X	Schlafendes Kind. Aqu. 1911	300.-
36783	X	Skizze zur Stadt am Bl. Fluss. 1910. Aqu.	475.-
36784	X	Orangenebale. Triest. 1909. Zeichen	50.-
36785	X	Landschaft. Farb. Zeichen. 1915.	300.-
36786	X	Sitzendes Mädchen. Zeichen.	150.-

There is no seller listed in ink

Receipt dated April 24, 1956

Luckas
Quittung Fr. 15'00
Erhalten von Gutekunst + Klipstein
die Summe von
Fr. 15'00
à Saldo Rechnung
per 24. 4. 56
Bern, den 24. 4. 1956
[Signature]

Duplicate

Receipt

Fr. 15,100

Received from Gutekunst & Klipstein

the amount of

Fr. fifteen thousand one hundred

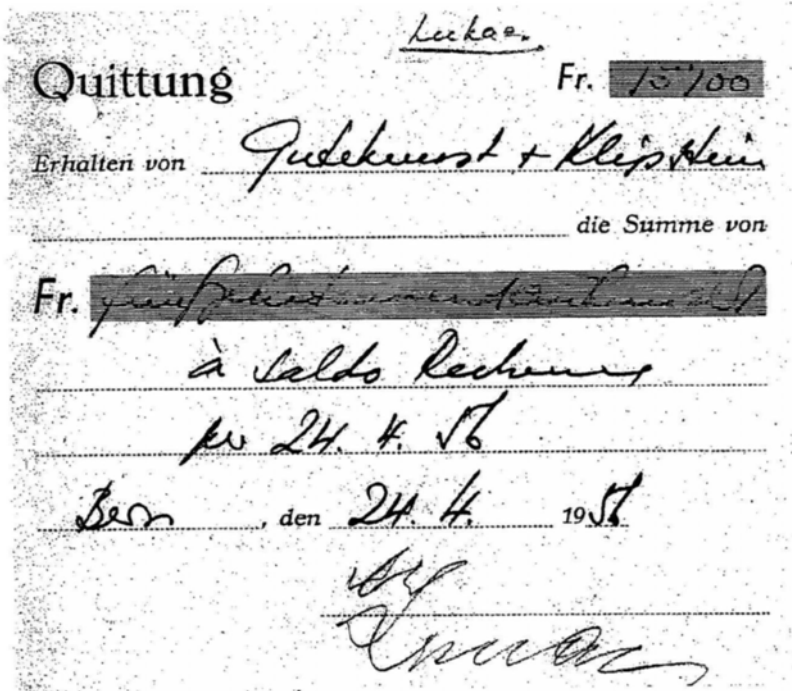
for the balance of the invoice of 4/24/56

Bern, 4/24/56.

[signature]

Kornfeld's Cash Receipt Date Does Not Match Date of 5/22/1956 Inventory Entry

Receipt dated April 24, 1956



Receipt Duplicate
Fr. 15,100
Received from Gutekunst & Klipstein
the amount of
Fr. fifteen thousand one hundred
for the balance of the invoice of 4/24/56
Bern, 4/24/56.
[signature]

Kornfeld's Cash Receipt Is Scrawled in Pencil That Does Not Match Mathilde Lukacs' Known Signatures

Why pencil?

8 Q Do you recall why Mathilde Lukacs signed
9 the receipt in pencil rather than ink?

10 A (Through Interpreter) Because she only
11 had a pencil at hand.

12 Q But you were with her. You could have
13 given her your pen, correct?

14 A (Through Interpreter) I do not remember
15 that.

EK Tr. 38:8-15

Receipt dated April 24, 1956

Lukas
Quittung Fr. 15'00
Erhalten von Gutekunst + Klipstein
die Summe von
Fr. früheres Inventarbuch
à Saldo Rechnung
per 24. 4. 56
Bern, den 24. 4. 1956
[Signature]

Duplicate

Receipt

Fr. 15,100

Received from Gutekunst & Klipstein

the amount of

Fr. fifteen thousand one hundred

for the balance of the invoice of 4/24/56

Bern, 4/24/56.

[signature]

Kornfeld's Cash Receipt Refers to an
"April 24, 1956 Invoice" That Kornfeld
Has Failed To Produce

Receipt dated April 24, 1956

Quittung Lukas Fr. ~~15'00~~

Erhalten von Gutekunst + Klipstein

die Summe von

Fr. ~~fünfzehntausend~~

à Saldo Rechnung

per 24. 4. 56

Bern, den 24. 4. 1956

[Signature]

Duplicate

Receipt

Fr. 15,100

Received from Gutekunst & Klipstein

the amount of

Fr. fifteen thousand one hundred

for the balance of the invoice of 4/24/56

Bern, 4/24/56.

[signature]

The Court Has Excluded From Evidence
Kornfeld's Penciled "Lukas" Notation on
this Cash Receipt

Comparison of Documents Allegedly Reflecting Kornfeld's Transactions With Lukacs

Documentation and Inconsistencies in
Kornfeld Recordkeeping Show
Kornfeld's Bad Faith in Acquiring the
Drawing

5/22/56 Bound Inventory Volume

Cash / Check 10,050

(Sale Lukacs)

