PRECLUDING THE STATUTE OF LIMITATIONS? HOW TO DEAL WITH NAZI-LOOTED ART AFTER *CORNELIUS GURLITT*

*Phillip Hellwege**

The Nazi regime collapsed seventy years ago; still today, we are concerned about the restitution of Nazi-looted art. In recent decades, the public debate in Germany has often focused on restitution by public museums and other public bodies. The recent case of Cornelius Gurlitt *has raised the issue of restitution of Nazi-looted art by private individuals and private entities. German law is clear about this issue: property based claims are time-barred after thirty years. Thus, according to German law, there is little hope that the original owners will have an enforceable claim for the restitution of such art. Early in 2014, the Bavarian State Government proposed a legislative reform of the German Civil Code. The draft bill aims to re-open property based claims for restitution. The draft bill is a direct reaction to the case of* Cornelius Gurlitt.

This article analyzes the availability of property based claims for the restitution of Nazi-looted art under German law and critically assesses the Bavarian State Government's draft bill. My conclusion is not encouraging for the original owners of Nazi-looted art. Even though the Bavarian draft bill breeds hope among Nazi victims and their heirs, who are led to believe that they now have enforceable claims against the present possessors of what was theirs, the truth is that many original owners have forever lost ownership of their art. Re-opening property based claims will not be of any help to these victims, because it is still

* Professor of Private Law, Commercial Law, and Legal History, University Augsburg, Germany. This article is based on presentations that the author gave in March 2014, to the Faculty of Law at the University of Cape Town, South Africa; in June 2014, to the Faculty of Law at the Jagiellonian University in Kraków, Poland; in September 2014, to the University of Pittsburgh School of Law; and in December 2014, to the Faculty of Law at the Eötvös Loránd University in Budapest, Hungary.

required, under German law that the original owner also be the current owner of the lost item. Furthermore, the Bavarian draft bill suffers from a number of inherent defects.

I. NAZI-LOOTED ART AND CORNELIUS GURLITT

There has always been a desire to acquire art. One should, however, satisfy this desire by lawful means, only. Yet, this desire can be so strong that it has often been satisfied by unlawful means: art has been stolen, lawful owners have been disseized, and art has been acquired under suspicious circumstances. History is full of such examples.[1] In the 20th century, Germany added a monstrous and incomparable chapter to this history, with the Holocaust. Germans speak of *Raubkunst*, which translates to mean "robbed art."[2] The word points to a number of different factual settings in which art was lost during the Nazi regime.[3] Of course, there were direct victims of

1. HANNES HARTUNG, KUNSTRAUB IN KRIEG UND VERFOLGUNG 11-26 (2005).

2. Author's translation.

3. GUNNAR SCHNABEL & MONIKA TATZKOW, NAZI LOOTED ART: HANDBUCH KUNSTRESTITUTION WELTWEIT 33-39 (2007) (Ger.); SABINE RUDOLPH, RESTITUTION VON KUNSTWERKEN AUS JÜDISCHEM BESITZ 11-56 (2007); Johannes Wasmuth, *Aufarbeitung der unter NS-Herrschaft verübten Entziehung von Kunstwerken*, 67 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 747, 747-748 (2014); Andrea F. G. Raschèr, *Washingtoner Raubkunst-Richtlinien*, 11 KUNST UND RECHT [KuR] 75, 76 (2009). *See* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE

the regime, especially Jewish people. Their loss was person-related in the sense that: they lost art, and other assets, on the basis of their race, religion, or other individual criteria. Assets were stolen from them, and they had to give up their belongings or their belongings were confiscated. There was also an object-related loss of art assets. Under the Nazi regime, modern art was disparaged as "entartete Kunst" ("degenerate art").[4] The works of modern artists were confiscated from public museums.[5] Even though this kind of loss was not person-related in the sense that it did not directly rob victims of the Nazi regime and even though only works in public museums were confiscated, this loss also indirectly harmed private collectors, including Nazi victims, who had generously loaned works of art to public museums.[6] Although restitution of *Raubkunst* is not complete, many pieces have been successfully returned from public collections to the original art owners or their heirs, and further efforts have been made to right these wrongs, following the Washington Conference Principles on Nazi-Confiscated Art of 1998.[7] In 2013, the case of *Cornelius Gurlitt* illuminated another facet of the problems surrounding the restitution of *Raubkunst*: restitution by private individuals and private entities.

Cornelius Gurlitt (1932-2014) came from a family of art dealers, art historians, artists, and musicologists.[8] His father was Hildebrand Gurlitt (1895-1956). Between 1938 and 1941, Hildebrand was one of

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FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994), for an account in English.

4. On "*Entartete Kunst*," see NATIONALSOZIALISMUS UND "ENTARTETE KUNST" (Peter-Klaus Schuster ed., 1987); HANS-HENNING KUNZE, RESTITUTION "ENTARTETER KUNST" 36-42 (2000). See *Datenbank "Entartete Kunst*, FREIE UNIVERSITÄT BERLIN, http://www.geschkult.fu-berlin.de/e/db_entart_kunst/ (last accessed Aug. 17, 2015), for a database of works confiscated as "*Entartete Kunst*."

5. NICHOLAS, *supra* note 3, at 21.

6. *See infra* note 188 and accompanying text for an example.

7. *See* SCHNABEL & TATZKOW, *supra* note 3, at 193-212; Bureau of European and Eurasian Affairs, *The Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE, http://www.state.gov/p/eur/rt/hlcst/122038.htm (last visited Nov. 15, 2015). See generally CONSTANTIN GOSCHLER, SCHULD UND SCHULDEN (2005); "ARISIERUNG" UND RESTITUTION (Constantin Goschler & Jürgen Lillteicher eds., 2002); RAUB UND RESTITUTION (Constantin Goschler & Philipp Ther eds., 2003), on the restitution of Nazi-era assets.

8. The details of the biography of Cornelius and Hildebrand Gurlitt are taken from Isgard Kracht, *Im Einsatz für die deutsche Kunst*, *in* WERKE UND WERTE 41-59 (Maike Steinkamp & Ute Haug eds., 2010); VANESSA-MARIA VOIGT, KUNSTHÄNDLER UND SAMMLER DER MODERNE IM NATIONALSOZIALISMUS 130-155 (2007); Thomas E. Schmidt, *Der ewige Sohn: Er lebte für die Bilder seines Vaters, des NS-Kunsthändlers Hildebrand Gurlitt*, DIE ZEIT [DZ], May 8, 2014, at 57; Julia Voss, *Marc, Mattise, Picasso, Dürer*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], Nov. 5, 2013, at 27; Jörg Häntzschel et al., *Der seriöse Herr von nebenan*, SÜDDEUTSCHE ZEITUNG [SZ], Nov. 4, 2013, at 2; Andreas Rossmann, *Seine Moralischen Geschäfte*, FAZ, Dec. 9, 2013, at 27; Bernhard Schulz, *Händler des Unrechts*, DER TAGESSPIEGEL, Nov. 11, 2013, at 19.

four art dealers who liquidated the pieces of art that were confiscated from museums as "*entartete Kunst*" – art confiscated on an object-related basis. He sold these works internationally, both to museums and to private collectors. Thus, the Nazi regime did not confiscate these works in order to keep them; this art was confiscated primarily for sale. Hildebrand was governed by the same commission that had given 126 pieces of art to the *Galerie Fischer* in Lucerne, Switzerland, to be sold at auction in June 1939.[9] The most important piece of art sold at the 1939 auction was a self-portrait of Vincent van Gogh (1853-1890), which was dedicated to Paul Gauguin (1848-1903), and was sold to Maurice Wertheimer (1886-1950),[10] who donated it in his will to the *Fogg Art Museum* at Harvard University. From 1943 on, Hildebrand was involved in the acquisition and liquidation of disseized art in France, which had been taken from its owners on a person-related basis. Hildebrand's rise to power was one of the many oddities of the Nazi era: in 1933, he lost his position as director of the *Hamburger Kunstverein* because he had, much to the discontent of Nazi officials, promoted modern art; later, he worked as a private art dealer, specializing in "*entartete Kunst*," which was illegal at the time; ironically, his family also had Jewish roots.[11]

Hildebrand Gurlitt amassed his own private art collection, as well. After the war, the collection was largely forgotten about until Cornelius, who inherited it, attracted the attention of the German customs officers.[12] In 2012, the collection of 1,280 pieces of art, was confiscated by the Augsburg public prosecution service.[13] In 2013, the case garnered enormous international media attention.[14] A number of factors influenced this attention: the fact that it was Hildebrand Gurlitt's collection; the fact that its provenance was thereby tainted; the obvious conclusion that it must also include *Raubkunst*; the sheer number of pieces of art; the fact that Cornelius Gurlitt is said to have stored them all in his apartment in Munich; the fact that this collection was unknown to, or forgotten by, the general public; and the names of

9. *See* NICHOLAS, *supra* note 3, at 3-5.

10. *See* NICHOLAS, *supra* note 3, at 3-4; Steven A. Reich & Hermann J. Fischer, *Wem Gehören die als "Entartete Kunst" Verfemten, von den Nationalsozialisten Beschlagnahmten Werke*?, 46 NJW 1417, 1418 (1993).

11. Felix Bohr et al., *Art Dealer to the Führer*, DER SPIEGEL [DS], Dec. 21, 2013, at 105-106 (Ger.).

12. *See* Julia Voss, *supra* note 8, at 27.

13. *Staatsanwaltschaft gibt auf: Beschlagnahmung der Sammlung Gurlitt beendet*, FAZ, Apr. 9, 2013, at 11.

14. *See, e.g.*, Alison Smale, *Report of Nazi-Looted Trove Puts Art World in an Uproar*, N.Y. TIMES, Nov. 4, 2013, at A1.

the artists whose works are in the collection: Marc Chagall (1887-1985), Ernst Ludwig Kirchner (1880-1938), Paul Klee (1879-1940), Oskar Kokoschka (1886-1980), Emil Nolde (1867-1956), Franz Marc (1880-1916), and Henri Matisse (1869-1954), to name a few. At first, it was speculated that the collection must be worth over one billion euros. Later, it became apparent that the collection comprised primarily of works on paper, and some art historians claimed that many pieces in the collection, even if created by important artists, are of secondary importance only; these art historians alleged that the collection was only worth between thirty to fifty million euros.[15] In mid-February 2014, additional artwork was found in Gurlitt's second home in Salzburg, Austria, totalling more than 200 pieces, including works by Pablo Picasso (1881-1973), Pierre-Auguste Renoir (1841-1919), and Claude Monet (1840-1926).[16]

In February 2014, Gurlitt's attorneys reclaimed the collection from the Augsburg public prosecution service.[17] In April 2014, Gurlitt signed an agreement with Federal and State officials, consenting that the collection would be left where it was, in order to clarify its provenance; Gurlitt further agreed that he would voluntarily return any piece of *Raubkunst* to its original owners, in accordance with the Washington Principle.[18] Indeed, the provenance of the collection remains unclear.[19] The collection contains some works that Hildebrand Gurlitt acquired legally: he was an art dealer before becoming in-

15. *See* Catrin Lorch, *Schwabinger Kunstfund: Ein Bilderschatz schmilzt zusammen*, SZ (Dec. 7, 2013, 11:08 AM), http://www.sueddeutsche.de/kultur/schwabinger-kunstfund-ein-bilderschatz-schmilzt-zusammen-1.1837892; *Gurlitts Eigentum: Der Wert des Münchner Kunstfunds*, FAZ, Nov. 22, 2013, at 35; Peter Raue, *Die beschlagnahmten Gurlitt-Bilder*, 47 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 2 (2014) (Ger.).

16. *Noch mehr Gurlitt: Sechzig weitere Werke gefunden*, FAZ, Feb. 12, 2014, at 34; *Es hört nicht auf: Weitere Meisterwerke bei Gurlitt*, FAZ, Mar. 27, 2014, at 9.

17. *Schwabinger Kunstfund: Gurlitts Anwälte fordern Rückgabe der* Bilder, SZ (Feb. 19, 2014, 2:57 PM), http://www.sueddeutsche.de/medien/schwabinger-kunstfund-gurlitts-anwaelte-fordern-rueckgabe-der-bilder-1.1893217.

