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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF FLAMENBAUM, DECEASED. No. 178

20 Eagle Street
Albany, New York 12207
October 15, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 178, Matter of
2 Flamenbaum.

3 Okay, counselor, you're on.

4 MR. SCHLESINGER: Thank you, Your Honors.
5 I'm Steven Schlesinger, and I represent the
6 appellants here.

7 CHIEF JUDGE LIPPMAN: Counselor, any
8 rebuttal time?

9 MR. SCHLESINGER: I'd like three minutes,
10 Your Honor.

11 CHIEF JUDGE LIPPMAN: Three minutes. Go
12 ahead.

13 MR. SCHLESINGER: Okay. It has been put
14 well by the respondents in their initial brief to the
15 trial court; they posed the question how did Mr.
16 Flamenbaum obtain title to it? That's the question
17 they asked the court below, the trial court in the
18 case.

19 CHIEF JUDGE LIPPMAN: We don't really know
20 how he got title, do we, counselor?

21 MR. SCHLESINGER: And that's exactly the
22 problem we have and why laches applies.

23 CHIEF JUDGE LIPPMAN: Where's the laches?
24 Tell us where the laches is on the part - - -

25 MR. SCHLESINGER: I don't have Ruven (sic)

1 Flam - - - Riven Flamenbaum alive to tell me how he
2 got it.

3 CHIEF JUDGE LIPPMAN: I know that, but
4 where are the laches by the museum?

5 MR. SCHLESINGER: The - - - we know for a
6 fact in 1954 Christie's saw the tablet. That's
7 clear. Their expert - - -

8 CHIEF JUDGE LIPPMAN: When did the museum
9 see it?

10 JUDGE GRAFFEO: Well, do we know the museum
11 knew in 1954?

12 MR. SCHLESINGER: They note it in their
13 records. It's right there. It's in the record book
14 of the museum, 1954, it was viewed in New York at
15 Christie's.

16 CHIEF JUDGE LIPPMAN: Yeah, but when did
17 they know? How do we know when they knew?

18 MR. SCHLESINGER: Well, we knew they know
19 no later than Grayson, in 1983, publishing the
20 article saying that Guterbach saw it in 1954.

21 JUDGE SMITH: They knew it was missing even
22 before that.

23 MR. SCHLESINGER: Oh, they knew it was
24 missing at the end of the war.

25 JUDGE SMITH: They knew it was missing in

1 1945 or 6.

2 MR. SCHLESINGER: Correct.

3 JUDGE SMITH: And at that point,
4 presumably, your theory is they should have been
5 running around looking for it.

6 MR. SCHLESINGER: They should have done
7 something. If they had gone out and put notices - -
8 -

9 CHIEF JUDGE LIPPMAN: What exactly is their
10 obligation?

11 MR. SCHLESINGER: Their obligation is to
12 use reasonable diligence to go and locate it. If
13 they had used reasonable diligence at the end of the
14 war, when Christie's saw it in 1954, Christie's could
15 have said, hey, this is - - -

16 CHIEF JUDGE LIPPMAN: What's the prejudice
17 of the way they acted or didn't act?

18 MR. SCHLESINGER: The fact that, as it was
19 said in Wertheimer, I no longer have my witnesses
20 available - - - they're dead - - - as to whether or
21 not I can make a claim to legal title. And there are
22 a lot of ways the museum could have lost the piece
23 during the war or in the aftermath of the war.

24 CHIEF JUDGE LIPPMAN: A lot of that is
25 speculation, isn't it, really?

1 MR. SCHLESINGER: And the only reason it's
2 speculation is because the witnesses are now dead
3 because they didn't use the diligence - - -

4 JUDGE ABDUS-SALAAM: But even if - - -

5 MR. SCHLESINGER: - - - in 19 - - -

6 JUDGE ABDUS-SALAAM: - - - even if Mr.
7 Flamenbaum said I stole it or I traded with some
8 Russian soldier for it for something else, would he
9 be able to keep it?