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May 22	36762	Schiele Landscape, Belgium 1914	1,500
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	36766	" Boy, watercolor drawing	300
	36767	" Self-portrait in prison, watercolor	400
	36768	" Self-portrait 1910, watercolor	375
	36769	" Male Portrait, 1917	325
	36770	" Woiman, 1917	275
	36771	" Portrait of a boy, 1914	350
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36764	X	Atte Tote Stadt. Del. 1911.	230.-
36765	X	Schoffstella von Aqu. Zeichen. 1910.	250.-
36766	X	Gefangener Kosak. Aqu. Zeichen.	350.-
36767	X	Kuabambildnis. Aqu. Zeichen.	300.-
36768	X	Selbstbildnis im Gefangnis. Aqu.	400.-
36769	X	Selbstbildnis. 1910. Aqu.	375.-
36770	X	Männl. Portrat. 1917.	325.-
36771	X	best. Bildnis. 1917.	275.-
36772	X	Portrat eines Jungen. 1914.	350.-
36773	X	Männl. Bildnis. 1917. Zeichen.	200.-
36774	X	Bildnis Roessler. 1914. Zeichen.	225.-
36775	X	Verhüllte Gestalt. Zeichen.	200.-
36776	X	Zwei Kinder. Aquarell.	300.-
36777	X	Stehendes Mann. Aquarell. 1913.	350.-
36778	X	Kauernde. Aqu. 1917.	300.-
36779	X	Leichenakt. Aqu. Zeichen. 1912.	200.-
36780	X	Rote Bluse. Aquarell.	200.-
36781	X	Rote Strümpfe. Aqu. 1913.	315.-
36782	X	Sitzendes Mädchen von vor. Aqu.	375.-
36783	X	Schlafendes Kind. Aqu. 1911	300.-
36784	X	Skizze zur Stadt am Bl. Fluss. 1910. Aqu.	475.-
36785	X	Orangensballe. Triest. 1909. Zeichen	50.-
36786	X	Landschaft. Farb. Zeichen. 1915.	300.-
36787	X	Sitzendes Mädchen. Zeichen.	150.-

(Missing) Documentation of Sale

- No 4/24/56 invoice corresponding to notation on 4/24/56 cash receipt which says that such an invoice existed
- No seller signature in ink on 4/24/56 receipt (pencil scrawl only)
- No seller name in ink on 4/24/56 receipt (excluded pencil notation)
- No correspondence from Lukacs showing Drawing or *Dead City*
- No correspondence from Kornfeld showing Drawing or *Dead City*
- No seller listed in ink in Kornfeld 5/22/56 inventory

Drawing NEVER mentioned in Correspondence

January 30, 1956

Messrs. Gutekunst & Co. Berne

Dear Mr. Kornfeld:

Sent to you yesterday, January 29th, according to previous announcement, 2 packages and 1 roll of sheets. Registered printed matter. Following here is a list of contents: Package I, tempera

- I/4 Female figure, black hair, red dress, sitting 1911, rear view, drawing
- I/5 Half-nude, female, black hair, black hat and skirt 1911
- I/6 Half-nude, female, lying, with red hat, purple skirt, signed S 10
- I/13 Lying female character with red stockings, black shoes 1912
- II/7 Woman sitting, purple dress 1911
- II/11 Female figure standing, red hair, red blouse 1915
brown, yellow, blue, black stockings

Package II, tempera

- III/1 Girl, head bent forward, red blouse 1910 Estate
- III/8 House with garden, garden Gods 1916
- III/15 Landscape, mountain and rocks 1917
- IV/2 Female half-nude kneeling, bright green blouse 1916 on Japanese paper
- IV/3 Two female nudes, 1914
- IV/12 Sun flowers 1916

September 21, 1955

Mrs. Mathilde Lucacs
195 Avenue Paul Deschanel
Brussels

Dear Mrs. Lucacs:

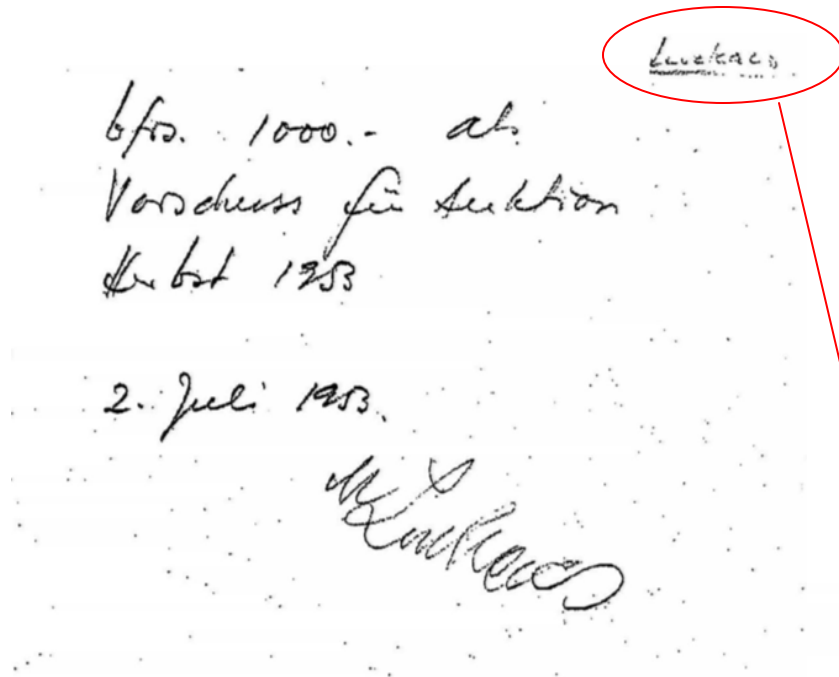
Below we would like to inform you of those sheets which have been admitted to the auction, as well as their appraisals:

No.	1	Schiele	dated	1913	300.00
	2	"	"	1914	300.00
	3	"	"	1912	300.00
	4	"	"	1913	250.00
	5	"	"	1917	400.00
	6	"	"	1914	400.00
	7	"	"	1913	300.00
	8	"	"	1913	300.00
	9	Corinth: Pastel			200.00
		Kokoschka: Drawing			400.00
		Kokoschka: Drawing			500.00
		Klimt: Drawing			120.00

The rest of the sheets, i.e. the Corinth graphic and the Kollwitz litho, have been rejected since the auction is to contain just few but selected sheets and these things therefore would not be suitable. We will try to sell them by private sale or will occasionally return them.