18. Heribert Prantl, *Der Gurlitt'sche Knoten, Aufgedröselt*, SZ Apr. 8, 2014, at 1; Hans Leyendecker & Georg Mascolo, *Fall Gurlitt – Bilderstreit gelöst*, SZ, Apr. 8, 2014, at 1, 2014 WLNR 9384791; Rose-Maria Gropp, *Wende im Fall Gurlitt: Überraschende Lösung füur Schwabinger Kunstfund*, FAZ, Apr. 8, 2014, at 9. The wording of the agreement is cited by Horst Bestelmeyer, *Die "Raubkunst-Vereinbarung" im Fall Gurlitt aus betreuungs- und erbrechtlicher Sicht*, 22 DER DEUTSCHE RECHTSPFLEGER RPFLEGER 457 (2014); Sophie-Charlotte Lenski, *Vergangenheitsbewältigung durch Vertrag – die Verfahrensvereinbarung im Fall Gurlitt*, 69 JURISTENZEITUNG [JZ] 888 (2014).

19. *See* Thomas Finkenauer, *Die Verjährung bei Kulturgütern – zur geplanten "lex Gurlitt"*, 69 JZ 479 (2014); Raue, *supra* note 15, at 2; Rose-Maria Gropp, *Schwabinger Schatz*, FAZ, Nov. 6, 2013, at 1; Julia Voss, *Erben ohne Chancen*, FAZ, Nov. 16, 2013, at 39; Stefan Koldehoff, *Woher aber kommen nun Gurlitts Bilder?*, FAZ, Mar. 28, 2014, at 14; Lothar Gorris et al., *Rechtsstaatlicher Expressionismus: Wie der Kunstfund von München Politik, Ermittler und Wis-*

volved with the Nazi regime, and other pieces of his collection were acquired after 1945.[20] On the other hand, a number of his pieces count as *Raubkunst* – the numbers supplied by the media vary significantly. These works may hail from an object-related confiscation of "*entartete Kunst*," as Hildebrand was involved in the liquidation of such works. Or, they might count as person-related loss as Hildebrand was undoubtedly involved in the acquisition and liquidation of such works in France.[21]

Following the agreement made in April 2014, the public prosecution service released the artworks previously held under the confiscation order,[22] but the pieces still remain in the hands of German officials. In May 2014, Gurlitt passed away, and he bequeathed the collection in his will to the Swiss *Kunsthalle* Bern Foundation.[23] At first, it was unclear if the Foundation would reject the inheritance, on principle.[24] In November 2014, the Foundation announced that it would not reject the inheritance.[25] The German Government claimed that the Foundation, as heir, is bound to the aforementioned April 2014 agreement.[26] In addition, the Federal Government and the Bavarian State Government signed an agreement in November 2014 with the Foundation, stating that the latter will voluntarily return any piece of *Raubkunst*. However, the question of who is Gurlitt's rightful heir is

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senschaftler überfordert und warum der Fall Gurlitt vor allem im Ausland Entsetzen auslöst, DS, Nov. 18, 2013, at 132; Bohr et al., *supra* note 11, at 105.

20. *Gurlitts Eigentum: Der Wert des Münchner Kunstfunds*, *supra* note 15, at 35.

21. This seems to be the case for the "Seated Woman" by Matisse. *See* Julia Voss, *Es ist keine Zeit zu verlieren: Wann wird die Raubkunst aus der Gurlitt-Sammlung an die Erben gegeben?*, FAZ, Dec. 12, 2014, at 13. Matisse's "Seated Woman" is one of the first restituted pieces. *See* Stephan Koldehoff, *Das Ende Eines Langen Wegs*, FAZ, May 22, 2015, at 13.

22. *Staatsanwaltschaft gibt auf: Beschlagnahmung der Sammlung Gurlitt beendet*, *supra* note 13, at 11; *Hochdynamisch Gurlitts Bilder bleiben, wo sie sind*, FAZ, Apr. 11, 2014, at 14.

23. Julia Voss & Stefan Koldehoff, *Gurlitt war empört: Seine Sammlung soll an das Kunstmuseum Bern gehen*, FAZ, May 8, 2014, at 13; Schmidt, *supra* note 8, at 57.

24. Hans Leyendecker & Catrin Lorch, *Mehr Ärger als Freude*, SZ, May 9, 2014, at 1, 2014 WLNR 12541223; *Erben dauert*, SZ, June 4, 2014, at 1, 2014 WLNR 15018047.

25. Julia Voss & Niklas Maak, *Ohne Wenn und Aber: Bern nimmt Erbe an*, FAZ, Nov. 25, 2014, at 9; *Kunstmuseum Bern nimmt Erbe Gurlitts an: Werke bleiben zunächst in Deutschland/ Weitere Nachforschungen zu Raubkunst*, FAZ, Nov. 25, 2014, at 1. According to German law, the estate passes directly to the heir. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], as amended, § 1922 (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html. The estate passes to the heir without the need of accepting the inheritance, but the heir has a right to reject it. *Id.* § 1942.

26. Gerog Mascolo & Hans Leyendecker, *Testament von Cornelius Gurlitt: Sammlung Gurlitt soll ins Ausland gehen*, SZ (May 7, 2014, 1:44 PM), http://www.sueddeutsche.de/kultur/testament-von-cornelius-gurlitt-sammlung-gurlitt-soll-ins-ausland-gehen-1.1953134.

not settled, as some relatives are now contesting the will,[27] and a final decision has not yet been reached.[28]

The *Gurlitt* case raises a number of legal issues. International commentators argue that Germany has failed to fulfill its obligations under the Washington Conference Principles[29] because the Augsburg public prosecution service did not take active steps to make the case public, the works were confiscated early in 2012, and the case only was publicized in late 2013. Some German pundits argue that there was no legal ground to confiscate the collection from Gurlitt.[30] To be sure, Gurlitt first attracted the attention of German customs officials while crossing the border from Switzerland to Germany with a large sum of money on his person.[31] It was suspected that he had committed tax-related offenses. For this reason, his home was searched. However, it was never proven that he actually evaded taxes. Nevertheless, the collection had been confiscated.

Finally, German lawyers point to the fact that Gurlitt's heirs could rely on a statute of limitations with respect to the *Raubkunst* parts of the collection, if Gurlitt had not voluntarily agreed to return these parts of the collection. Surely, the artwork's true owners will have a claim for the return of their property arising from section 985 of the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)).[32] Sec-

27. *Gurlitts Testament: Gericht muss Gültigkeit prüfen*, FAZ, Nov. 26, 2014, at 9; *Reaktion aus München: Gurlitts Cousine bekräftigt ihren Anspruch auf das Erbe*, FAZ, Nov. 25, 2014, at 9; *Testament Gurlitts angezweifelt*, FAZ, Nov. 22, 2014, at 1; Stefan Koldehoff, *Leichtgradig kompliziert. Was wollen Gurlitts Erben – und wer sind sie?*, FAZ, Nov. 19, 2014, at 12; Stefan Koldehoff, *Wer beerbt Gurlitt?: Verwandte erwägen die Anfechtung des Testaments*, FAZ, May 12, 2014, at 9. *But see* Von Hans Leyendecker, *Case Gurlitt – Uneinige Verwandtschaft: Das Kunstmuseum Bern nimmt das Erbe von Cornelius Gurlitt an. Doch Gurlitts Familie ist uneins über den letzten Willen des Mannes, über dessen geistigen Zustand noch gerätselt wird.*, SZ (Nov. 24, 2014, 1:12 PM), http://www.sueddeutsche.de/kultur/fall-gurlitt-uneinige-verwandtschaft-1.2235149 (stating that other relatives seem to accept the will). *See generally* Ryan MacDonald, Note, *For the Sake of Restitution: An Analysis of Cornelius Gurlitt's Will, Its Court Challenge, and why Public Policy Should Drive the Court's Decision*, 16 RUTGERS J.L. & RELIGION 443 (2015), for an analysis on these points.

28. *See Kein Erbschein: Beschluss gegen Gurlitts Cousine*, FAZ, Mar. 27, 2015, at 9.

29. *See* Raue, *supra* note 15, at 2-3; Mary M. Lane & Harriet Torry, *U.S. Pushes Germany for Details of Art Cache*, WALL ST. J., Nov. 7, 2013, at A1. *But see* Wolfgang Ernst, *Bilderbesitz im Rechtsstaat*, 69 JZ 28, 31-32 (2014).

30. Ulf Bischof, *Ein Kommentar zum Schwabinger Kunstfund*, 15 KUR 179-182 (2013); Jürgen Kaube, *Aus diesem Dilemma führen nur heikle Auswege: Rückwirkende Gesetzgebung? In Heidelberg diskutierten Kunstrechtler die Folgen des Schwabinger Kunstfunds*, FAZ, Nov. 25, 2013, at 29; Corinna Budras, *Rettung durch "Lex Gurlitt": Eine Bundesratsinitiative Bayerns soll eine "schwer erträgliche Rechtslage" kitten*, FAZ, Jan. 10, 2014, at 10; *see also* Ernst, *supra* note 29, at 28-32.

31. David Klaubert, *Schwabinger Sensation*, FAZ, Nov. 6, 2013, at 3 (Ger.).

32. BGB § 985.

tion 985 of the BGB is the German version of what is known in European legal history as the *rei vindicatio*.[33] However, the obligation of return arising under section 985 of the BGB has a statute of limitations of 30 years, after which the obligation to return property becomes unenforceable, even though the original owner will remain owner.[34] Thus, Gurlitt's heirs would be under no enforceable property-based obligation to return any piece of the collection to its true owner. In January 2014, the Bavarian State Government proposed a change to the BGB. The government filed a draft bill with the Bundesrat (Federal Council) that would create an exception to the statute of limitations: a person who in bad faith acquires possession of lost property will be barred from using the statute of limitations against claims arising under section 985 of the BGB.[35] The draft bill is, of course, a reaction to the *Gurlitt* case, and is aimed primarily at remedying the problem of Nazi-looted assets. Nevertheless, the draft bill is of general applicability.

In this article, I will analyze the following question: when does an original art owner, according to German law, have an enforceable property based claim against the artwork's current possessor? I will answer this question by analyzing the *Gurlitt* case, in particular. I will also discuss Nazi-looted art, in general. And I will critically assess the Bavarian State Government's draft bill. Even though Gurlitt and the *Kunsthalle* Bern Foundation have agreed to return any piece of *Raubkunst* voluntarily, this analysis is important with respect to other potential cases of lost art. Furthermore, it is important to note that it has been argued that the agreement of April 2014 between Gurlitt and Federal and State officials to voluntarily return any piece of *Raubkunst* is actually void for a number of reasons:[36] one of these

33. UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 183 (2000).

34. BGB § 197.

35. Regierungsentwurf [Cabinet Draft], BUNDESRAT DRUCKSACHEN [BR] 2/14, http://www.bundesrat.de/SharedDocs/drucksachen/2014/0001-0100/2-14.pdf (Ger.). *See generally Bayerischer Landtag: Grüne warnen vor Folgen von "Lex Gurlitt"*, SZ (Feb. 27, 2014, 3:06 PM), http://www.sueddeutsche.de/bayern/bayerischer-landtag-gruene-warnen-vor-folgen-von-lex-gurlitt-1.1900087; Voss, *supra* note 19, at 39; Budras, *supra* note 30, at 10; Corinna Budras, *Lex Gurlitt im Bundesrat: Bayern will der Verjährung ein Schnippchenschlagen*, FAZ, Feb. 15, 2014, at 37.

36. *See* Lenski, *supra* note 18, at 888. Lenski points to constitutional problems, arguing that Federal officials acted beyond their constitutional powers when signing the agreement because the subject matter falls exclusively within the competence of the State. *Id.* at 888-92. She also points to administrative law problems, arguing that the agreement entered into was a public-law contract, and that the public interest requires the parties to meet certain material criteria, which were arguably not met in this case. *Id.*; *see also* Bestelmeyer, *supra* note 18, at 457. Bestelmeyer

reasons may equally apply to the agreement of November 2014 with the *Kunsthalle* Bern Foundation. My focus in this article will be on property based claims only. Original owners may, of course, have claims based in tort law or unjust enrichment. Because the Bavarian State Government's draft bill does not discuss these legal claims, I will disregard them for purposes of this article. Even with such restriction to property based claims in German law, the topic is, for a number of reasons, complex.

First, the details of the *Gurlitt* case and the background of each work in the collection remain unclear. In other words, the facts of the case are still unclear, which makes any legal analysis complicated. In general, art has, as we have seen, been lost during the Nazi regime in a variety of ways; subsequently, this art may have changed hands, and it may have been sold or auctioned off. The individual story of each piece of lost art will have an impact on the legal analysis.

Second, in the *Gurlitt* case, the *Raubkunst* pieces of the collection may have German or French origins. Today, these pieces are located in Germany and in Austria.[37] The *Kunsthalle* Bern Foundation is Swiss. And the original owners, or their heirs, are probably living all over the world. Leaving the *Gurlitt* case aside, lost art may have crossed borders many times. Thus, in each case, questions of jurisdiction and of conflict of laws arise.