10 MR. SCHLESINGER: The - - - that's a very
11 interesting question. The court in New Jersey, the
12 Supreme Court in New Jersey has held that once the
13 statute of limitations runs, it is sort of a
14 tautology not to vest title, similar to the concept
15 you have - - -

16 JUDGE SMITH: But New York law is
17 different, isn't it?

18 MR. SCHLESINGER: I don't believe it's
19 settled in New York, clearly settled.

20 JUDGE SMITH: But isn't it clear that if -
21 - - if Mr. Flamenbaum bought this from a thief, he
22 never gets title?

23 MR. SCHLESINGER: The - - - he never gets
24 title, but if he bought it from a thief, the question
25 is did he buy it from a thief or someone who acquired

1 lawful title. And there were ways people - - -

2 JUDGE SMITH: Okay. But if you - - - if
3 there's no law - - - I mean, if he bought it from a
4 Soviet soldier, well, it's a little hard to see how
5 the Soviet soldier had lawful title, isn't it?

6 MR. SCHLESINGER: I don't think it's that
7 hard, because clearly, under Stalin's orders and
8 under the decree from the Soviet parliament, at the
9 time - - -

10 JUDGE SMITH: Well, I can see how the
11 Soviet Union might have had lawful title, but not
12 General Pavlov.

13 MR. SCHLESINGER: The Soviet Union may have
14 had lawful title and may have divested itself of it.

15 JUDGE PIGOTT: What's the best - - -

16 MR. SCHLESINGER: And the question becomes,
17 did, at some point, the German museum lose lawful
18 title.

19 JUDGE PIGOTT: What's the best argument,
20 assuming that your client were alive and you were
21 able to put forth the proof that you think would be
22 - - -

23 MR. SCHLESINGER: I think the best argument
24 is twofold. The court should follow Wertheimer - - -

25 JUDGE PIGOTT: No, no, forget that. I'm

1 saying let's put - - - let's put your client - - -
2 let's bring him back alive and put him in court, what
3 is he going to say to defeat what we know was, at
4 least at one point, legitimate title in the museum?

5 MR. SCHLESINGER: One of three things. A,
6 I stole it, statute of limitations has run; I got it
7 from someone who got lawful title as a spoil of war,
8 or whatever; or I have a right of offset for the five
9 years I spent in Auschwitz.

10 JUDGE SMITH: Pause on the second one, for
11 a minute. I got it from - - - spell it out. Who's
12 this person with lawful title that he got it from? I
13 mean, make up his testimony. Give him the best
14 testimony you could possibly have for your client.

15 MR. SCHLESINGER: Under the Soviet rules at
16 the time, there was a permission to pillage and
17 plunder.

18 JUDGE SMITH: Um-hum.

19 MR. SCHLESINGER: That pillage and plunder
20 creates - - - divests the museum of title. And once
21 a museum loses title, they no longer have a right of
22 replevin.

23 JUDGE SMITH: So how can - - - but how does
24 your client's testimony help you with that?

25 MR. SCHLESINGER: My client testifies - - -

1 JUDGE SMITH: He wasn't there when they
2 pillaged and plundered - - -

3 MR. SCHLESINGER: - - - that he got it from
4 a Russian soldier who lawfully got it by pillage and
5 plunder.

6 JUDGE ABDUS-SALAAM: And so - - -

7 JUDGE RIVERA: So your claim is based on
8 pillaging and plundering the wealth of the - - -

9 MR. SCHLESINGER: My claim is based - - -

10 JUDGE RIVERA: - - - country's museum?

11 MR. SCHLESINGER: My claim is based upon
12 three possible theories. One, the statute of
13 limitations ran; my client, in the aftermath of World
14 War II, when he got out of Auschwitz - - -

15 JUDGE ABDUS-SALAAM: And that's why he
16 didn't put it in his will?

17 MR. SCHLESINGER: - - - went to the museum
18 and took shelter there and pilfered - - -

19 JUDGE SMITH: So if - - - that - - - in
20 other words, it would be to your client's advantage
21 to say I'm a thief, I stole it.