In the meanwhile, I am, with kind regards,
yours sincerely,

Receipt - July 2, 1953



- Receipt for advancement of 1000 francs for Autumn 1953 Auction.

Not written on form

No payor indicated

Excluded pencil notation

1,000 Belgian francs - as
advancement for Auction
Autumn 1953

July 2, 1953.

(s) M. Lukacs

Auction Sales Receipt - Nov. 24, 1953

(10)

Auction Sale Invoice of
Gutekunst & Klipstein

Telephone 34673 Berne Laupenstrasse 49

Berne, dated November 24, 1953

Credit Note

Mr. and Mrs. M. Lukacs, Av. Paul Deschanel 195, Brussels

from the sale of Graphic

Bank Account: Cantonal Bank of Berne Postal Checking: Cantonal Bank III 106

AUKTIONS-RECHNUNG VON GUTEKUNST & KLIPSTEIN Telephone 34673 BERN Laupenstraße 49					
BERN, den 24. November 1953					
<u>Gutschrift</u>					
Herrn und Frau M. Lukacs, Av. Paul Deschanel 195 Bruxelles					
aus Versteigerung <u>Graphik</u>					
Bankkonto: Kantonalbank Bern Postscheck: Kantonalbank III 106					
Katalognummer	Franken	Rp.	Katalognummer	Franken	Rp.
31		150.-			
42		70.-			
50		200.-			
57		520.-			
101		105.-			
102		zk			
173		100.-			
183		290.-			
230		zk			
231		70.-			
232		60.-			
250		175.-			
260		80.-			
397		130.-			
398		85.-			
399		80.-			
385		160.-			
		2275.-			
20% Kommiss.		455.-			
Fr.		1820.-			
		=====			
<i>Juli 21.</i>		0.-			
<i>m. 2. 1953.</i>					
		1737.-			

Catalog No.	Francs
31	150
42	70
50	200
57	520
101	105
102	zk
173	100
183	290
230	zk
231	70
232	60
250	175
260	80
397	130
398	85
399	80
385	160
	2275
20% Commission	455
Fr.	1820
(Several words illegible)	83
	1737

No notation of 1000 francs advanced on 7/2/1953

Receipt dated Dec. 7, 1955

No seller listed

Hans Bolliger as payor

Quittung

Fr. 9300.-

Erhalten von Herrn Hans Bolliger

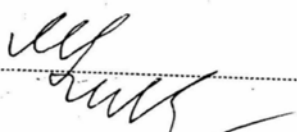
..... die Summe von

Fr. -neuntausenddreihundert 0/00-

à saldo aller Ansprüche zu Ende 1955

Bern den 7. Dez. 19 55

50 CENTIMES



RECEIPT

Fr. 9,300.00

Received from Mr. Hans Bolliger

the sum of

Fr. -- nine thousand and three hundred and no/00 --

in full payment of account balance as of the end of 1955.

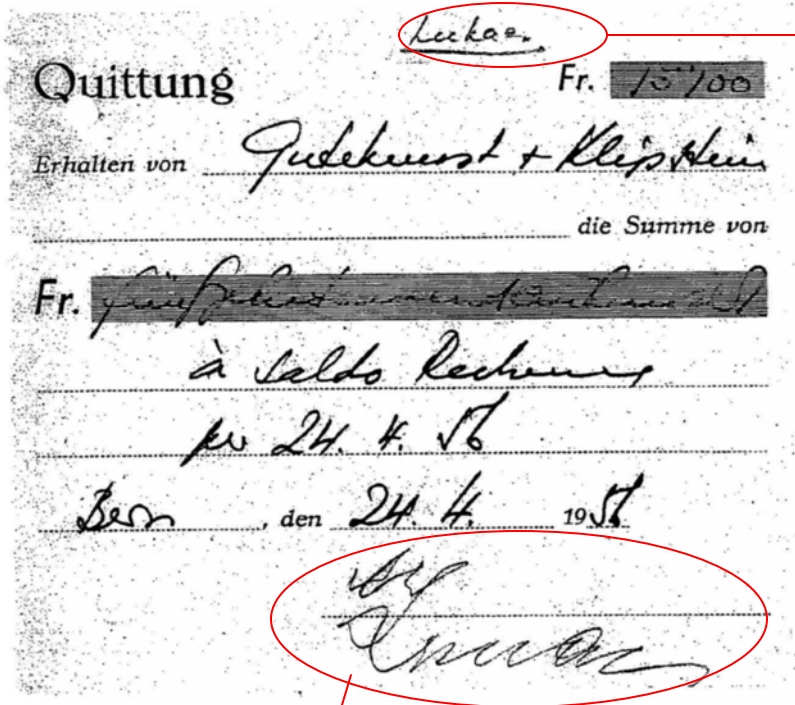
Berne, dated December 7th, 1955.

(Signature)

(Stamp for 50 centimes)

No invoice of what is included
in "end of 1955" balance

Receipt dated April 24, 1956



Pencil signature

Excluded notation

Duplicate

Receipt Fr. 15,100
Received from Gutekunst & Klipstein
the amount of
Fr. fifteen thousand one hundred
for the balance of the invoice of 4/24/56
Bern, 4/24/56.
[signature]

No invoice

Where is the Invoice?

- No invoice for receipts dated December 7, 1955 or April 24, 1956.