Third, even if we focus on German law, we will see that there are different layers of law that affect our analysis. After World War II, the Allied Forces introduced special legislation about the restitution of property that had been lost by the Nazi victims.[38] This legislation was only introduced in the American, British, and French occupied zones, and in West Berlin.[39] Later, the Federal Republic of Germany (West Germany) introduced legislation about the compensation of Nazi victims. In the German Democratic Republic (East Germany) no corresponding legislation was enacted. Instead, there was special legislation about the subject, only after Germany's reunification, in 1990.[40] Fi-

raises a different point than Lenski, arguing for the invalidity of the agreement because it was entered into by Gurlitt's court-appointed custodian, who was appointed in February 2014, under the belief that Gurlitt was no longer able to manage his affairs; however, the German court failed to seek approval of a Family Court judge for the custodian to enter into agreements on Gurlitt's behalf. Bestelmeyer, *supra* note 18, at 457-65.

37. *See* Rose-Maria Gropp, *supra* note 18, at 9.

38. *See* WALTER I. FARMER, THE SAFEKEEPERS: A MEMOIR OF THE ARTS AT THE END OF WORLD WAR II 86 (2000).

39. *See* RUTH MEYER, *Appendix I to* WALTER I. FARMER, THE SAFEKEEPERS: A MEMOIR OF THE ARTS AT THE END OF WORLD WAR II 123, 138 (2000).

40. *See* WALTER I. FARMER, *supra* note 38, at 114.

nally, there are the provisions about general private law in the BGB.[41] The *Gurlitt* case, and the initiative of the Bavarian State Government, have, once again, raised the question of the interplay of these different layers of law.

Fourth, the Nazi's victims not only lost pieces of art, but also most of their belongings. Yet, today we are mostly concerned with lost art. The reason is simple: pieces of art can easily be hidden away in collections, and will only re-appear decades later. It is only then that the victims or their heirs will have the chance to claim back what was, or still is, theirs. Thus, the restitution of art is more intricate than, for example, the restitution of immoveable property, like homes. Nevertheless, most of the aforementioned layers of law do not specifically address lost art, instead being applicable to all kinds of property. Moreover, the Bavarian draft bill proposes a rule that is applicable to lost property, in general.[42]

Fifth, one may ask why all of these distinctions should matter. Is it not clear, on principle, that lost property must be returned to its owners, regardless of what the applicable law is, of whose hands the property fell into, or what kind of property it is? Nevertheless, other policy considerations come into play, too. We should not lose sight of these divergent policy considerations when tackling such a complex and sensitive topic.

The structure of this article is simple. My focus will be on property based claims under German law, specifically section 985 of the BGB, its applicability, its requirements, and its statute of limitations. As we will see, other legal factors, such as the aforementioned special laws concerning the restitution of property to, and the compensation of, the victims of the Nazi regime, may influence the application of section 985 of the BGB. I will also critically review the Bavarian State Government's draft bill.

I have one more preliminary remark: many of the legal discussions herein may seem very formalistic and technical to an Anglo-American audience. However, the purpose of this article is to introduce German law to an international audience, and present the current legal discussions in Germany, accessibly. Thus, this article simply hopes to reflect how legal problems surrounding the art restitution of Nazi victims are analysed and discussed in Germany.

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41. *See, e.g.*, BGB § 985.

42. *See* Regierungsentwurf, BR 2/14, http://www.bundesrat.de/SharedDocs/drucksachen/2014/0001-0100/2-14.pdf (Ger.).

II. THE REI VINDICATIO OF § 985 BGB AND ITS STATUTE OF LIMITATIONS

A. The rei vindicatio of § 985 BGB

The claim of the true owner against the present possessor under German law arises under section 985 of the BGB: "The owner may require the possessor to return the thing."[43]

The claim is based on the ownership of the claimant, and it is part of property law, not tort law. It derives from the *rei vindicatio* of Roman law,[44] and it is found in civil-law systems, like in Austria, Italy, Switzerland, South Africa, and Louisiana.[45] It is not found in Anglo-American, common law legal systems (with the exception of Louisiana, in the United States). Common law countries make use of torts such as conversion, wrongful interference with goods, and replevin, in order to make victims whole.[46]

Consequently, section 985 of the BGB does not involve any wrongdoing. It merely sets out two requirements:[47] the claimant must be the owner, and the debtor must be the possessor. A third requirement follows from section 986 of the BGB: the "possessor may refuse to return the thing if he. . .is entitled to possession as against the owner."[48] In the case of lost art, it is the first requirement that is prob-

43. BGB § 985. All translations of German statutory provision are, unless otherwise indicated, taken from *Gesetze im Internet*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ [BMJ], http://www.gesetze-im-internet.de/ (last visited Nov. 15, 2015).

44. Christian Baldus, *in* 6 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 985 para. 6 (Franz J. Säcker at al. eds., 6th ed. 2013).

45. For Austrian law: ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 366, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 (Austria). For Italian law: Art. 948 CODICE CIVILE [C.C.] [CIVIL CODE]; Bernhard Eccher, *Sachenrecht*, *in* HANDBUCH ITALIENISCHES ZIVILRECHT 403, 405-406 (2009). For Swiss law: SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907 SR 210, Art. 641; WOLFGANG ERNST, SACHENRECHT 59 (2010); JÖRG SCHMID & BETTINA HÜRLIMANN-KAUP, SACHENRECHT 162-163 (4th ed. 2012). For South African Law: D. L. CAREY MILLER, THE ACQUISITION AND PROTECTION OF OWNERSHIP 255 (1986). For the law of Louisiana: LA. CIV. CODE ANN. art. 526 (2015); 2 ATHANASSIOS N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY § 347 (4th ed. 2001); 12 WILLIAM E. CRAWFORD, LOUISIANA CIVIL LAW TREATISE: TORT LAW § 12:13 (2d ed. 2009); Dual Drilling Co. v. Mills Equip. Invs., 98-0343 (La. 12/01/98), 721 So. 2d 853. *See also* BEATE SCHÖNENBERGER, RESTITUTION VON KULTURGUT 64-65 (2009).

46. *See, e.g.*, Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007) *aff'd*, 548 F.3d 50 (1st Cir. 2008); Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *vacated*, 298 N.Y.S.2d 979 (1969); PETER HAY, US-AMERIKANISCHES RECHT 131 (5th ed. 2011); Yiannopoulos, *supra* note 45, at § 346; Andrew Tettenborn, *Wrongful Interference with Goods*, *in* CLERK & LINDSELL ON TORTS § 17 (Michael A. Jones et al. eds., 21st ed. 2014).

47. *See* FRITZ BAUR ET AL., SACHENRECHT paras. 11.4, 11.39-40 (18th ed. 2009) (detailing the requirements of a claim arising from § 985 BGB).

48. *Id.*

lematic.[49] Before discussing this problematic requirement, it is important to note three things.

i. The applicability of German law

Firstly, it is important to understand when German law applies. If the *Kunsthalle* Bern Foundation remains the heir to Gurlitt's collection, Swiss courts will have jurisdiction over property based claims brought by the original owners—wherever they are domiciled—against the Foundation, for the return of the work, since the Foundation has its domicile in Switzerland.[50] With respect to moveable property, Swiss law follows the *lex rei situs* rule.[51] This rule is commonly accepted with respect to moveable property;[52] the concept is also found in English[53] and American law.[54] A Swiss court will, thus, apply German law to the artworks that are located in Germany, and apply Austrian law to those parts of the collection that are situated in Austria.[55]

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49. *Id.*

50. *See* SCHWEIZERISCHES BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [SWISS FEDERAL ACT ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, AS 1776 (1988), art. 2, 98; Council Decision of 27 November 2008 Concerning the Conclusion of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2009/430, art. 2, 2009 O.J. (L 147) 1, 6 (EU).

51. IPRG, Dec. 18, 1987, AS 1776 (1988), art. 100 (Switz.).

52. *See* Christiane Wendehorst, *in* 11 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 43, para. 3 (Franz J. Säcker et al. eds., 5th ed. 2010); HAIMO SCHACK, KUNST UND RECHT para. 500 (2004); ASTRID MÜLLER-KATZENBURG, INTERNATIONALE STANDARDS IM KULTURGÜTERVERKEHR UND IHRE BEDEUTUNG FÜR DAS SACH- UND KOLLISIONSRECHT 158-165 (1996).

53. *See* Winkworth v. Christie Manson and Woods Ltd. [1980] Ch. 496 (Eng.); 2 A.V. DICEY ET AL., DICEY AND MORRIS ON THE CONFLICT OF LAWS 963 (Lawrence Collins ed. 13th ed. 2000).

54. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971); HAY, *supra* note 46, at 96.

55. A question which seems to be more problematic on the basis of the facts known from the media coverage of the case is which law would be applied to answer the question whether the *Kunsthalle Bern Foundation* is Gurlitt's heir. In the media it was alleged that he held Austrian citizenship. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Apr. 2014), http://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment. Yet, the fact that he was born in Germany suggests that he also has German citizenship. *See id.* Furthermore, he had a home both in Munich (Germany) and in Salzburg (Austria). *Id.* A Swiss court would apply the private international law of the country in which Gurlitt had his last domicile. *See* IPRG, Dec. 18, 1987, AS 1776, art. 91. The last domicile could be both Munich and Salzburg. Both German and Austrian law would apply the law of the country which Gurlitt was a citizen of. *See* BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPR-GESETZ] [AUSTRIAN FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] July 7, 1978, BUNDESGESETZBLATT [BGBL] No. 304/1978, art. 28 (Austria); EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [BGBEG] [INTRODUCTORY ACT TO THE CIVIL CODE], Aug. 18, 1896, as amended, art. 25, *translation at* http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html (Ger.). Both

The position would not be any different if the will were successfully challenged. An heir who has his or her domicile within the European Union would have to be sued in the Member State of his or her domicile, and cannot be sued in any other Member State.[56] A different question, which is beyond the scope of this article, is whether a court outside of the European Union could assume jurisdiction over any claims for the restitution of any piece of art in the collection. However, even if a court outside of the European Union were to assume its jurisdiction, it would not be advisable to file a claim there, as that would lead to problems when the judgment has to be recognised and enforced in Germany if the piece of art is situated in Germany.[57]

For a German court, the *lex rei situs* rule follows from Article 43 of the German Introductory Act to the Civil Code (*Einführungsgesetzbuch zum Bürgerlichen Gesetzbuche* (EGBGB)).[58] This rule applies to all property questions, including questions about the applicable property based claim[59] and the acquisition of property.[60] Thus, with moveable property, the law of the country where the property is situated will govern the transfer of ownership. If moveable property changes countries, and if in one country there occurs a transfer of ownership, a court will apply the law of the country where the property was situated at the time, with respect to this transfer.[61]

German and Austrian law would give preference to their own citizenship in case of a dual citizenship. *See id.* at art. 5(1)(2); IPR-GESETZ, July 7, 1978, BGBL No. 304/1978, art. 28. Regulation (EU) No. 650/2012 will not apply to the case. *See* Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 4, 83(1), 2012 O.J. (L 201), 107, 118, 133 (EU). Yet, leaving these problems of conflict of laws aside, it seems clear that both under German and Austrian law the *Kunsthalle* Bern Foundation should be heir.

56. *See* Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 2(1), 2001 O.J. (L 12) 1, 3 (EC).

57. *See* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], as amended, § 328, translation at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.).

58. EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [BGBEG] [INTRODUCTORY ACT TO THE CIVIL CODE], Aug. 18, 1896, as amended, art. 43, *translation at* http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html (Ger.).

59. Bundesgerichtshof [BGH] [Federal Court of Justice] June 10, 2009, 62 NJW 2824, 2009 (Ger.); Wendehorst, *supra* note 52, § 43, para. 96; Landgericht Bonn [LG] [Regional Court] June 25, 2002, 56 NJW 673, 2003 (Ger.).

60. BGH, July 20, 2012, 68 JZ 305, 2013 (Ger.); Wendehorst, *supra* note 52, § 43, paras. 79-80.

61. *See generally* Wendehorst, *supra* note 52, § 43, paras. 119-77 (referencing German law supporting proposition).