22 MR. SCHLESINGER: It would be. It would
23 be, or to say I took it based upon my entitlement for
24 killing my family in Auschwitz.

25 CHIEF JUDGE LIPPMAN: Let's pause on that.

1 You're saying there is such a thing as righteous
2 anger that would give him title to the tablet?

3 MR. SCHLESINGER: No, I think there's a
4 right of offset. If you kill someone, and I have a
5 claim, based upon that wrongful death, and I come
6 into possession of your property, I can claim that I
7 had a right - - -

8 CHIEF JUDGE LIPPMAN: Is that a policy
9 argument or a legal argument?

10 MR. SCHLESINGER: I think it's a legal
11 argument.

12 JUDGE PIGOTT: Did you assert that?

13 MR. SCHLESINGER: We did below, yes.

14 JUDGE SMITH: Well, you could - - -
15 actually, his - - - how does that help you on the
16 laches point? You can make that argument today. We
17 know he was a Holocaust survivor.

18 MR. SCHLESINGER: Because we don't know
19 whether he was the thief or not.

20 JUDGE PIGOTT: Judge Abdus-Salaam was going
21 to ask a - - -

22 JUDGE ABDUS-SALAAM: No, I was just
23 wondering, he must have known there was some problem
24 with this because he didn't put it in his will.
25 You're saying the statute of limitations had passed

1 and, you know, if he were a thief that - - - that
2 would be okay too. And he made the will in 1971, so
3 why didn't he put it in his will and why didn't the
4 daughter - - -

5 MR. SCHLESINGER: I'll tell you why. He
6 went to Christie's in 1954, and Christie's - - - and
7 it's in the report of the museum, when they
8 researched it - - - Christie's said it was a fake.
9 And the reason Christie's probably said it was a fake
10 is because the museum didn't put the art world on
11 notice it was missing. And so he had no reason to
12 believe it was worth anything more than the value of
13 the gold.

14 JUDGE SMITH: So he thought it was just a
15 minor part of his coin collection?

16 MR. SCHLESINGER: Excuse me?

17 JUDGE SMITH: He thought it was just a
18 trinket in his coin collection?

19 MR. SCHLESINGER: Correct. He had no idea,
20 because Christie's specifically told him, and the
21 museum puts it in their expert report, Christie's
22 said it was a fake.

23 JUDGE SMITH: Okay. But your - - - but
24 let's - - - I'm sort of interested in your second
25 theory, which is, yeah, I got it - - - I got it from

1 a - - - from a Russian soldier, or maybe he says I
2 got it from the so-and-so gallery, and then you go to
3 the gallery and the gallery says they got it from a
4 Russian soldier. Maybe that's more plausible. How
5 does that give him lawful title?

6 MR. SCHLESINGER: It gives him lawful title
7 because, clearly, there was no protection from
8 Russian soldiers pillaging and plundering - - -

9 JUDGE SMITH: You're saying it was - - -

10 MR. SCHLESINGER: - - - as a matter of law.

11 JUDGE SMITH: - - - it was legal for
12 Russian soldiers to take German art in 1945.

13 MR. SCHLESINGER: Correct. And I don't
14 think there was any - - -

15 JUDGE SMITH: Do we have to decide that
16 question to decide your case?

17 MR. SCHLESINGER: I don't think you - - -
18 you only have to decide to follow Guggenheim II,
19 which is that laches applies in the Wertheimer test
20 that says there - - - so much time has passed that
21 I'm - - -

22 JUDGE SMITH: Okay.

23 MR. SCHLESINGER: - - - divested of the
24 ability - - -

25 JUDGE SMITH: But the time - - - the

1 passage of time doesn't change the law. Either the
2 Soviets had the right to take everything in the
3 German museum or they didn't. And the passage - - -
4 and I don't see how laches makes it any harder to
5 argue that question. If what the Russian - - - if
6 what the Soviets did in 1945 was unlawful, if they
7 were thieves, then doesn't your whole case collapse?
8 You have a thief in your title.