Invoice dated Sept. 18, 1956

KLIPSTEIN & CO., VORM.
GUTEKUNST & KLIPSTEIN
KUNSTHANDLUNG

Telephon 3 46 73
Telegramm-Adresse: Artus
Bank: Kantonalbank Bern
Postcheck-Konto der Kantonalbank: III 106

BERN, den 18. Sept. 1956
Laupenstrasse 49

RECHNUNG

Herrn Otto Kallir, 46 West 57th Street, New York

		Egon Schiele	
7)	36766	Knabenbildnis, Bleistift Tempera u. Kleisterfarbe.	Fr. 650.--- 151.50
9)	36783	Skizze zur Stadt zum blauen Fluss. 136.47	Fr. 800.--- 186.77
11)	36781	Sitzendes Mädchen. Aquarell u. Bleistift.	Fr. 600.--- 139.55
14)	36520	Halbakt. Schwarzes Mädchen. Aquarell u. Bleistift.	Fr. 650.--- 151.50
18)	36775	Zwei Proletqriekinder. Schwarze Kreide u. Aquarell.	Fr. 600.--- 137.85
23)	36518	Stehende Frau. Aquarell Tempera u. Bleistift.	Fr. 600.--- 137.85
26)	36776	Stehender Mann mit feuerrotem Tuch. Bleistift u. Tempera.	Fr. 700.--- 147.16
36)	36527	Bildnis Edith Schiele. Schwarze Kreide.	Fr. 600.--- 137.85
37)	36241	Mutter und Kind. Schwarze Kreide.	Fr. 600.--- 139.65
39)	36765	Bildnis eines gefangenen Russen.	Fr. 700.--- 162.16
42)	36772	Männliches Bildnis. Schwarze Kreide. 54.89	Fr. 450.--- 104.89
44)	36770	Frauenbildnis. Schwarze Kreide u. Tempera. 89.85	Fr. 600.--- 139.85
45)	36515	Vorstadthaus. Bleistift und farbige Kreide. 89.85	Fr. 450.--- 104.89
46)	36523	Gebirgslandschaft. Schwarze Kreide. 89.85	Fr. 450.--- 104.89
47)	36244	Dächer von Hinterhäusern. Schwarze Kreide. 37.85	Fr. 600.--- 137.85
50)	36232	Halbakt mit grünen Strümpfen, seitlich vom Rücken. Kreide u. Tempera.	Fr. 600.--- 139.85
51)	36777	Sitzende mit angezogenem linkem Bein. Schwarze Kreide u. Tempera.	Fr. 650.--- 151.50
53)	36243	Sitzender Akt von vorn. Schwarze Kreide.	Fr. 500.--- 116.53
		brutto	Fr. 10800.--- 2517.29
		netto	Fr. 9100.--- 2121.05
1)	36763	Tote Stadt. Oel auf Holz. netto 836.04	Fr. 3650.--- 850.75
			Fr. 12750.--- 2971.80
16)	36921	Selbstbildnis, Akt. Bleistift, Tempera u. Deckfarbe, weiss. netto	Fr. 520.--- 121.22
			Fr. 13270.---
			=====
			Fr. 3093.---
			=====
			Fr. 3093.---

Klipstein & Kornfeld, vorm.
GUTEKUNST & KLIPSTEIN

\$ 3093.-
KAL 0001

- Professional Letterhead
- Lists all artworks by title, inventory number and price.
- Signed by E. Kornfeld
- Stamped

Purported 4/24/1956 Acquisition of the Drawing and *Dead City*

- 4/24/1956 – Kornfeld paid cash for Drawing and *Dead City* and 43 other Schieles (P.Ex. 84 at P 48, 49, 50)
- Receipt signed in pencil (P. Ex. 84 at P 050)
- Receipt was payment for “**4/24/1956 Invoice**” (**missing**)
- Payment was for 2/7/1956 delivery of 20 Schieles and 25 additional Schieles including Drawing and *Dead City* (EK Tr. 34:9-16)(P. Ex. 84 at 48, 49, 50)
- Drawing and *Dead City* entered in EK inventory on 5/22/1956 with 23 other Schieles (P. Ex. 84 at 49)
- Seller’s name not recorded
- “Lukacs” added later in pencil (excluded)

Pre-War Publications Showing Fritz Grunbaum's Schiele Collection Known to Kornfeld and Kallir

- 1928 Hagenbund/Neue Galerie Correspondence
- 1925 Wurthle Gallery Catalog
- 1930 Otto Kallir Catalog Raisonnee
- Kornfeld reprinted these sources in the 1956 catalog and was thus aware of them
- Knew Otto Kallir personally and could have obtained all materials from OK or questioned OK
- OK had access to FG's apartment and art collection in 1928 (Def. Ex. T4)

Kornfeld's Personal Collection of Grunbaum Schieles

Goes To Kornfeld's Credibility and
Weight to Be Afforded Parole Evidence
in Transaction With Decedent

Kornfeld's Acquisitions from the Unnamed Seller for His Personal Collection - Red Blouse - JK 1394



Red Blouse

Rote Bluse

Gouache, watercolor, and pencil. Signed and dated, lower right. Inscribed "Rote Bluse," lower right. 18 7/8 x 12 1/2" (48 x 31.6 cm). ~~Rudolf Leopold~~

Provenance: E. W. Kornfeld; Kornfeld, June 26, 1981, sale 175, lot 58

Exhibitions: Bern, 1956, no. 28, ill.; Bern, 1957, no. 106; St. Gallen, 1957, no. 102; ~~Albertina, Vienna, 1968, no. 216, ill.;~~ "50 Jahre Kunsthandelsverband der Schweiz," Kunsthaus Zurich (Sept. 15–Nov. 11, 1973), no. 269; Tokyo, 1986, no. 43, ill.