A decision of the Regional Court (*Landgericht* (LG)) Bonn, in 2002, may serve as an example, in order clarify what I have written.[62] There, the plaintiff was domiciled in Columbia, South America, and he attempted to reclaim a painting entitled *Waldrand* by August Macke (1887-1914), from the defendant.[63] Macke sold the painting in 1910 to Oberländer.[64] The defendant allegedly found the painting in 1991, in the bulky trash; in Germany, citizens usually put their bulky trash at the curb for the waste-removal service to pick up.[65] The defendant claimed that he found the painting in front of a house 61 K-Street in the city of B.[66] Later, he discovered that the painting was a *Macke*.[67] In 1995, it was exhibited at a public exhibition in Bonn.[68] The claimant's attention was drawn to the painting by the media coverage on how the painting was found in the bulky waste.[69] The claimant alleged that Oberländer was his great-grandfather, Emanuel Oberländer, who died in 1933.[70] The property rights in the painting passed to Emanuel's son, Karl.[71] Karl was Jewish, and fled Germany with his family, in 1938.[72]

It is obvious that the *lex rei situs* rule may be abused. There are, most importantly, different approaches to the question of what constitutes *bona fide* acquisition of moveable property.[73] Some legal systems utilize a rule, known in Roman law as *nemo plus iuris transferre potest quam ipse habet or nemo dat quod non habet* (nobody can give what he himself does not have).[74] This legal concept is utilized in English[75] and American law.[76] Other legal systems recognize the possibility of *bona fide* acquisition, but restrict it to property that is not lost.

62. *See* 56 NJW 673 (673-75); 2 MICHAEL ANTON, ZIVILRECHT-GUTER GLAUBE IM INTERNATIONALEN KUNSTHANDEL: RECHTSHANDBUCH KULTURGÜTERSCHUTZ UND KUNSTRESTITUTIONSRECHT 110-11 (2010).

63. ANTON, *supra* note 62, at 110-11.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* I will return to the case later, as I will exemplify other points with it, too. At this point it is only of interest that the Colombian claimant filed his action in Germany, and that the LG Bonn applied German law.

73. For a comparative overview, see SCHÖNENBERGER, *supra* note 45, at 113-25.

74. DIG 50.17.54 (Ulpian, Ad Edictum 46); MAX KASER, RÖMISCHES PRIVATRECHT: A STUDIENBUCH 139 (20th ed. 2014).

75. *See* Sale of Goods Act 1979, c. 54, § 21(1) (Eng.); Michael Bridge, *Transfer of Title by Non-Owners*, *in* BENJAMIN'S SALE OF GOODS 7-00–7-115 (Michael Bridge ed., 8th et al. eds.,

This concept is utilized in Germany. Again, other legal systems allow *bona fide* acquisition even with respect to property that is lost. This is true of Italian law.[77] A present possessor might be tempted to abuse the *lex rei situs* rule by transferring lost property to a *bona fide* acquirer in a country where he or she is able to do so—to the detriment of the original owner. Especially in the context of lost art, it is internationally debated whether it is preferable to apply, for example, the laws of the country where the moveable property was lost,[78] or where it originated.[79] Regarding Nazi-looted art, it has been suggested that German law should always be applicable, regardless of where in Europe the art was taken from the original owners; it is also argued that it is in the interest of the victims of the Nazi regime to apply just one legal system to their cases.[80] However, in Germany, and beyond, these rules have never gained acceptance, as they are said to lead to legal uncertainty:[81] anyone to whom ownership is transferred should be

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2010). *But see* Martin Illmer, *Warenkauf*, in ENGLISCHES HANDELS- UND WIRTSCHAFTSRECHT 90, 98-100 (Volker Triebel et al. eds., 3rd ed. 2011) (relating on exceptions from the principle).

76. U.C.C. § 2-403 (2002); HAY, *supra* note 46, at 167.

77. Art. 1153 C.c. (It.); PETER KINDLER, EINFÜHRUNG IN DAS ITALIENISCHE RECHT: VERFASSUNGSRECHT, PRIVATRECHT UND INTERNATIONALES PRIVATRECHT 225-228 (2nd ed. 2008); Eccher, *supra* note 45, at 427.

78. *See* Heinz-Peter Mansel, *DeWeerth v. Baldinger: Kollisionsrechtliches zum Erwerb gestohlener Kunstwerke*, 1998 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 268, 271; Hans Hanisch, *Internationalprivatrechtliche Fragen im Kunsthandel*, *in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS 193, 218 (Albrecht Dieckmann et al. eds., 1986); M. Jefferson, *An Attempt to Evade the Lex Situs Rule for Stolen Goods*, 96 L. Q. REV. 508, 508-11 (1980).

79. Erik Jayme, *Neue Anknüpfungsmaximen für den Kulturgüterschutz im internationalen Privatrecht*, *in* RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES 35 (Rudolf Dolzer et al. eds., 1994).

On the restricted approval of the *lex originis* rule, see Gesetz zur Ausführung des UNESCO-Übereinkommens vom 14. November 1970 Über Maßnahmen Zum Verbot und zur Verhütung der Rechtswidrigen Einfuhr, Ausfuhr und Übereignung von Kulturgut und Zur Umsetzung der Richtlinie 93/7/EWG des Rates vom 15.März 1993 Über Die Rückgabe Von Unrechtmäßig Aus Dem Hoheitsgebiet Eines Mitgliedstaats Verbrachten Kulturgütern [Kultgürückg] [Act Implementing the UNESCO Convention Of Nov. 14, 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and Implementing Council Directive 93/7/EEC of March 15, 1993 on the Return of Cultural Objects Unlawfully Removed From the Territory of a Member State] May 18, 2007, BUNDESGESETZBLATT, Teil I [BGBl I] 757, as amended, § 9 (Ger.); Thomas Finkenauer, *Kulturgüterschutz im BGB*, 5 KuR 96, 97 (2007). Angelika Fuchs, *Kulturgüterschutz im Kulturgutsicherungsgesetz*, 2000 IPRAX 281, 285.

80. RUDOLPH, *supra* note 3, at 141-46.

81. SCHACK, *supra* note 52, ¶ 504-06; Hans Stoll, *Sachenrechtliche Fragen des Kulturgüterschutzes in Fällen mit Auslandsberührung*, *in* RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES 53, 57-60 (Rudolf Dolzer et al. eds., 1994); Martina Benecke, Abhandenkommen und Eigentumserwerb im Internationalen Privatrecht, *in* 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 362, 364-365 (2002); Christian Armbrüster, *Priva-*

able to rely on the law of the country being applicable where the property is situated.

A rather unusual case demonstrating the risk of abuse of the *situs* rule is *Vineberg v. Bissonnette*, which was decided in 2007 by the United States District Court, District of Rhode Island. The case involved a painting by Franz Xaver Winterhalter (1805-1873).[82] The painting's original owner was Max Stern, a Jewish art gallery owner in Düsseldorf.[83] In 1937, Stern was forced to sell the painting at the Lempertz auction house, in Cologne.[84] He was able to flee Germany and settle in Canada.[85] After World War II ended, Stern applied for restitution under the Restitution Law which was in force in the British occupation zone of Germany; he was awarded monetary compensation for the loss of his painting.[86] Stern also tried to identify the person to whom his painting was sold, and where the painting was; however, this proved to be impossible at the time because the Lempertz auction house's records were destroyed during the war.[87] As it turned out later, the painting had been sold in the auction to Karl Wilharm, the defendant's stepfather.[88] In 1959, the defendant inherited the painting from her mother.[89] The defendant lived in the United States since 1956, became an American citizen, and resided in Rhode Island since 1991.[90] In 2005, she attempted to sell the painting at a public auction.[91] At that time, the Stern Estate's trustees, who are citizens of Canada, learned about the *situs* of the painting, and reclaimed it.[92] Unusually, the defendant actually sent the picture back to Germany and initiated an action there in order to clarify the title in the painting.[93] This suggests that the defendant thought it was advantageous to have a German court decide the case under German law,

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trechtliche Ansprüche auf Rückführung von Kulturgütern ins Ausland, 54 NJW 3581, 3582-83 (2001) (Ger.); HERRMANN J. KNOTT, DER ANSPRUCH AUF HERAUSGABE GESTOHLENEN UND ILLEGAL EXPORTIERTEN KULTURGUTS 71-88 (1990).

82. Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 303 (D.R.I. 2007) *aff'd*, 548 F.3d 50 (1st Cir. 2008).

83. *Id.* at 302-303.

84. *Id.*

85. *Id.* at 303.

86. *Id.* Both the restitution and compensation laws will be discussed in the next section of this article.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 304.

92. *Id.*

93. *Id.*

and thus, take advantage of the *situs* rule. Because the defendant failed to raise the claimant's choice of law, the district court held that the defendant thereby waived her argument on the choice of law and, as a result, the court applied the law of Rhode Island.[94]

ii. The applicability of § 985 BGB

To be sure, German law applies to those works in Gurlitt's collection that are situated in Germany. One would assume that, as a consequence, the *rei vindicatio* of section 985 of the BGB would apply. It is the general property based claim of an owner against any possessor, requiring the return of the property.[95] Going beyond the *Gurlitt* case, one would also assume that section 985 of the BGB is applicable whenever a piece of *Raubkunst* is still situated in Germany. However, there were special provisions about the restitution of, and compensation for assets lost during the Nazi regime.

For instance, between 1947 and 1949, the Allied Forces in Germany enacted special laws concerning the restitution of such assets.[96] In the American-occupied zone, Law No. 59 on the Restitution of Identifiable Property of November 10, 1947, governed such restitution.[97] Law No. 59 regulated the rights of the victims of the Nazi re-

94. *Id.* at 304-305. I will return to this case later in this paper.

95. BGB § 985.

96. On these laws, *see generally* THOMAS ARMBRUSTER, RÜCKERSTATTUNG DER NAZI-BEUTE (2008); WALTER SCHWARZ, RÜCKERSTATTUNG NACH DEN GEZSETZEN DER ALLIERTON (1974); Otto Küster, *Das Rückerstattungsgesetz für die US-Zone*, DER BETRIEBS-BERATER [BB] 361-65 (1947); Adolf Arndt, *Das Rückerstattungs-Gesetz der amerikanischen Zone*, 1 NJW 161, 161-65 (1948); HERMAN MULLER, RÜCKERSTATTUNG IN DEUTSCHLAND (1948); REINHARD FREIHERR VON GODIN & HANS FREIHERR VON GODIN, RÜCKERSTATTUNG FESTSTELLBARER VERMÖGENSGEGENSTÄNDE IN DER AMERIKANISCHEN BESATZUNGSZONE (1948); Berthold Mosheim, *Das Rückerstattungsgesetz Nr. 59 für die britische Zone*, 4 BB 337-39 (1949); *see* MAIK WOGERSIEN, DIE RÜCKERSTATTUNG VON UNGERECHTFERTIGT ENTZOGENEN VERMÖGENSGEGENSTÄNDEN: EINE QUELLENSTUDIE ZUR WIEDERGUTMACHUNG NATIONAL-SOZIALISTISCHEN UNRECHTS AUFGRUND DE GESETZES NR. 59 DER BRITISCHEN MILITÄRREGIERUNG (2000). On the discussion leading to these laws and on their differences, see CONSTANTIN GOSCHLER, WIEDERGUTMACHUNG 106-28 (1992); Cornelius Pawlita, *"Wiedergutmachung" durch Zivilrecht?*, 24 KRITISCHE JUSTIZ 42, 42-60 (1991)(Ger.); Hans-Dieter Kreikamp, *Zur Entstehung des Entschädigungsgesetzes der amerikanischen Besatzungszone*, *in* WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 61-75 (Ludolf Herbst & Constantin Goschler eds., 1989).

97. *See* Restitution of Identifiable Property [Law No. 59], Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G. Restitution of the Identifiable Property to Victims of Nazi Oppression [Law No. 59], May 12, 1949, MILITARY GOVERNMENT GAZETTE GERMANY: BRITISH ZONE OF CONTROL No. 28 at 1169.; Ordonnance No. 120 Relative À La Restitution des Biens Ayant Fait L'objet D'acies de Spoliation, Nov. 10 1947, 119 JOURNAL OFFICIEL DU COMMANDEMENT EN CHEF FRANÇAI EN ALLEMANGE. GOVERNMENT MILITAIRE DE LA ZONE FRANÇAISE D'OCCUPATION at 1219-22. On the position in Berlin and on further details, *see* SCHNABEL & TATZKOW, *supra* note 3, at 103.

gime regarding the restitution of lost property.[98] It was not restricted to lost art; it also applied to every kind of property right.[99] It consisted of 95 articles. A large number of articles concerned the procedure of restitutionary claims before Restitution Agencies and Restitution Chambers. Article 1(1) states the purpose of the Law:

> It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism.[100]

It is important to note that according to article 1(1), the law aimed to remedy what I have referred to throughout this article as person-related loss. Consequently, the law did not relate to cases involving object-related loss – cases in which owners have lost pieces of art that have been confiscated as "*entartete Kunst*" in museums. This has at least been the position taken by the case law and by commentators.[101] This is of special importance for the *Gurlitt* case.