9 MR. SCHLESINGER: No, because my guy could
10 have been the thief, and my guy could have had the
11 right of offset.

12 JUDGE SMITH: Well, the right of offset, if
13 you're talking about a lawful right of offset,
14 assuming you could prove it today, but you're just -
15 - - I think you're using offset as just a nice word
16 because you don't want to say your client's a thief.

17 MR. SCHLESINGER: My client could have
18 taken it in retribution for - - -

19 JUDGE SMITH: He's morally not a thief, but
20 you say legally he may well have been a thief.

21 MR. SCHLESINGER: Um-hum.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.
23 Thanks, counselor. You'll have rebuttal.

24 MR. DOWD: May it please the court. My
25 name is Raymond Dowd. I represent the

1 Vorderasiatisches Museum.

2 CHIEF JUDGE LIPPMAN: Counsel?

3 MR. DOWD: Yes.

4 CHIEF JUDGE LIPPMAN: Why - - - from a
5 policy perspective, why should the museum get back
6 this tablet at this point in time, after all these
7 years, given, at the very least, whether it's legally
8 laches or not, it hasn't been particularly vigorous
9 in terms of seeking the return of the tablet? Why
10 isn't, from a policy perspective - - - why do they
11 deserve to have the tablet back?

12 MR. DOWD: I disagree about the part about
13 the museum not being vigorous. In 1945, it was
14 recorded in the museum records. It's an instrument
15 of the Federal Republic of Germany.

16 CHIEF JUDGE LIPPMAN: Yeah, but after that,
17 what have they done - - -

18 MR. DOWD: After that - - -

19 CHIEF JUDGE LIPPMAN: - - - in a positive
20 way to get back this tablet?

21 MR. DOWD: After that it was published; the
22 fact that it was missing was published by scholars
23 repeatedly. Thus the world was on notice that the
24 item was missing - - -

25 CHIEF JUDGE LIPPMAN: Does the museum - - -

1 MR. DOWD: - - - from the museum.

2 CHIEF JUDGE LIPPMAN: - - - have any
3 obligation to proactively seek it out, to put
4 advertisements, to - - -

5 MR. DOWD: No, Your Honor.

6 CHIEF JUDGE LIPPMAN: - - - to make
7 inquiries?

8 MR. DOWD: If the - - -

9 CHIEF JUDGE LIPPMAN: What, under our case
10 law, is their obligation?

11 MR. DOWD: There is none. Under - - -

12 CHIEF JUDGE LIPPMAN: They don't have to do
13 - - -

14 MR. DOWD: If the - - -

15 CHIEF JUDGE LIPPMAN: - - - anything, and
16 eventually they get it back? You take out of the
17 equation the war, everything that went on - - -

18 MR. DOWD: That's - - -

19 CHIEF JUDGE LIPPMAN: - - - that's being
20 cited numerous times?

21 MR. DOWD: If the Mona Lisa is stolen from
22 the Louvre, and everyone knows it, the museum does -
23 - - the Louvre doesn't have to do anything - - -

24 CHIEF JUDGE LIPPMAN: What if the - - -

25 MR. DOWD: - - - further.

1 CHIEF JUDGE LIPPMAN: What if the Mona Lisa
2 was stolen from the Louvre in the same circumstances
3 as this tablet became missing? With the war, and
4 everything around it, with an occupying army, and
5 being cited here or there, the museum, again, not
6 doing anything specifically - - -

7 MR. DOWD: As long as the world is on
8 notice - - -

9 CHIEF JUDGE LIPPMAN: So your answer is
10 whoever - - - and I'm just trying to get out what the
11 legal or policy arguments are - - - your answer is
12 whoever was the original owner, no matter how many
13 years, no matter what happened, gets it back?

14 MR. DOWD: As a matter of law, and under
15 Guggenheim, yes, that's - - -

16 JUDGE SMITH: Even - - - even if the delay
17 prejudices the possessor?

18 MR. DOWD: There's no such thing as delay
19 prejudicing. What prejudice is - - -

20 JUDGE SMITH: Wait a minute, are you saying
21 that laches is not a defense in these cases?

22 MR. DOWD: Laches is a defense only where
23 the true owner knows, watches the circumstances, and
24 does nothing under circumstances that directly cause
25 a prejudice to the new purchaser.