Kornfeld's Acquisitions from the Unnamed Seller for His Personal Collection - Portrait of the Art Critic Arthur Roessler JK 1631 Female Nude with Raised dress -JK 1308



Portrait of the Art Critic Arthur Roessler

Bildnis des Kunstschriftstellers Arthur Roessler

Pencil. Signed and dated, lower right. Verso D. 1308.
18 7/8 × 12 5/8" (48 × 32 cm). E. W. Kornfeld

Exhibitions: Bern, 1956, no. 31, ill.; Lucerne, 1974, no. 247;
"Von Goya bis Tinguely: Aquarelle und Zeichnungen aus
einer Privatsammlung," Kunstmuseum Bern (March
10–May 21, 1989), no. 133, ill.

Literature: *Philobiblon*, 1961, p. 12

See: D. 1630. **Study for:** G. 8

1308

Female Nude with Raised Dress

Pencil. Inscribed "Roessler" and numbered by another
hand, lower right. Verso D. 1631. 18 7/8 × 12 5/8" (48 × 32 cm).
E. W. Kornfeld

Chief Inspector Benesch - JK 2098

Chief Inspector Benesch

Zentralinspektor Benesch

Gouache, watercolor, and black crayon. Signed and dated

lower right. 18 × 11 ½" (45.7 × 29.3 cm). E. W. Kornfeld

Exhibitions: Bern, 1956, no. 43, ill.; Lucerne, 1974, no. 252; Brussels, 1981, no. 92, ill.; Paris, 1986; "Von Goya bis Tinguely: Aquarelle und Zeichnungen aus einer Privatsammlung," Kunstmuseum Bern (March 10–May 21, 1989), no. 137, ill.

Literature: Clair, 1986, p. 435

Comments: Schiele apparently began this series of studies of Benesch at the end of July 1917 after the latter returned from a trip (Nebenhay, 1979, #1238). The artist had painted Benesch with his son Otto in 1913 (P. 250). **See:** D. 2099–2101. **Related to:** P. 308



Kornfeld's Personal Acquisitions

- Give him direct financial stake in fabricating Lukacs story
- Give him direct financial stake in alleged transaction with deceased Mathilde Lukacs
- Renders any self-serving parole evidence regarding conversations with a decedent related to the 5/22/1956 inventory entry (P. Ex. 84) of zero probative value

Applicable Swiss Law

Swiss Civil Code Requires Bakalar and Kornfeld to Prove Due Diligence Before Alleging Good Faith

Swiss Civil Code Art. 714 Requirement of Good Faith

1. Transfer of chattel ownership requires transfer of possession to the acquirer.
2. Whoever, **in good faith**, obtains a chattel for the purpose of acquiring ownership becomes the owner as soon as he is protected under the rules of possession, even if the alienator was not entitled to transfer the ownership.

(P 743)(emphasis supplied)

Swiss Civil Code Art. 1

1. The Law must be applied in all cases which come within the letter or the spirit of any of its provisions.
2. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator.
3. Herein he must be guided by approved legal doctrine and case-law.

(P 742)

Swiss Civil Code 936 Acquisitions of Chattel Not In Good Faith

1. Whoever, **not in good faith**, acquires a chattel, may be required **at any time** by the previous possessor to return it.
2. If the previous possessor did not himself acquire it in good faith, however, he may not reclaim the thing from a subsequent possessor.

(P 746)

Swiss Civil Code 940 – Bad Faith Possessor Required To Return Chattel

1. Whoever possesses a thing in **bad faith** must return it and indemnify the entitled party for all damages resulting from the illicit withholding, including the fruits he collected or failed to collect.

[2, 3].

(P 746)

Swiss Civil Code Art. 3 – Prerequisite of Due Diligence to Pleading Good Faith

1. *Bona fides* is presumed whenever the existence of a right has been expressly made to depend on the observance of good faith.
2. **No person can plead *bona fides* in any case where he has failed to exercise the degree of care required by the circumstances.**

(P 742)(emphasis supplied)
(Mosimann Report, Def. Ex. P6 at ¶ 28)

Failure to Act Prudently = Bad Faith Under Swiss Law

- Under Swiss law, a bad faith acquirer is one who was unaware of the defect of title simply because at the time of the acquisition he or she failed to act prudently in such a way that could have been expected under the circumstances (BGE = Federal Court's Decision 122 III 3, E 2a). (Mosimann Report, Def. Ex. P6 at ¶ 29)

Bad Faith Under Swiss Law Where Purchaser Should Have Taken Possible Lack of Authority Into Consideration

- Bad faith even exists in an individual who should have taken the possibility of a seller's lack of authority into consideration or who was in doubt about his authorization (BG = Federal Court of July 5, 1951 Stolen Property Chamber, Buehrle v Fisher et al., p. 15).
- The duty of due diligence is governed by objective criteria. Under Swiss rules of evidence (that are considered to be [substantive] law) the following applies: If the acquisition of certain items is typical for a business sector, then the average measure of the due diligence is guided by the common practice of that sector, although of course not by any negligence (BeKomm/Jaggij, Art. 3 ZGB marginal number 125). (Mosimann Report, Def. Ex. P6 at ¶ 29).

Under Swiss Law, Art Dealing Is A Business Sector Subject to Heightened Diligence Requirement

- Under Swiss law, where the purchaser is familiar with the sector and the line of business is subject to offers of goods of dubious provenance, then a heightened diligence with a duty to investigate applies where, based on the circumstances, there are *reasons for suspicion* (BGE 122 III 1, E, 2a). Art dealing is one such business sector. BGE 122 III I) (Mosimann Report, Def. Ex. A5 at ¶ 31).

Conditions of the Era

- 1954 Swiss law case, *Ammon vs. Royal Dutch* (BGE 80 II 53)
 - “after the war, one could not guiltlessly be oblivious to the risk connected to transaction with goods from Germany or occupied countries” (Def. Ex. A5)
- Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (1943)(Def. Ex. Q8)
- Robbed Property Decision by Swiss Federal Council (1949)(Mosimann Def. Ex. A5)

Under Swiss Law, What Determines Bad Faith?