Compared to a claim arising from section 985 of the BGB, Law No. 59 contained a number of provisions in favor of the victims of the Nazi regime: article 1(2) makes it clear that provisions on *bona fide* acquisition do not work in the favor of third parties. Article 2 clarified that the law applied to all cases where property had been lost on the basis of a private transaction, in which it had been unlawfully taken and seized by the Nazi regime.[102] According to article 3, it was presumed that Nazi victims had lost their property in a way defined in

98. Law No. 59, Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G.

99. For details, *see* GODIN & GODIN, *supra* note 96, at art. 1 ¶ 3; MULLER, *supra* note 96, at 15.

100. Law No. 59, Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G, art. 1.

101. Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] July 26, 1952, 3 RECHTSPRECHUNG ZUM WIEDERGUTMACHUNGSRECHT [RzW] 266, 1952 (Ger.); OLG Karlsruhe, May 20, 1954, 5 RzW 255, 1954 (Ger.); Kammergericht Berlin [KG][Higher Regional Court] Jan. 8, 1965, 16 RzW 161, 1965 (Ger.); OLG München, Oct. 30, 1967, 19 RzW 58, 1968 (Ger.); Oberstes Rückerstattungsgericht [ORG] [Supreme Restitution Court] Nov. 11, 1967, 18 RzW 299, 1967 (Ger.); Carl-Heinz Heuer, *Die Kunstrabzüge der Nationalsozialisten und ihre Rückabwicklung* 52 NJW 2258, 2560 (1999); ARMBRUSTER, *supra* note 110, at 474; SCHNABEL & TATZKOW, *supra* note 3, at 105; Kurt Siehr, *Gutgläubiger Erwerb von Kunstwerken nach deutschem Recht*, 14 KUR 87, 93 (2012). *But see* Reich & Fischer, *supra* note 10, at 1419 (suggesting the opposite position without further discussion).

102. Law No. 59, Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G, art. 2.

article 2. This was a rebuttable presumption. In order to rebut the presumption, one must prove that the Nazi victim had voluntarily sold his or her property, that he or she had received a fair price for it, and that he or she was able to freely dispose of the received price.[103] Furthermore, any transaction was voidable for duress under article 4 unless the transaction "would have taken place even in the absence of National Socialism."[104] According to article 5, there was a rebuttable presumption that any donation of property by a Nazi victim was considered a bailment or constituted a fiduciary relationship.[105] Yet, the law also involved one great disadvantage. Article 56(1) reads "[a] petition for restitution pursuant to this Law shall be submitted to the Central Filing Agency in writing on or before 31 December 1948. . ."[106] The very fact that we are still struggling to answer questions concerning the restitution of Nazi-era assets reveals that the statute of limitations as contained in article 56(1) of Law No. 59 was far too short.

Law No. 59 and its counterpart laws in the British and French-occupied zones, as well as in West Berlin were aimed primarily at restitution in kind of what had been lost. Compensation was available as a secondary remedy.[107] In 1957, the Federal Republic of Germany enacted further legislation – the Federal Act on Compensatory Liabilities of the German Empire and similar Entities (*Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reiches und gleichgestellter Rechtsträger* (BRüG)).[108] Any claim had to be filed on or before April 1, 1959.[109] And there was further legislation, for example, the Federal Act on the Compensation of the Victims of National-Socialistic Persecution (*Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung* (BEG)) of 1953.[110] It did not aim for restitution in kind of what had been lost, but rather for monetary compensation by the Federal Re-

103. *Id.* at art. 3.

104. *Id.* at art. 4.

105. *Id.* at art. 5.

106. *Id.* at art. 56(1).

107. *See* Johannes Wasmuth, *Wiederaufgreifen des Rückerstattungs- und Rückgabeverfahrens wegen Auffindens als verschollen angenommener NS-geschädigter Kunstwerke,* 23 ZEITSCHRIFT FÜR OFFENE VERMÖGENSFRAGEN 142 (2013).

108. Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reichs und gleichgestellter Rechtsträger [Bundesrückerstattungsgesetz – BRüG] [Federal law Regulating the Restitution Money Liabilities of the German Reich and Assimilated Entities] July 19, 1957, BUNDESGESETZBLATT [BGBL I] at 734 (Ger.); GEORG BLESSIN & HANS WILDEN, BUNDESRÜCKERSTATTUNGSGESETZ (1958).

109. Bundesrückerstattungsgesetz – BRüG, July 19, 1957, BGBL I at 734.

110. Bundesergänzungsgesetz zur Entschädigung für Opfer der Nationalsozialistischen Verfolgung [BEG] [Federal Supplementary Law on Compensation for Victims of Nazi Persecu-

public of Germany.[111] It is still contested whether the Allied Forces' restitution laws were a success.[112] Until 2011, nearly 49 billion euros were paid out as compensation under the BRüG and the BEG.[113] However, there was one obvious shortcoming of all of these pieces of legislation: they only applied to the American, British, and French-occupied zones, West Berlin,[114] and then to West Germany. That is why, after German reunification in 1990, the legislature introduced the Act on the Settlement of Open Property Issues (*Gesetz zur Regelung offener Vermögensfragen* (VermG)).[115]

What remains controversial is the relationship between these restitution and compensation laws, on the one hand, and a claim arising from section 985 of the BGB, on the other. With respect to the Allied Forces' restitution laws, it is said, for example, that Law No. 59 did not contain independent remedies, but that the remedies are those of German private law, for example, section 985 of the BGB. Law No. 59 is said to have modified the provisions of the BGB by introducing a number of presumptions in favor of the victims of the Nazi regime, and is said to have introduced a special procedure to enforce any remedy.[116] Such an understanding has far reaching consequences. If Law No. 59 modified claims arising from section 985 of the BGB but did

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tion], Sept. 18, 1953, Bundesgestzblatt [BGBl I] at 1387; on the details, see GEORG BLESSIN ET AL., BUNDESENTSCHÄDIGUNGSGESETZ (2d ed. 1957).

111. *See* Wolfgang Ernst, *Zur heutigen Rechtsbedeutung der alliierten Restitutionsgesetze in Deutschland*, *in* LUS ROMANUM—LUS COMMUNE—LUS HODIERNUM: STUDIES IN HONOUR OF ELTJO J.H. SCHRANGE 115, 116 (Harry Dondorp et al. eds., 2010).

112. *See* HARTUNG, *supra* note 1, at 155-56.

113. 69 billion euros in total have been paid as compensation. BUNDESMINISTERIUM DER FINANZEN, ENTSCHÄDIGUNG VON NS-UNRECHT 29 (2012); HEBDÖRFER, *supra* note 96, at 55, 57; SCHNABEL & TATZKOW, *supra* note 3, at 107-108.

114. *See* RUDOLPH, *supra* note 3, at 74-77 (noting the controversial details); MULLER, *supra* note 96, at 11; SCHWARZ, *supra* note 96, at 99-107; ARMBRUSTER, *supra* note 96, at 469-470; Wasmuth, *supra* note 107, at 142; Helmut Buschbom, *Die völkerrechtlichen und staatsrechtlichen Mabnahmen zur Beseitigung des im Nationalsozialistischen Unrechts, in* DAS BUNDESRÜCKERSTATTUNGSGESETZ 1, 32 (Bundesminsterium der Finanzen & Walter Schwarz eds., 1981); Court of Restitution Appeals [CoRA], Feb. 26, 1954, 5 RzW 198, 1954 (Ger.); 5 CoRA 199; OLG Karlsruhe, Jan. 11, 1952, 3 RzW 199, 1954 (Ger.).

115. Gesetz zur Regelung Offener Vermögensfragen [Law Regulating Open Property Issues] Sept. 23, 1990, BUNDESGESTZBLATT [BGBL II] at 1159; *see* SCHNABEL & TATZKOW, *supra* note 3, at 107-109.

116. Wolfgang Ernst, *Anmerkung*, 68 JZ 359, 360 (2013); Ernst, *supra* note 111, at 124-125; Wasmuth, *supra* note 107, at 142; VON GODIN & VON GODIN, *supra* note 96, at art. 57; MULLER, *supra* note 96, at 10, 12; BLESSIN & WILDEN, *supra* note 108, at 34; HARTUNG, *supra* note 1, at 166; Peter Goetze, Die Rückerstattung in Westdeutchland und Berlin 294 (1950); Günther Korth, *Die materiellrechtliche und prozessuale Ausgestaltung des Rückerstattungsanspruchs,* SÜDDEUTSCHE JURISTEN-ZEITUNG [SJZ] 377, 383 (1948); HENDRIK G. VAN DAM, RÜCKERSTATTUNGS-GESETZ FÜR DIE BRITISCHE ZONE 15 (1949); EGON KUBUSCHOK & RUDOLF WEIBSTEIN, RÜCKERSTATTUNGSRECHT DER BRITISCHEN UND AMERIKANISCHEN ZONE 263 (1950).

not introduce any distinct remedy, then article 56(1) of the law would have had the result that a claim arising from section 985 of the BGB would have had to be filed on or before December 31, 1948. According to this understanding of the Allied Forces' restitution laws, claims based on section 985 of the BGB, today, could not be raised any longer with respect to lost property falling within in the scope of these laws.

A literal interpretation of Law No. 59 does not demand such an understanding.[117] One could read article 1(1) to introduce a specific remedy that is distinct from section 985 of the BGB. Article 57 is often cited to exclude any claim arising from section 985 of the BGB that has not been duly filed. Article 57 ("Relation to Other Remedies") reads:

> Unless otherwise provided in this Law, any claim within the scope of this Law may be prosecuted only under the provisions and within the periods of limitation, set forth in this Law. However, any claim based on tort, outside the scope of this Law, may be prosecuted in the ordinary courts.[118]

Indeed, if—but only if—section 985 of the BGB is a "claim within the scope of this Law" then the period of article 56(1) applies. However, those who argue in favor of the view that a claim arising from section 985 of the BGB had to be filed within the period of article 56(1) do not simply rely on the wording of the law, but point to a policy consideration that supposedly underlies it: in order to achieve legal certainty for the future economic development of Germany, the Allied Forces felt it necessary to accelerate the restitution of lost property.[119]

This interpretation was followed by the Court of Restitution Appeals in the American occupation zone,[120] the appellate court which handled claims arising from Law No. 59 and the members of which also came from the Allied Forces.[121] And until 2012, German courts, too, have been in accordance with this interpretation: claims based on section 985 of the BGB were excluded if they were not duly filed

117. *But see* Wasmuth, *supra* note 3, at 749.

118. Law No. 59, Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G, art. 57.

119. BGH, Oct. 8, 1953, 10 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 340, 1953 (Ger.); Wasmuth, *supra* note 3, at 749; Ernst, *supra* note 116, at 360; WOGERSIEN, *supra* note 96, at 24-25; SCHWARZ, *supra* note 96, at 26.

120. *See, e.g.*, CoRA Dec. 19, 1951, 3 RzW 102, 1952.

121. SCHNABEL & TATZKOW, *supra* note 3, at 104.

under the procedure of Law No. 59.[122] Nevertheless, this view has always been contested:[123] it has been argued that the Allied Forces' restitution laws primarily served the interests of Nazi victims. There are also lower court judgments that simply do not discuss the exclusionary effect of the Allied Forces' restitution laws.[124] In the aforementioned judgment of the LG Bonn involving the *Macke* painting, the court simply discussed whether the requirements of a claim arising from section 985 of the BGB were fulfilled without even mentioning the problem of whether such a claim was applicable in the first place.[125]

In 2012, the German Federal Supreme Court (*Bundesgerichtshof* (BGH)) changed, or qualified, its previous position.[126] The claimant of the case was the son of Hans Sachs (1881-1974). Hans Sachs, a Jewish dentist, built up a huge and valuable collection of late 19th and early 20th century posters.[127] Being Jewish, he had to flee Nazi persecution in Germany, in 1938.[128] Not surprisingly, his collection was confiscated.[129] After the war, he believed that his collection was lost during the war. Thus, he did not file a claim under the restitution laws of the Allied Forces. Instead, he received 225,000 German marks as compensation under the BRüG in 1961.[130] In 1966, he found out that his collection had, at least partially, survived the war, and that the remaining works in the collection were located in two museums in the German Democratic Republic.[131] There was no point in pursuing any claim against the East German Government because it would have refused to return his collection, regardless. After German reunification, the son of Hans Sachs, Peter Sachs, reclaimed his collection from the trust that was in possession of the remaining works.[132] He even offered to pay back the price-adjusted value of the compensation that

122. BGH, Oct. 8, 1953, 10 BGHZ 340, 1953 (Ger.); BGH, May 27, 1954, 7 NJW 1368, 1954 (Ger.); BGH, Feb. 28, 1955, 8 NJW 905, 1955 (Ger.); OLG Frankfurt, June 29, 1950, 1 RzW 372, 1949/1950 (Ger.); BGH, Oct. 8, 1953, 4 RzW 367, 1953 (Ger.).