1 JUDGE SMITH: What says that, that they
2 have to - - - you mean they had to know that
3 Flamenbaum had the tablet?

4 MR. DOWD: Correct.

5 JUDGE SMITH: What case says that?

6 MR. DOWD: I go back to the Trenton Bank
7 case; that's a case of your court, 1881. And it
8 talks about how someone didn't register a deed and
9 whether or not that prejudiced someone, whether or
10 not the person had to register a deed. And this
11 court looked and said the person who's in the best
12 position to - - - when they're purchasing something,
13 to do the investigation, is the new purchaser.

14 JUDGE SMITH: Suppose - - -

15 MR. DOWD: And every decision of this court
16 has been consis - - -

17 JUDGE SMITH: Suppose, hypothetically, that
18 Flamenbaum bought this thing in 1954 from someone
19 who, in fact, had valid title. Now, I - - - oh,
20 yeah, we can go on and say whether that's
21 theoretically possible or not, but just assume it for
22 the moment. Is it really fair for your client to sit
23 around for sixty years, wait till he's dead, and then
24 come in and sue?

25 MR. DOWD: That is just not consistent with

1 - - -

2 JUDGE SMITH: I mean, what I'm saying is,
3 is it much more - - - assuming he did have valid
4 title, you have made it a lot harder to prove it than
5 you might have if you'd been running around in 1954,
6 advertising, saying anybody seen my missing tablet.

7 MR. DOWD: The Federal Republic of Germany
8 didn't even have access to museum premises until
9 1991. I represent West Germany; it was in East
10 Germany during that whole time. So what we did
11 explain to the circuit below - - -

12 JUDGE SMITH: So wait a minute, are you
13 really saying West Germany can't - - - East Germany's
14 delay can't be attributed to West Germany?

15 MR. DOWD: That's correct.

16 JUDGE SMITH: So - - -

17 MR. DOWD: The Soviet Union, okay, took
18 over East Berlin in 1945. This is well documented.
19 They took almost everything - - -

20 JUDGE SMITH: Wait, wait, wait a minute.
21 You have a communist government - - -

22 MR. DOWD: Correct.

23 JUDGE SMITH: - - - with a perfectly valid
24 claim which it sleeps on and doesn't assert. You're
25 saying that when the noncommunist government takes

1 over and succeeds the communist government, it's not
2 - - - its predecessor's laches is not attributable to
3 it?

4 MR. DOWD: No. Germany was not the - - -
5 East Germany was a creation of the Soviet - - -

6 CHIEF JUDGE LIPPMAN: Counselor, you
7 represent Germany, right?

8 MR. DOWD: Yes, the - - -

9 CHIEF JUDGE LIPPMAN: Not - - -

10 MR. DOWD: - - - the Federal Republic of
11 Germany.

12 CHIEF JUDGE LIPPMAN: - - - not west or
13 east.

14 MR. DOWD: Well, yes, it's today the
15 Federal Republic of Germany - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but isn't that
17 the point that Judge Smith is asking you, you mean at
18 this point you're going to say even though it's the
19 united Germany - - -

20 MR. DOWD: We're not the successor.

21 CHIEF JUDGE LIPPMAN: - - - but hey, half
22 of Germany didn't know what the other half was doing?

23 MR. DOWD: That's exactly - - -

24 JUDGE SMITH: Wasn't East Germany the
25 predecessor of Germany?

1 MR. DOWD: No, East Germany - - -

2 CHIEF JUDGE LIPPMAN: East Germany was not
3 Germany?

4 MR. DOWD: - - - occupied West Germany.

5 CHIEF JUDGE LIPPMAN: Is that a legal - - -

6 MR. DOWD: If East Germany - - -

7 CHIEF JUDGE LIPPMAN: Is that a legal fact?

8 MR. DOWD: Yes.

9 CHIEF JUDGE LIPPMAN: Where does it say
10 that?

11 MR. DOWD: This court can take notice of
12 that. I mean, this is diplomatic history.

13 JUDGE SMITH: So all - - -

14 MR. DOWD: This is the history of World War
15 II.

16 JUDGE SMITH: So all of East Germany's time
17 barred claims were immediately revived in 1991; they
18 can sue on every 1946 obligation?