- “Kornfeld was acting in bad faith if he had **knowledge** of the lack of Mrs. Lukacs’ authority to sell.” (Def. Ex. A5, Expert Report of Dr. Mossiman)
- Kornfeld had actual knowledge ML lacked authority to sell as she had no power of attorney nor heirship/estate certificates

Allegations of Due Diligence

- Kornfeld did not exercise due diligence
- Otto Kallir did not exercise due diligence
- David Bakalar did not exercise due diligence
- Therefore, the plain language of the Swiss Civil Code bars them from claiming an acquisition through good faith (Swiss Civil Code Art. 3)

Evaluating Suspicious Circumstances/Due Diligence Under Swiss Law

- Warning Signs/Considerations:
 - Observations of Public Law
 - Existence of Certificates of Origin or appraisals
 - Experience and knowledge of market of purchaser
 - Conditions of the era
 - Seller's financial situation
 - Existing (or missing) documentation of sale

(Mosimann Report, Def. Ex. A5 at ¶ 31, 33).

Evidence of Kornfeld's Bad Faith

- Warned not to acquire art from Nazi-occupied Austria by Swiss government (EK Tr. 126:20)
- Swiss art dealers are a profession requiring due diligence under Swiss law
- Schiele's works (Austrian artist whose collectors murdered) a "red flag" to Kornfeld (EK Tr. 140:3;129:20)
- Kornfeld knew of Grunbaum provenance of Dead City and was on notice of contents of 1925 Wurthle catalog showing other '56 sale items as Grunbaum's (EK Tr. 109:16-19; 121:17-22)
- No Austrian export license
- No Swiss import documents
- Failed to record seller's name in ink in business records
- Lukacs had no ownership documents (P. Ex. 84 at P 48, 49, 50)
- Concealment of Lukacs name until late 1990's until Lukacs conveniently dead

EK Knowledge Pre-April 24, 1956 – Generally – WW II, Austria & Jews

- Knew many Jews in Vienna were murdered by Nazis and dispossessed of belongings (EK Tr. 126:10)
- Knew art market had been flooded with degenerate art stolen from Jews (EK Tr. 140:8)
- Kornfeld a Schiele Expert (EK Tr. 129:20)
- Knew Schieles had been deemed degenerate works by Nazis (EK Tr. 140:3)
- Had previously been involved in sales of Schiele works in 1945 (EK Tr. 99:12)
- Knew Austria was invaded by Nazis
- Had worked at Gutekunst & Klipstein for 11 years (EK Tr. 98:9)

EK Knowledge Pre-April 24, 1956 – Mathilde Lukacs (Alleged Prior Dealings)

- Knew she was Austrian (EK Tr. 81:15)
- Knew she lived in Brussels with her husband (EK Tr. 134:24)
- Had collection of art, including Schieles
- She was elderly (EK Tr. 75:14)
- She lived at a “very good standard of living” (EK Tr. 80:24)
- Couldn’t spell her name on correspondence (EK Tr. 74:8-13)

EK Knowledge as of April 24, 1956

- EK claims ML wanted money to retire to Lengnau, a Jewish community in Switzerland (EK Tr. 128:9)
- 4/24/1956 Receipt shows seller demanded cash before delivery of *Dead City* and Drawing on May 22, 1956
- Knew that *Dead City* had belonged to FG at least since 1930 (26 years earlier)
- Knew *Dead City* created in 1911 (45 years earlier)
- Drawing created in 1917 (39 years earlier)
- Thus, EK knew, “old Viennese family possession” story to be false

Evidence Kallir and Kornfeld Knew '56 Catalog Artworks Were Grunbaum's

- '56 Catalog listing for Dead City – FG
- 1928 Hagenbund corr. shows Kallir familiar with Grunbaum's entire collection
- 1930 catalog shows Grunbaum was client of Kallir's
- 1955 Kollwitz catalog shows Kallir and Kornfeld were joint venturers, not arm's length
- Shows bad faith or that minimal due diligence would have revealed the artworks to be stolen from Fritz Grunbaum

Observations of Public Law/ Existence of Certificates and Appraisals

- No export licenses
- No Swiss customs papers
 - Kornfeld testified the POSTAL deliveries went through customs (EK Tr. 134:1-4), but offers no evidence the deliveries did.
- No heirship decree or will (EK Tr. 129:7-9)
- No certificate of Origin
- No appraisals (EK Tr. 129:14-16)

Financial Situation of Seller

- ML only interested in selling, not buying (EK Tr. 87:1)
- ML selling artwork to finance retirement home in Lucerne, Switzerland (EK Tr. 128:9)

Plaintiff's Affirmative Defense of Laches

Plaintiff Has Failed To Establish
Any of the Elements of Laches

Bakalar's Attempted 2004 Sale

- 8/2004 – Consigned for Fall NY Auction at Sotheby's
- 8/2004 – Sotheby's Elizabeth Gorayeb immediately learns of Grunbaum provenance
- 8/2004 – Elizabeth Gorayeb warns Sotheby's of provenance problems
- 8/2004 Sotheby's withdraws Drawing from NY Auction

Sotheby's Exports Schiele

- 8/2004 – Simmons told of provenance problems
- 9/2004 – Checks with D.A.'s and MOMA office to see if Rita Reif still searching
- 1/2005 – Warned by genealogist Cornelia Muggenthaler “more research need to be done” to determine heirs on Fritz's side of family tree
- 1/2005 Jewish Community's Erika Jakobovits writes letter informing Sotheby's the Drawing is Grunbaum's
- 2/8/2005 Sotheby's auctions Drawing
- 2/2005 Fischer and Vavra informed of Drawing's provenance
- 2/2005 Fischer and Vavra act immediately to assert claim

Plaintiff's Affirmative Defense of Laches

- Plaintiff must show Defendants knew of Bakalar's possession of a Grunbaum artwork;
- That knowing of Bakalar's possession of the Grunbaum artwork, Defendants delayed pursuing a claim against Bakalar without excuse;
- That Plaintiff suffered prejudice as a result of Defendants' failure to act.