123. Rudolf Weibstein, *Wirkung von Entscheidungen und Rechtsgutachen des Amerikanischen Rückerstattungberfungsgerichts,* DER BETRIEBS-BERATER 921; Heinz Dubro, *Anmerkung,* 6 NJW 706 (1953); RUDOLPH, *supra* note 3, at 88-89, 94-100; Matthias Weller, *Kein Ausschluss des allgemein zivilrechtlichen Anspruchs auf Herausgabenach § 985 BGB durch das Rückerstattungsrecht – zugleich: Besprechung von Sabine Rudolph "Restitution von Kunstwerken aus jüdischem Besitz,"* 2009 KUNSTRECHTSSPIEGEL 42.

124. LG Berlin, Jan. 31, 2008, KUR 20, 2009 (Ger.).

125. 56 NJW 673 (673-675) (Ger.).

126. BGH, Mar. 16, 2012, 68 JZ 356, 2013 (Ger.).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

his father had received in 1961, totalling 600,000 euros.[133] The value of the entire collection was estimated at 4,500,000 euros.[134] However, the trust refused to give the collection back to Peter Sachs.[135] Nevertheless, he brought an action for the restitution of two posters.[136] It is important to note that the defendant in this case explicitly did not rely on the argument that the statute of limitations had run.[137]

The BGH held that Peter Sachs had a claim under section 985 of the BGB.[138] Because the collection had been confiscated in what was later known as West Berlin, the BGH discussed the relationship of section 985 of the BGB with the relevant restitutionary laws of the Allied Forces in West Berlin. The BGH also needed to decide how it would treat the claim under section 985 of the BGB, given that Hans Sachs had received monetary compensation for his collection in 1961 under the BRüG. The BGH held that the Allied Forces' restitution laws did not preclude his claim under section 985 of the BGB if the victim of the Nazi regime believed that his or her property had been lost.[139] Moreover, restitution claims under section 985 of the BGB are not precluded if the victim was only able to trace his or her property after December 31, 1948.[140] The BGH tried to deduce this interpretation from the wording of the law, and said that the law only applied to "identifiable" property, and if the victim thought that his or her property was lost in the war, it was thus not 'identifiable."[141] In other words, the victim needed to know where his or her property was. This interpretation does not equate what was meant by the word "identifiable."[142] This becomes obvious from Regulations No. 1 and No. 2 under Military Government Law No. 59:[143] if the claimant did not know where his property was situated, he merely had to state the last place where it was known to him. Indeed, the facts given in the aforementioned case, *Vineberg v. Bissonette*, suggested that Stern had applied for the restitution of his painting under the applicable British

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 358.
138. *Id.*
139. *Id.*
140. *Id.* at 357.
141. *Id.*
142. WALTER SCHWARZ, RÜCKERSTATTUNG UND ENTSCHÄDIGUNG 36-39 (1952); SCHWARZ, *supra* note 96, at 118-119; ARMBRUSTER, *supra* note 96, at 461; VON GODIN & VON GODIN, *supra* note 96, at art. 1 para. 4; MULLER, *supra* note 96, at 18; Wasmuth, *supra* note 3, at 749.
143. Law No. 59, Nov. 10, 1947, MILITARY GOVERNMENT GAZETTE GERMANY UNITED STATES AREA OF CONTROL at Issue G, 26-35.

restitution law, even though he did not know its *situs*.[144] With respect to compensation, the BGH held that the acceptance of it did not amount to a waiver of claims under section 985 of the BGB.[145] However, the compensation had to be returned.

German pundits have heavily criticized the aforementioned decision.[146] Indeed, it is odd that the BGH qualified its interpretation of the effect of the Allied Forces' laws for the first time over 65 years after their enactment. Nevertheless, this qualification of the exclusionary effect of the laws is sensible: it is in line with the discussed ratio of the introduction of the harshly short statute of limitations imposed by the Allied Forces in, for example, article 56(1) of Law No. 59. It is argued that the Allied Forces wanted to achieve legal certainty for the future economic development of Germany by accelerating the restitution of property. However, this ratio relates especially to the restitution of real property and of property interests in companies. Moreover, real property and property interests in companies were easily identifiable after the war. Both points are not true for art collections. They might not have been identifiable. It was not truly necessary for Germany's future economic development to accelerate this restitution. Furthermore, the interpretation of the BGH fits the main rationale behind the Allied Forces' restitution laws: to facilitate restitutionary claims of the victims of the Nazi regime. Regarding the traditional interpretation, the restitution laws would have actually had the opposite effect on art: because much stolen art was identified many decades after the end of the war, its restitution would not have been facilitated, but instead, made impossible by these restitutionary laws. Thus, a more restrictive interpretation of, for example, article 56(1) of Law No. 59, is possible. In German legal methodology, we would call this a teleological reduction (*teleologische Reduktion*)—the literal understanding of a provision that is qualified by reference to the rationale, the *telos*, of that provision.[147] This is a restrictive inter-

144. Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 303 (D.R.I. 2007) *aff'd*, 548 F.3d 50 (1st Cir. 2008).

145. 68 JZ 356 (358) (Ger.).

146. *See* Ernst, *supra* note 116, at 361; Finkenauer, *supra* note 19, at 480-481; Wasmuth, *supra* note 3, at 750; *see also* Götz Schulze, *Moralische Forderungen und das IPR*, 2010 IPRAX 290, 297; Götz Schulze, *Die Washington Principles und die Restitution der Plakatsammlung Sachs*, 2010 KUNSTRECHTSSPIEGEL 8 (supporting the position that the BGH took with reference to the judgment of the second instance court).

147. *See* ERNST A. KRAMER, JURISTISCHE METHODENLEHRE 224 (4th ed. 2013) (discussing the so-called teleologische Reduktion). Such a reduction of the restitution laws of the Allied Forces would not be unprecedented. *See* BGH, Feb. 28, 1955, 8 NJW 905, 1955 (Ger.), for an early example.

pretation because the exclusionary effect of article 56(1) of Law No. 59 is reduced in such a way that it does not apply to cases in which a victim did not file a claim because he or she believed that the property was forever lost or destroyed.

Another solution to the problem which is discussed in the literature does not go all the way: often, victims of the Nazi regime proceeded under Law No. 59, but no restitution was granted to them, simply because their art was not traceable. If such works are found today, can their original owner apply for re-opening of the restitution claim under Law No. 59? This possibility raises a number of procedural problems,[148] including problems of the applicability of, for example, Law No. 59;[149] however, utilizing Law No. 59 would be beneficial to Nazi victims due to its rebuttable presumptions in favor of such victims. However, what is clear is that this solution would only work if the Nazi victim had originally filed a claim under Law No. 59. Such a scenario is not unthinkable: the facts of *Vineberg v. Bissonnette* given in the judgment suggest that Stern had filed his restitutionary claim under the relevant law of the British-occupied zone,[150] and, many years later, the painting was located. *Vineberg v. Bissonnette* highlights another problem: let us assume that in *Vineberg v. Bissonnette*, the court would have held that German law applied to the question of whether Wilharm was a *bona fide* purchaser of the property at the public auction.[151] The solution to the case would have depended on the finding of whether Wilharm actually acted in good faith. However, if we applied, for example, article 1(2) of Law No. 59, then *bona fide* acquisition would have been excluded altogether. Thus, is it possible for a foreign court, which must apply German law according to the *situs* rule, to rely on one of the provisions of the Allied Forces' restitution laws, using the argument that the victim of the Nazi regime or his or her successor, could apply for a re-opening of the restitution procedure under such a restitution law? Again, this question raises a number of procedural issues, but the answer should be in the affirmative.[152] And even though the case of *Vineberg v. Bissonnette* is

148. *See* Wasmuth, *supra* note 107, at 143-145; Wasmuth, *supra* note 3, at 750.

149. Strictly speaking, the restitution laws of the Allied Forces are no longer in force. *See* Ernst, *supra* note 111, at 120-122, 131, 140.

150. Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 303 (D.R.I. 2007) *aff'd*, 548 F.3d 50 (1st Cir. 2008).

151. *See infra* note 224 and accompanying text, for a discussion on the *bona fide* acquisition in public auctions.

152. *But see* Ernst, *supra* note 111, at 132, 140 (noting that only the Restitution Agencies and the Restitution Chambers under the restitution laws were able to apply these laws).

silent on this issue, it might have been the defendant's fear that the court could apply the presumptions of the applicable restitution law in favor of the claimant, which held her back from addressing the claimant's choice of law.

The summary of my analysis of the Allied Forces' restitution laws is complex. Although I focus on the Gurlitt collection, my analysis may equally apply beyond the *Gurlitt* case.

(a) Hildebrand Gurlitt's involvement in the liquidation of "*entartete Kunst*" suggests that the collection contains pieces of art that the original owners have lost on an object-related basis. The Allied Forces' restitution laws have never applied to an object-related loss and, thus, have never excluded a claim arising under section 985 of the BGB. If the requirements of section 985 of the BGB are met, then the original owner, or his or her heirs, may bring such a claim.

(b) Hildebrand Gurlitt was also involved in the acquisition and liquidation of disseized art in France – art which had been confiscated on a person-related basis. The restitution laws of the Allied Forces never covered any loss which occurred outside of Germany. Again, if the requirements of section 985 of the BGB are met then the original owners, or any heirs, will have such a claim.

(c) If the Gurlitt collection comprises artworks that their original owners have lost on a person-related basis in Germany, then we have to start off by analyzing the exclusionary effect of the Allied Forces' restitution laws. However, following the case of the BGH in 2012, the original owners, or any heirs, might still have a claim under section 985 of the BGB. He or she will have to prove that his or her case falls within the principles formulated by the BGH in 2012. We will have to see how the case law will substantiate these principles in the future.

(d) If a victim of the Nazi regime relies on section 985 of the BGB, and its application is not excluded by the Allied Forces' restitution laws, then he or she will have to rely solely on the provisions of the BGB.[153] The presumption in these laws in favor of the victim only applies to claims arising from these laws that have been filed within the strict statute of limitations under, for example, article 56(1) of Law No. 59.

(e) That is why it might still be preferable to apply for a re-opening of the restitution procedure under the applicable Allied Forces' restitution laws. This is, however, only possible if the victim had filed a

153. GOETZE, *supra* note 116, at 294; Weller, *supra* note 123, at 43-44. *But see* VON GODIN & VON GODIN, *supra* note 96, at art. 57; RUDOLPH, *supra* note 3, at 247-53.

claim before the deadline as contained in, for example, article 56(1) of Law No. 59. There is, as of yet, no case law on such a re-opening of a restitution procedure.

iii. § 985 BGB and the Washington Conference Principles on Nazi-Confiscated Art of 1998

It is important to note that the Washington Principles do not, according to Germany's understanding of them, directly affect claims arising from section 985 of the BGB against private individuals and private entities.[154] These principles have the character of a self-commitment of the public hand. Consequently, public museums do not rely on the statute of limitations when faced with a claim for the restitution of Nazi-era art.[155] However, these principles have, as we will see later, an indirect effect on claims against private individuals and entities. As a consequence of the Washington Principles, the open database, www.lostart.de, was created; the newfound ability to check whether a piece of art is listed in the database affects whether one is a *bona fide* purchaser.[156]

iv. Loss of ownership through valid transfer under § 929(1) BGB

The problematic requirement of section 985 of the BGB in the case of lost art is that the original owner, or any heirs, must have remained the owner in order to receive a remedy. When discussing this requirement, we have to distinguish: first, the original owner may have lost ownership at a time when he or she had to give up possession to

154. LG Berlin, Jan. 31, 2008, KuR 20, 2009 (Ger.). *See generally supra* note 7 and accompanying references for a discussion on the principles. *See also* Siehr, *supra* note 101, at 94; Ernst, *supra* note 29, at 31-32; Wasmuth, *supra* note 3, at 751-752; Rudolph, *supra* note 3, at 3; Raschèr, *supra* note 3, at 77; Schnabel & Tatzkow, *supra* note 3, at 192-199; Georg Crezelius, Rechtssystematisches zur Kunstrestitution, 9 KuR 125, 125-129 (2007) (discussing the *Gurlitt* case and restitutionary claims against private entities). *But see* Schulze, *supra* note 146 (specifically pointing to Washington Principles in support of the position that the restitution laws of the Allied Forces should not exclude claims arising from § 985 BGB).