19 MR. DOWD: No.

20 JUDGE SMITH: It seems ridiculous.

21 MR. DOWD: No, that - - - no, that's not
22 the argument. The question is when we're looking at
23 laches, whether any delay of the true owner was
24 reasonable or not. There was no unreasonable delay.

25 CHIEF JUDGE LIPPMAN: Counselor, you're

1 saying there was no true owner again till 1991?

2 MR. DOWD: The true owner was ousted of
3 possession.

4 CHIEF JUDGE LIPPMAN: Between 1945 and 1991

5 - - -

6 MR. DOWD: The tr - - -

7 CHIEF JUDGE LIPPMAN: - - - who was the
8 true owner?

9 MR. DOWD: The true owner was the Federal
10 Republic of Germany, which at the time was West
11 Germany, and now has all of Germany.

12 JUDGE PIGOTT: No, the true owner was not -
13 - -

14 MR. DOWD: The true owner didn't have
15 access to the premises.

16 JUDGE PIGOTT: The true owner was always
17 the museum, right?

18 MR. DOWD: Correct.

19 JUDGE PIGOTT: And you're saying at one
20 point this coin was out of their possession. But
21 regardless of where they were, I mean, didn't they
22 have the same rights, duties and responsibilities as
23 anybody else?

24 MR. DOWD: No, Your Honor. When you have
25 the island - - - it's called the Museumsinsel where

1 the Pergamon Museum sits. And our museum is within
2 the Pergamon Museum. That was behind Checkpoint
3 Charlie. There was a wall dividing Berlin.

4 JUDGE PIGOTT: Right.

5 MR. DOWD: You couldn't physically get in
6 there.

7 JUDGE PIGOTT: So your museum was in West
8 Berlin?

9 MR. DOWD: Correct. No, no, the - - - the
10 country occupied West - - - West Germany.

11 JUDGE PIGOTT: I get that. I mean - - -

12 MR. DOWD: It was ousted of physical
13 possession of the real estate of East Germany.

14 JUDGE PIGOTT: Right, but - - -

15 JUDGE SMITH: Yeah, but which sector of
16 Berlin was your - - - it was in the Soviet section,
17 right?

18 MR. DOWD: The physical building was
19 located in - - - on - - - in East Berlin.

20 JUDGE SMITH: In East Berlin.

21 JUDGE PIGOTT: But didn't you know when you
22 lost this thing, whether it was - - -

23 MR. DOWD: They lost half the city.

24 JUDGE PIGOTT: No, I'm talking about you,
25 the museum. I didn't - - -

1 MR. DOWD: The mu - - - well, East - - -
2 West Germany knew that half the city had been taken
3 by the Soviets.

4 JUDGE PIGOTT: Yeah, but no, let me go
5 back. Did - - -

6 MR. DOWD: Everything was taken.

7 JUDGE PIGOTT: Didn't the museum, whoever
8 you're now representing - - -

9 MR. DOWD: Correct.

10 JUDGE PIGOTT: - - - didn't they know they
11 lost this thing?

12 MR. DOWD: It was documented in - - -

13 JUDGE PIGOTT: Right.

14 MR. DOWD: - - - 1945.

15 JUDGE PIGOTT: All right. So from '45 on,
16 they knew they'd lost this thing. Did they look for
17 it?

18 MR. DOWD: You're - - -

19 JUDGE PIGOTT: And then you want to say,
20 well - - -

21 MR. DOWD: They documented it and the
22 documentation was published worldwide.

23 JUDGE PIGOTT: Right.

24 MR. DOWD: The true owner was ousted of
25 possession. The West Germans were not going to - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but do you
2 absolve yourself of any responsibility for whatever
3 happened in those fifty years, or whatever it is,
4 that - - - that you had no - - - no one has any
5 responsibility because East Germany was there, the
6 museum was there, and therefore the museum, the
7 present government, everything is absolved, what
8 happened in those fifty years?