See Bakalar v. Vavra (WHP) Aug. 10, 2006

1. Bakalar Failed To Prove Defendants Knew Bakalar Possessed The Drawing Prior to 2005

- Sotheby's first learned of Drawing's Grunbaum provenance in 2004 (Tr.451:6-23)
- Sotheby's first published Grunbaum provenance of Drawing in 2005 (P. Ex. 90)
- Jewish Community ("IKG") learned of Drawing's Grunbaum provenance and Bakalar auction in 2005 (Tr.109:22-110:11)
- Fischer learned through Lansky in 2005 (Tr.637:7-15)
- Milos Vavra learned through IKG in 2005 (P. Ex. 125 ¶ 16)
- Bakalar testimony: he didn't even learn of Grunbaum provenance of Drawing until 2005

2. Plaintiff Failed To Show Defendant's Knowledge Plus Defendants' Failure to Act

- Plaintiff failed to show Defendants had pre-2005 knowledge of Drawing's provenance
- Defendants acted to claim Drawing within days of being notified by IKG in 2005 (Tr. 637:16-20)
- Plaintiff has failed to prove Defendants
 - A. Knew of Bakalar's possession of the Drawing prior to 2005;
 - B. Knew of the Drawing's Grunbaum provenance prior to 2005; and,
 - C. Knowing A. and B. failed to act in a timely manner to claim the Drawing

3. Plaintiff Failed To Show Any Prejudice Flowing From Defendants' Alleged Failure to Act

- Bakalar never researched provenance of the Drawing (Tr. 50:13-15)
- Owners of artworks routinely consult experts or organizations such as Art Loss Register when wishing to sell works with wartime provenances (Tr.)
- Bakalar never tried to sell 1964-2004 (Tr.)
- When he tried to sell in 2004, Sotheby's stopped him without Defendants' intervention (Tr.448:23-449:5)
- GSE was on notice 1964-1998 Reifs were looking for Grunbaum artworks (Tr. 418:20-24; 536:17-537:8; 542:22-543:7)
- Had Bakalar tried to sell 1964-2004 with truthful provenance, he would have been caught
- Thus, Bakalar was not prejudiced by any act or failure to act of Defendants

Evidence Defeating Laches

- Bakalar produced no provenance documents and concealed the transaction in which he acquired the Drawing
- Bakalar wealthy and sophisticated art trader
- Diligent and public search by Reif family for years
- In weighing equities: much of family murdered, remainder had no access to Austrian records or evidence, Reifs misled by Kallirs
- Bakalar conducted no provenance inquiry whatsoever, claims he knew nothing about the Drawing's provenance until 2004
- Bakalar could have found all information in 1963 by conducting reasonable inquiry, thus no prejudice
- Bakalar will testify he knew that he should get provenance before purchase
- Bakalar on "red flag" notice by Swiss provenance, NY Law, U.S. State Dept bulletins, news reports of stolen art, wartime provenance of art, custom of art industry to check provenance
- Bakalar falsely claimed that he relied on Gutekunst & Klipstein's reputation when purchasing the Drawing
- Morgenthau seizure in national publications

Unclean Hands: Plaintiff's Concealment of Ownership Precludes Laches Defense

- Plaintiff's concealment of his ownership of the Drawing precludes laches defense
- Bakalar claims: "for decades after [Kornfeld's 1956 acquisition] the Drawing was exhibited in various locations, described in scholarly texts and publicly documented as belonging to Plaintiff's collection" (Cplt. ¶ 15) (Am. Cplt. ¶ 15)
- Evidence shows Dr. Bakalar's pattern of concealment giving the false impression Dr. Bakalar sold the Drawing prior to 1990

The Kenyon Review Does Not Mention Bakalar

616

KLIMT AND SCHIELE

(the portrait of Paris Guetersloh). Memorial shows devoted to Schiele could be seen in 1948 and 1957 at the St. Etienne gallery, whose owner, Otto Kallir, is the author of the Schiele *catalogue raisonné* (Vienna, 1930), which reproduced every one whose whereabouts was known.

However, in this country a full appreciation and understanding of the contributions of Klimt and Schiele is still to be achieved: Too few here have looked beneath the sensuously decorative surface that veils the significance of Klimt's art; too many have yet to see that beneath the agitation in Schiele's drawings and paintings there is the calm of a brooding philosophy which searches out the remotest corners of the soul. It is true, of course, that the most refined and subtle senses are needed to approach the emotional imagination revealed in the exquisite works of these two masters. To the superficial, Klimt's lavish use of gold and of precious, enamel-like pigments may very well suffice to hide the melancholy mood of futility (this mood is also to be found in the dramas of Schnitzler and Hofmannsthal, who were equally preoccupied with the evanescence of all human endeavor). Moreover, one who has not studied the totality of Schiele's work might be misled by the shrillness of what appears at first glance as morbid eroticism.

Actually, these two were predicting, each in his own way, the fall of a society as prosperous and smug as 'ours. An international banker left New York's Armory Show in a grave mood, saying, "There is something wrong with this world—these men know." Klimt and Schiele *did* know that the Austro-Hungarian monarchy had waltzed itself into exhaustion. In some of Klimt's paintings, death heads can be seen ominously peering at beautiful children or at lovers in embrace. Schiele's female nudes in long black stockings and high-heeled boots are attending the funeral of a society which refused to admit it was dead. But the work of these two men has remained alive. For it is filled with echoes of the Everyman theme. It is activated by what seems to be a fever but in reality is the heartbeat of man, eternally searching for salvation.