155. *See, e.g.*, 68 JZ 356 (358) (Ger.); *see also supra* note 137 and accompanying text.

156. Michael Franz, *NS-Raubkunst, Dokumentation und Transparenz – Die Koordinierungsstelle für Kulturgutverluste und www.lostart.de*, 11 KuR 91, 93 (2009) (Ger.). Regarding the database *see* Andrea Baresel-Brand, *Transparenz: Dokumentation von NS-Raubkunst und Beutekunst*, KuR 181 (2005); Katharina Pabel, Rechtliche Grundlagen der Kulturgutrestitution in Deutschland, KuR 1, 6-7 (2005); Philip Kardel, *Die Lost Art- Datenbank auf www.lostart.de*, 8 KuR 5, 128 (2006). For information on the closed database Art Loss Register, see Sarah Jackson, *The Art Loss Register –A Tool for Due Diligence*, 8 KuR 5, 123 (2006); *The World's Largest Database of Stolen Art*, The Art Loss Register, www.artloss.com (last visited Nov. 15, 2015).

the Nazi regime. I will address the two alternatives – loss of ownership through a valid transfer, and loss of ownership through confiscation. It is clear that in many cases, the Nazi victims did not lose their ownership at the time that they had to give up physical possession of their property; they, at first, remained owners of what they had lost. This was, for example the case if property was simply taken away from Nazi victims. Others may have left their property behind when they escaped persecution in Germany. Still, others may have entrusted their property to Gentile neighbors and friends in the hopes that it would be returned to them some day. Second, if the original owner remained the owner when he or she lost physical possession of the property, he or she may still have lost ownership subsequently, for example, through *bona fide* acquisition or through *usucapio.*

Many Nazi victims, especially Jewish people, had to sell their property, or they were forced to do so—often significantly below market value.[157] There were many reasons for doing so. These victims were forced to close their businesses, and therefore had to sell assets in order to provide for their families. Jewish families also had to pay special discriminatory taxes and fees, for example, if they wanted to leave Germany. This raises the question of whether there was ever a valid transfer of property under these circumstances.

German law follows the principle of abstraction, implying that ownership is not transferred with the sale contract.[158] The sale contract creates an obligation to transfer the property. Section 433(1) of the BGB states:

> By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer.[159]

There is a second act following the sale, the effect of which is that the ownership is transferred. With respect to moveable property, the most important provision is found in section 929(1) of the BGB:

> For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass.[160]

Section 929(1) of the BGB has two requirements: delivery and agreement.[161] The agreement is another form of contract, which is not

157. *See* RUDOLPH, *supra* note 3, at 26; Wasmuth, *supra* note 3, at 748.

158. *See* DIETER MEDICUS, ALLGEMEINER TEIL DES BGB 98-103 (10TH ED. 2010).

159. BGB § 433.

160. BGB § 929.

161. *Id.*

to be confused with the sale contract; the content of which is simply that the parties agree that the property is actually transferred. Even if both the sale contract and the transfer of property happen simultaneously, German lawyers distinguish between the two contracts.

The principle of abstraction also implies that the validity of the sale contract, and of the transfer of ownership are not dependent on each other.[162] There are some grounds of invalidity which will affect both the sale contract and the transfer of property, as is the case with incapacity. Then German lawyers speak of a *Fehleridentität* (sameness of defect).[163] Other grounds of invalidity may only affect the sale contract or the transfer, as may be the case with mistake. If the sale contract is invalid but the transfer of property is valid, the former owner will have a claim for unjustified enrichment under section 812(1) of the BGB for the retransfer of property, but he or she will not have a property based claim.[164]

For a claim arising under section 985 of the BGB, the original owner must have remained owner.[165] Thus, the transfer of property needs to be invalid. This raises the question of which grounds of invalidity may apply if a victim of the Nazi regime was forced into transferring his or her property. First, there is section 123(1) of the BGB, "A person who has been induced to make a declaration of intent. . .unlawfully by threat may avoid his declaration."[166]

It is not necessary that the other party to the transaction must have made a threat. Even if the threat was made by someone who was not a party to the transaction, which is called a *Kollektivdrohung* (literally: collective threat), this may suffice.[167] Regardless of who makes the threat, it must have been unlawfully made. Finally, the threat must have been made with the intention that the victim enters into the contract[168] – and this may be the problematic requirement in the case of

162. *See* MEDICUS, *supra* note 158, at 98.

163. *Id.* at 101.

164. *Id.* at 99.

165. BGB § 985.

166. *See* BGB § 123(1), *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html. This translation has been modified as the true translation of the German word *Drohung* is not duress, but threat (author's translation).

167. *See* KG Berlin, Oct. 29, 1946, 2 SJZ 257, 1947 (Ger.); *see also* W. Roemer, *Anmerkung*, SJZ 263-267 (1947); Christian Armbrüster, *in* 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 123 para. 116 (Franz Jürgen Säcker et al. eds., 6th ed. 2012); SCHWARZ, *supra* note 96, at 98; Max Hachenburg, *Kollektivzwang oder Zwangslage?*, SJZ 799-801 (1949) (Ger.); Ernst, *supra* note 111, at 123-124.

168. Reinhard Singer & Barbara von Finckenstein, *in* J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 123 para. 69 (rev. ed. 2012).

collective threats. Whether a right to rescind exists will depend on the details of the case. The LG Hagen held in March 1947, for example, that the threat was not of such a nature to successfully apply section 123(1) of the BGB in a case where an owner of a cinema was forced to rent out his business because he had a Jewish wife.[169] Thus, a victim of the Nazi regime, who was forced into transferring his or her property, *might* have a right to rescind the real contract under the meaning of section 929(1) of the BGB. However, even if the victim had such a right to rescind, he or she must have done so within a certain period of time. According to section 124 of the BGB, the right to rescind must be exercised within one year after the threat has stopped being exercised against the victim or, regardless of whether the threat has stopped being exercised, within ten years after the transaction has been entered into.[170] Thus, it is likely that the transferor has not duly rescinded the real contract in cases that come before the courts today.

According to section 138(1) of the BGB, a legal transaction is void if it is "contrary to good morals." According to section 138(2) of the BGB, as it was in force before 1976, if someone, "by exploiting the distress, improvidence or inexperience" of another person receives a performance which is clearly disproportionate to the counter-performance," the legal transaction is also void.[171] Again, the question of whether section 138(1) or (2) are applicable in the present context will depend on the details of the case. When applying section 138(2) of the BGB, we have to remember that section 138(2) of the BGB had been interpreted narrowly: the exploitation of the weaker party's distress must have put him or her at the risk of jeopardising his or her *economic* existence.[172] This may not have always been the case when victims of the Nazi regime were forced into selling their property. Furthermore, not in every case will section 138(1) of the BGB be helpful[173] – again, everything will turn on the facts of the case. With section 138(1) of the BGB, it is, for example, problematic that the

169. LG Hagen, Mar. 1, 1947, 1 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 29, 1947 (Ger.).

170. BGB § 124.

171. BGB § 138.

172. *See* Wasmuth, *supra* note 3, at 748; BGH, May 21, 1957, 10 NJW 1274, 1957; *see also* the discussion of Helmut Coing, *in* 1 J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 138 para. 35 (11th ed. 1957).

173. *See* Roemer, *supra* note 167, at 263-64; Weller, *supra* note 123, at 44. In favor of an extensive application of § 138(1) BGB, *see* RUDOLPH, *supra* note 3, at 161; Michael Anton, *Paradigmenwechsel im gutgläubigen Erwerb von Kunst- und Kulturgütern*, *in* 2010 JURISTISCHE RUNDSCHAU 415, 417. For an example from the case law where § 138(1) BGB was not applied, *see* 2 SJZ 257 (257-58).

other party to the contract must have subjectively infringed moral standards.

It may come as a surprise to the reader that there is no rich case law on the application of section 123 of the BGB and of section 138 of the BGB in the present context, and that is why the preceding observations had to be rather vague. The reason is simple: until the enactment of the BGH of 2012, it was believed that the Allied Forces' restitution laws barred any claim arising under section 985 of the BGB. Thus, there was no chance for a rich case law to develop. And as the BGH observed in 1953, the problems caused by the application of section 123 of the BGB and section 138 of the BGB may have been reasons to introduce these laws' presumptions favoring the victims of the Nazi regime:

> Before the introduction of the Restitution Laws, the courts[174] have tried to help the victims of person-related acts of confiscation by applying the provisions of the general private law. These efforts have proven to be particularly difficult as they tried to remedy such exceptional facts as they arise from actions of persecution by the *Drittes Reich* . . . by applying the existing law and at the same time they tried to do justice to the legitimate concerns of all parties involved. The views were already divided when it came to the question of whether only § 123 BGB could be applied . . . or whether at best § 138 BGB was applicable . . . These difficulties led to the commonly shared view that these problems can only satisfactorily be solved through special legislation.[175]

In the words of a commentator from the 1970s, who drew on a short analysis by Max Hachenburg (1860-1951):[176] "The ninety year old master of private law had realized that the reality of a non-rule-of-law-state cannot be captured with rule-of-law-concepts [as those of the BGB]." Hachenburg was one the eminent commercial lawyers of his time, who was forced to flee Germany in 1939 at the age of 79 because he was Jewish.[177] In 1949, when he had arrived in Berkeley, California, he wrote a short analysis of the Allied Forces' restitution

174. *Compare* 1 MDR 29 (Ger.) (where the judgment was such an unsuccessful effort) *with* 2 SJZ 257 (257-258) (Ger.) (where a partially successful effort was made).

175. 10 BGHZ 340 (344) (author's translation); *see also* Roemer, *supra* note 167, at 265; Hannelore Zöller, *in* 1 DAS BÜRGERLICHE GESETZBUCH MIT BESONDERER BERÜCKSICHTIGUNG DER RECHTSPRECHUNG DES REICHSGERICHTS UND DES BUNDESGERICHTSHOFES § 138, ¶ 146 (Kurt H. Johannsen et.al. eds., 12th ed. 1982); SCHWARZ, *supra* note 96, at 97.

176. SCHWARZ, *supra* note 96, at 98 (author's translation).

177. *See* Konrad Duden, *Max Hachenburg*, *in* 7 NEUE DEUTSCHE BIOGRAPHIE 405-406 (1966).

laws, in which he hinted at the difficulties of applying section 123 and section 138 of the BGB in the present context.[178]

After the BGH has opened the door to applying a claim arising under section 985 of the BGB in the case of a person-related loss, German courts will have to face these difficulties again. Thus, an original owner of a piece of art that has been lost on a person-related basis will have to prove firstly that his or her case falls within the principles formulated by the BGH in 2012 and secondly that any transfer is invalid according to § 138 BGB or that it had been rescinded under § 123 BGB. It is predictable that in few cases the original owner will succeed.

v. Loss of ownership through confiscation

Other victims of the Nazi regime may have lost their assets or specific pieces of property through statutory provisions or through acts of confiscation based on statutory provisions.[179] The *Elfte Verordnung zum Reichsbürgergesetz* (Eleventh Regulation to the Reich Citizenship Act) of 1941[180] may serve as an example. According to section 3 of that Regulation Jewish people lost their assets *ipso iure* when they lost their German citizenship; according to section 2(b), Jewish people lost their citizenship *ipso iure* when moving their domicile outside of Germany. For the application of the Regulation it was assumed that a deportation to one of the concentration camps in, for example, Poland or Ukraine fulfilled the requirement of section 2(b).[181]

The regulation was repealed by the *Kontrollratsgesetz Nr. 1 betreffend die Aufhebung von NS-Recht* (Law No. 1 of the Allied Control Council on Repealing of Nazi Laws) of 1945.[182] Furthermore, German courts have held that the regulation, and comparable pieces of legislation, are examples of *legislatives Unrecht* (legislative injus-

178. *See* Hachenburg, *supra* note 167, at 799-801.

179. For a fuller account, see Alexander von Brünneck, *Die Eigentumsordnung im Nationalsozialismus*, 12 KRITISCHE JUSTIZ [KJ] 151, 155-57 (1979); Reich & Fischer, *supra* note 10, at 1418.