9 MR. DOWD: No, we're not talking about - -
10 -

11 CHIEF JUDGE LIPPMAN: So what are you
12 saying?

13 MR. DOWD: - - - responsibility here, we're
14 talking about, in the context of laches, whether or
15 not anyone was prejudiced by - - -

16 CHIEF JUDGE LIPPMAN: We can't make - - -

17 MR. DOWD: - - - a purported - - -

18 CHIEF JUDGE LIPPMAN: Do you agree that we
19 can't make this determination based on who's running
20 the country at any given time? Isn't it the museum
21 that's at issue here, whether it's part of East
22 Germany at the time, whether it's a part of the
23 Federal Republic today? Isn't it the museum that
24 we're talking about and whether there is a laches
25 argument against the museum?

1 MR. DOWD: No, and I don't even think that
2 laches should be an inquiry here. What - - -

3 JUDGE PIGOTT: Let's assume you've got an
4 individual, you know, who owns this coin and is
5 looking for it, does it make a difference whether
6 they're in any other country? I mean, if - - - can
7 you say, well, gee, I - - -

8 MR. DOWD: If it was published and known to
9 the world that this theft existed, then the answer is
10 no, no one could possibly prejudice. That's the
11 factual case - - -

12 JUDGE RIVERA: So - - -

13 MR. DOWD: - - - that we have here.

14 JUDGE RIVERA: So your position is once the
15 world was on notice, in the way you've already
16 described, you did not have an ongoing responsibility
17 - - - despite the fact that there's war and there's
18 pillaging going on, you didn't have another
19 responsibility, at any other point in time, until you
20 learn in 2008 about this tablet, to again remind the
21 world that this has been stolen or is missing?

22 MR. DOWD: Scholars talk about it; it's
23 published, it's out there. Obviously Israel
24 Flamenbaum knew about it and wrote to the museum and
25 said VA994 is in my family's possession; you should

1 claim it. And he wrote to us.

2 JUDGE SMITH: Let me ask you a different
3 question. Is there any way that the Soviet Union
4 could have acquired lawful valid title to this
5 tablet?

6 MR. DOWD: No, and my colleague - - -

7 JUDGE SMITH: If you're right about that,
8 isn't the whole conversation we've been having up to
9 now academic? If they - - - you know, it doesn't
10 matter whether you were laches or not laches, if - -
11 - or it doesn't matter if you were justified or not
12 justified if there's no way this guy could get valid
13 title.

14 MR. DOWD: It's completely academic.
15 There's no such thing as this right of pillage. My
16 colleague, Tom Kline, wrote for the - - -

17 JUDGE SMITH: What about reparations?

18 MR. DOWD: - - - amici curiae, a wonderful
19 brief specifically on that point.

20 JUDGE SMITH: What about - - - well, I
21 mean, I see - - - pillage isn't a terribly - - - a
22 right of pillage isn't the most appealing of
23 arguments. What about reparations?

24 MR. DOWD: Reparations has nothing to do
25 with the case at bar.

1 first of all, it didn't. Second, this court ought to
2 exercise judicial restraint here. You're being asked
3 to use laches as this sort of supra-legislative way
4 of regulating the entire world's conduct on foreign
5 soil in acts of foreign sovereigns. So - - -

6 JUDGE SMITH: Well, maybe - - -

7 MR. DOWD: - - - laches is - - -

8 JUDGE SMITH: I'm not sure who's asking us
9 to regulate. I mean, he's just asking - - - he said,
10 look, I had this thing in my coin collection for
11 forty years; leave me alone. What's so restrained
12 about giving - - -

13 MR. DOWD: Asking - - -

14 JUDGE SMITH: - - - it back to somebody who
15 hasn't seen it since none of us were alive?

16 MR. DOWD: Asking this court to be critical
17 of the actions of a foreign sovereign on a foreign
18 sovereign's soil, for the reasons set forth in my
19 brief, I think this court ought to - - -