Egon Schiele:
"Seated Woman, torso"
Courtesy Galerie St.
Etienne, New York.

Egon Schiele:
"Seated Woman, torso"
Courtesy Galerie St.
Etienne, New York.

Art Dealers Keep Client Information Secret

- JK testified that she keeps client information secret (307:6-10; 309:10-20)
- 1/4/2006 protective order permitted Sotheby's, GSE and Christie's to keep all information on Grunbaum-owned works secret
- Thus, Grunbaum heirs had no way of figuring out who owned the Drawing from 1964 until 2005 when Bakalar tried to auction it

Concealment of Bakalar Ownership

- Jane Kallir testified that the provenance on the Drawing must have been a “mistake” and conceded that an “ordinary reader” of her catalog would have no way of knowing Bakalar was in possession of the Drawing (Kallir 308:20-309:3)

1974

Seated Woman with Bent Left Leg (Torso)

Sitzende mit angezogenem linken Bein (Torso)

Gouache and black crayon. Signed and dated, lower center. 13 7/8 × 10" (35.1 × 25.5 cm) [sight]. Private collection

Provenance: Gutekunst & Klipstein, Bern; Galerie St. Etienne, New York; Norman Granz; Galerie St. Etienne, New York; David Bakalar

Exhibitions: Bern, 1956, no. 51, ill.; New York, 1957, no. 28, ill.; Boston, 1960, no. 63, ill.

Literature: *Kenyon Review*, 1964, facing p. 616

Other Examples of Bakalar/Private Collection Schiele Provenances

2418

Squatting Woman with Boots

Black crayon. Signed and dated, lower right. 17 ½ × 11" (43.5 × 28 cm) [sight]. Private collection

Provenance: Galerie St. Etienne, New York; David Bakalar

1112

Reclining and Seated Female Nudes on a Red and Green Cloth

Liegende und sitzende weibliche Akte auf rot-grünem Tuch

Gouache, watercolor, and pencil. Signed and dated, lower right. 12 ½ × 17 ¾" (31.7 × 45.5 cm)

Provenance: Gutekunst & Klipstein, May 17, 1958, sale 90, lot 936; Galerie St. Etienne, New York; David Bakalar; Odyssea Gallery, New York; Sotheby's, NY, May 22, 1981, sale 4620m, lot 837

See: D. 1111

1357

Portrait of Miss Wärndorfer

Watercolor and black crayon. Signed and dated, lower right. Inscribed "Frl. Waerndorfer," lower right. 19 × 13" (48.3 × 33 cm) [sight]. Private collection

Provenance: Alfred Spitzer; Galerie St. Etienne, New York

Exhibitions: Hagenbund/Neue Galerie, Vienna, 1928 (not in catalogue); "Lovis Corinth, Oskar Kokoschka, Egon Schiele," Galerie St. Etienne, New York (May 27–June 26, 1953); New York, 1957, no. 18, ill.; "European and American Expressionists," Galerie St. Etienne, New York (Sept. 22–Oct. 17, 1959); Boston, 1960, no. 34, ill.; New York, 1962

Comments: Fritz Wärndorfer was the principal financier of the Wiener Werkstätte from 1903 to 1913. Schiele executed several studies of family members. See: D. 1227

Shows absence of
"mistake"

Guggenheim v. Lubell – NY Law Permits Property Owners To “Trap” Thieves

- Guggenheim museum did not report theft for 20 years and made no effort to find artwork
- “According to the [Guggenheim] museum, some members of the art community believe that publicizing a theft exposes gaps in security and can lead to more thefts; the museum also argues that **publicity often pushes a missing painting further underground**. In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art (see, Burnham, Art Theft: Its Scope, Its Impact and Its Control), it would be particularly inappropriate for this Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin.

Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 320 (N.Y. 1991)

Laches Must Fail: Bakalar Has Shown No Prejudice

- New York law permits true owners to “trap” possessors of stolen art entering New York
- Any missing evidence is due to Bakalar’s concealment of the Drawing’s ownership
- Bakalar could have investigated the Drawing’s provenance 1964-2004
- Bakalar retained no documents showing acquisition or possession of the Drawing 1964-2004 (Tr.58:11-17; 76:9-11)

No Prejudice to Bakalar – Actual or Constructive Notice of Problematic Provenance

- Bakalar's claim he never heard of Nazi art looting not credible (Tr.88:17-89:5)
- History and sophistication in acquiring European artworks following WW-II (Tr.74:12-15)
- On constructive notice of U.S. Government and State Dept. warnings (Def. Ex. S8, R8)
- NY Times publicity of Nazi art looting (Def. Ex. C9)
- National publicity of *Dead City* seizure (96:18-22; 108:7-12; 273:7-16)
- Knew Schiele was Austrian, constructive notice Schiele's collectors were largely murdered Jews

Laches –Balancing of Equities

- Bakalar made millions in '80's sales of European art through Sotheby's, estimates from \$6,980,000 to \$10,300,000 (Def. Ex. F7; H7)
- 10 out of 11 paintings sold by Bakalar concealed wartime provenance information
- Laches is a doctrine depending on “conscience of the court” – Bakalar's status as wealthy art entrepreneur sophisticated in art trades weighs against him in balancing the equities against dispossessed heirs
- Bakalar not a mere dabbler

Bakalar Auction Catalog Provenance

Painting 5: BETONTE ECKEN, Wassily Kandinsky (DBM 5246)

Provenance:

Schwartz, Berlin-Charlottenburg (?)

Nierendorf Gallery, Berlin

Hilla Rebay, Connecticut

Solomon R. Guggenheim Museum, New York

The Solomon R. Guggenheim Foundation, New York City (sale, Sotheby's,
London, June 30, 1964, no. 5 - £22,000)

Stephen Hahn, New York

Missing all prewar transaction and
transactions during WWII