20 JUDGE SMITH: And that requires - - -

21 MR. DOWD: - - - exercise judicial
22 restraint - - -

23 JUDGE SMITH: - - - us to say that East
24 Berlin - - - that this museum was on Soviet soil in
25 1945.

1 MR. DOWD: That's the case.

2 CHIEF JUDGE LIPPMAN: Okay, counsel,
3 thanks.

4 Counselor, rebuttal?

5 MR. SCHLESINGER: First of all, there was
6 nothing that prohibited that museum from doing what
7 the Weimar Museum, as cited by the Second Circuit in
8 Elicofon, did. It was discovered, the theft, in
9 1945. The Weimar Museum, which was also in East
10 Germany, immediately reported the theft and
11 thereafter engaged in diligent efforts to locate the
12 paintings. This is from the Second Circuit decision.
13 These efforts included contacting various German
14 museums and administrative organs, the Allied Control
15 Council - - -

16 JUDGE ABDUS-SALAAM: Well, just because
17 they did that, counsel - - -

18 MR. SCHLESINGER: - - - the Soviet Military
19 Administration - - -

20 JUDGE ABDUS-SALAAM: Counsel, just because
21 one museum did that, does it mean that every museum
22 has to be that proactive? Why isn't it sufficient
23 that, in their records, they noted that the amulet
24 was missing and that scholars then wrote about this
25 thing being missing?

1 MR. SCHLESINGER: The only evidence - - -

2 JUDGE ABDUS-SALAAM: In the art world,
3 wouldn't that be enough?

4 MR. SCHLESINGER: The only evidence in the
5 record below was that a Canadian scholar wrote an
6 article in 1983 saying that it was seen in 1954 by
7 Christie's. If you had done what the Weimar museum
8 did, which contacted the Fogg Museum, Harvard
9 University and - - -

10 CHIEF JUDGE LIPPMAN: What does our case
11 law say about what the responsibility is of the
12 museum?

13 MR. SCHLESINGER: To use reasonable
14 diligence. The only thing in the record is one note
15 in a scholarly article on Assyriology in 1983.

16 JUDGE PIGOTT: But you're down to some kind
17 of basic arguments that - - - to override the fact
18 that everyone concedes this is their property, and
19 you want to say, well, maybe it was stolen and the
20 statute ran. I mean, what's missing that if your
21 client was alive, that would - - - that would now - -
22 -

23 MR. SCHLESINGER: I articulated, I think,
24 three separate bases.

25 JUDGE PIGOTT: I know.

1 MR. SCHLESINGER: One - - -

2 JUDGE PIGOTT: Is that it? I mean, there's
3 nothing like he said, you know, I bought it from an
4 official at the museum who told me, you know, we're
5 trying to protect this thing?

6 MR. SCHLESINGER: He could have; we have no
7 idea.

8 JUDGE PIGOTT: You're not making that
9 argument, and I guess there's no basis to make it.

10 MR. SCHLESINGER: I have no - - - I
11 couldn't even interview my client, who is now
12 deceased, to find out what really happened. I mean,
13 there was family lore that's been reported as to what
14 happened, but there was no probative evidence that we
15 could introduce as to what happened because I didn't
16 even know to ask my client the question. When he
17 went to Christie's, they told him it was fake.

18 JUDGE ABDUS-SALAAM: Well, but counsel,
19 your client's son knew enough to contact the museum
20 when his sister did not acknowledge the amulet in her
21 accounting.

22 MR. SCHLESINGER: We have no idea what
23 caused the brother to research it and contact the
24 museum and how he researched it. He never disclosed
25 it. He never took the stand. He was adverse to the

1 sisters below. And you know, there is - - -

2 JUDGE SMITH: You're allowed to take his
3 deposition, aren't you?

4 MR. SCHLESINGER: There was no depositions
5 in the case.

6 CHIEF JUDGE LIPPMAN: Okay, counselor,
7 thanks.

8 MR. SCHLESINGER: Okay. Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you both.
10 Appreciate it.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Flamenbaum, Deceased, No. 178 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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