180. Elfte Verordnung zum Reichsburgergesetz [Eleventh Regulation to the Reich Citizenship Law] Nov. 25, 1941, REICHSGESETZBLATT, TEIL I [RGBL. I] at 722.

181. *See* Hans-Dieter Schmid, *"Finanztod"*, *in* DIE GESTAPO IM ZWEITEN WELTKRIEG 141, 150-151 (Gerhard Paul & Klaus-Michael Mallmann eds., 2000).

182. Repealing of Nazi Laws [Law No. 1], Oct. 29, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY at 1, 6.

tice).[183] In a positivistic legal system, these pieces of legislation were prima facie valid. After the war, the German legal philosopher, Gustav Radbruch (1878-1949), developed a formula that is today known as the *Radbruchsche Formel.*[184] In essence, the formula stated that positive law is not to be followed if the injustice caused by it is unbearable. Any act based on such an act is also deemed invalid. The Eleventh Regulation of 1941 was an example of an application of the *Radbruchsche Formel.*[185] In general terms, every instance of a person-related loss of property—meaning that a victim of the Nazi regime lost his or her piece of art or any other asset on the basis of belief, ethnic origin or other individual criteria—through statutory provisions or through acts of confiscation based on such statutory provision, is invalid. Thus, if the Gurlitt collection contains paintings of such an origin then the original owners will remain the current owners.

The case is more complicated regarding object-related loss. During the Nazi regime, the works of modern artists were confiscated from museums. The legal basis underlying this confiscation was the *Gesetz über Einziehung von Erzeugnissen "entarteter Kunst"* (Act on the Confiscation of Works of "Degenerated Art") of 1938.[186] The act consisted of three sections only. Section 1 of the Act stated:

> Works of degenerate art, which have been seized in museums and in public collections before the commencement of this act . . . , may be confiscated in favor of the *Reich* without compensation if these works have been, at the time when they were seized, the property of private nationals of the *Reich* or of domestic juristic persons.[187]

Even though this kind of loss had been object-related and not person-related in the sense that it was not specifically aimed at the victims of the Nazi regime, this loss, which burdened primarily museums, also burdened private collectors, frequently Jewish people, who

183. *See* 1 MICHAEL ANTON, RECHTSHANDBUNH KULTURGUTERSCHUTZ UND KUNSTRESTITUTIONSRECHT: ILLEGALER KULTURGUTERVERKEHR 1150 (2010) (discussing courts' application of *legislatives Unrecht* in interpreting the Eleventh Regulation to the Reich Citizenship Act).

184. *See* Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, SJZ 105-108 (1946). On the details, *see, e.g.*, Clea Laage, *Die Auseinandersetzung um den Begriff des gesetzlichen Unrechts nach 1945*, 22 KJ 409 (1989).

185. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 14, 1968, 23 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 98 (Ger.); 7 JZ 365 (359) (Ger.); 8 NJW 905 (Ger.); BGH, Feb. 11, 1953, BGHZ 9, 34 (Ger.); *see also* 2 SJZ 257(263) (Ger.); 56 NJW 673(675) (Ger.); Wasmuth, *supra* note 3, at 748; RUDOLPH, *supra* note 3, at 32, 162-169; Heuer, *supra* note 101, at 2562; Amtsgericht Wiesbaden [AG] [District Court] Nov. 13, 1945, 1 SJZ 36, 1946 (Ger.).

186. Gesetz über Einziehung von Erzeugnissen entarteter Kunst [Act on the Confiscation of Works of Degenerated Art], May 31, 1938, REICHSGEZETZBLATT, TEIL I [RGBL I] at 612 (Ger.).

187. Author's translation.

had loaned these works to affected museums. The painting *Sumpflegende* by Klee may serve as an example:[188] it was painted in 1919, and was part of the personal collection of Paul Erich Küppers (1889-1922). After his death, the painting passed to his wife Sophie (1891-1978). In 1926, she loaned this panting, and others, to the *Provinzialmuseum*. In 1927, she married the Russian artist El Lissitzky (1890-1941), and moved to Moscow. In 1937, the painting was confiscated as "*entartete Kunst*." This case fits perfectly into the present context because Hildebrand Gurlitt purchased the work in 1941 from the *Reich*; and it would have remained in the discovered Gurlitt collection if it had not been sold again, later. After some time in Switzerland, the painting is now back in Munich. The speciality of the case is that the act of confiscation was not even covered by section 1 of the Act, as Sophie became a Soviet Citizen in 1938.[189] Sophie's son, Jen Lissitzky, filed an action to reclaim the painting in 1992. This action was unsuccessful, as the museum argued that the statute of limitations had pased.[190] However, in 2012, Jen Lissitzky filed another action and the action was admitted. Since then, the parties have been in conciliation hearings.[191]

It may come as a surprise to the reader that the Act of 1938 was never actually repealed after 1945.[192] In fact, the Allied Forces left it in force. The reason is simple: the act primarily burdened public museums that were plundered by the Nazi regime. It was felt that there was no need to step in in favor of such public museums. Furthermore, most works had already been sold internationally. Yet, does the *Radbruchsche Formel* apply if a private collector was affected by a confiscation based on the Act of 1938? The answer to the question is controversial. Many answer in the affirmative.[193] Some disagree, arguing that the formula should not be applied because such confiscation was not specifically directed against the victims of the Nazi egime. The

188. *See* KG Berlin, May 21, 1992, 46 NJW 1480, 1993 (Ger.). On these cases, *see* Siehr, *supra* note 101, at 93-94; Reich & Fischer, *supra* note 10, at 1417-21; Erik Jayme, *Anmerkung der Redaktion*, 1995 IPRAX 43.

189. Astrid Müller-Katzenburg, *Besitz- und Eigentumssituation bei gestohlenen und sonst abhanden gekommenen Kunstwerken*, 52 NJW 2551, 2552 (1999); Jayme, *supra* note 188 at 43.

190. Jayme, *supra* note 188, at 43.

191. Rose-Maria Gropp, *Schritte in die richtige Richtung*, FAZ (May 6, 2013), http://www.faz.net/aktuell/feuilleton/kunst/restitutionsstreit-klees-sumpflegende-schritte-in-die-richtige-richtung-12173245.html.

192. Heuer, *supra* note 101 at 2560; Schnabel & Tatzkow, *supra* note 3 at 40-41; Raue, *supra* note 15 at 3; Wasmuth, *supra* note 3 at 751; Kunze, *supra* note 4, at 64-66.

193. Reich & Fischer, *supra* note 10, at 1419; Müller-Katzenburg, *supra* note 189, at 2552; Kunze, *supra* note 4, at 67-84; *see also* Erik Jayme, *"Entartete Kunst" und Internationales Privatrecht*, 1994 IPRAX 66, 67.

rationale of the act was to confiscate specific types of modern art that were considered degenerate by the Nazi regime.[194] Even if we strongly disagree with the reasoning behind the act, today, this in and of itself does not make the act void.[195] A well-settled case law does not exist surrounding this issue. Thus, if the statute of limitations extended under the Bavarian draft bill, this controversial issue needs to be settled by the courts. It is obvious that the Gurlitt collection will contain paintings that were confiscated under the Act of 1938.[196]

However, apart from these legal issues, there are also problems of proving ownership by victims of the Nazi regime, or their heirs. Again, the judgment of the LG Bonn in the case involving the painting by Macke may serve as an example.[197] In that case, the claimant had to prove that he, his mother, his sister, and his cousin, were the rightful owners of the painting, but they failed to do so. The court held that it was clearly established that the claimant's great-grandfather had purchased the painting from Macke.[198] Based on the evidence presented to the court, it further held that the painting was still the property of Karl Oberländer in 1938.[199] However, the court was not convinced that the painting had been confiscated: if it had been confiscated, it should have contained a purple mark on the back of the painting. Furthermore, evidence provided by the son of the former homeowners, Paul and Marie Kahle, in front of which the painting was found, was given great weight. Paul and Marie had emigrated to England, not because they were Jewish, but because they had helped Jewish families persecuted by the Nazis.[200] In exchange for the Kahle family's help, Jewish families had given things to them in custody but also as presents for their help. There was no evidence that Karl Oberländer and the Kahle family ever knew each other. However, the court thought that it was possible that Karl had given the painting to friends, who in turn, had handed it over to Marie Kahle.[201] The house was confiscated in 1939, but it was later returned to the Kahle family. The present owner of the house, whose father had bought the house from the Kahle family, testified that she had found the painting in the

194. Heuer, *supra* note 101, at 2561; Wasmuth, *supra* note 3, at 751.

195. *See* Hermann Parzinger, *Bleiberecht vor Rücknahme*, FAZ, Nov. 28, 2014, at 9, for the most recent discussions on the Act of 1938.

196. Finkenauer, *supra* note 19, at 479; Raue, *supra* note 15, at 2.

197. 56 NJW 673 (673-675) (Ger.).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

attic, and put it into the bulky waste.[202] Thus, the painting became ownerless, meaning that the defendant became its owner according to section 958 BGB, when taking possession of it.

vi. Loss of ownership through bona fide acquisition

We have seen, in many cases, that Nazi victims did not actually lose ownership of their artwork when they had to give up their possession of it, and that they remain owners of what they have lost. This is true when property was simply taken away from the original owners, when owners have left their property behind when escaping Nazi Germany, or when owners have entrusted their property to neighbors and friends, in the hope that it would be returned to them, some day. Others owners apparently transferred ownership to someone else, or they lost ownership through an act of confiscation. Yet, we have just seen that these transfers and confiscations may have been invalid with the consequence that the original owners have in some cases never lost their ownership at the point of time when they lost possession.

Of course, there is also the possibility that the original owners lost their ownership later, for example, when it was transferred by the person who took or received it from the original owner to a third party who is a *bona fide* purchaser. We have already observed, from a comparative perspective, that there are various approaches to the analysis of *bona fide* acquisition of moveable property.[203] Some legal systems, such as in England and America, start off with the rule that no one can give what he, himself, does not have. German law recognizes the possibility of *bona fide* acquisition, but only applies it to property that is not lost. The relevant German legal provisions about *bona fide* acquisition of moveable property are found in sections 932-36 of the BGB.[204] Section 932 of the BGB states:

> (1) As a result of a disposal carried out under § 929, the acquirer becomes the owner, even if the thing does not belong to the alienor, unless the acquirer is not in good faith at the time when under these provisions he would acquire ownership. . .
>
> (2) The acquirer is not in good faith if he is aware, or as a result of gross negligence he is not aware, that the thing does not belong to the alienor.[205]

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202. *Id.*

203. *See supra* notes 73-77 and accompanying text.

204. *See* BAUR ET AL., *supra* note 47, paras. 52.1-52.55 (discussing bona fide acquisition of moveable property in German law).

205. BGB § 932.

As I have already mentioned, in the case of lost moveable property, the acquirer will not typically be able to acquire such property. Section 935(1) of the BGB states:

> The acquisition of ownership under §§ 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way.

Something is lost if the possessor unintentionally loses it.[206] Error and fraud do not negate the intent requirement.[207] Moreover, in the case of section 138 of the BGB, the relevant intent is not excluded.[208] With respect to threats, the position is unclear. Some argue that a threat will, in general, negate the intent to give away ones possession.[209] The case law and the predominant view hold that a threat must be of such a degree that the victim was compelled to act against his or her own will.[210] Thus, with respect to Nazi-era assets, it will depend on the facts of the case whether lost art will count as being lost under the meaning of section 935(1) of the BGB.

Art that has been confiscated from the victims of the Nazi regime is regularly regarded as being lost under the meaning of section 935(1) of the BGB. Usually, an administrative act of confiscation is said to exclude the application of section 935 of the BGB, even if the administrative act turns out to be invalid.[211] However, in the case of confiscation from the victims of the Nazi regime, the German courts take a special position:[212] they, again, point to the fact that the act of confiscation was based on legislative injustice and argue for the application of section 935(1) of the BGB. It does not make a difference if a private individual committed a criminal offence in order to acquire the possession of art, or if the state organized the looting of art. However, the position with regard to those pieces of art that have not been confiscated on a person-related, but instead were taken under the Act of

206. BAUR ET AL., *supra* note 47, at para. 52.37.

207. BGH, Nov. 15, 1951, 4 BGHZ 10, 38, 1952 (Ger.); OLG Karlsruhe, Nov. 21, 1996, NEUE JURISTISCHE WOCHENSCHRIFT. RECHTSPRECHUNGS-REPORT 1761, 1998 (Ger.); Jürgen Oechsler, *in* 6 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 935 para. 7 (Franz Jürgen Säcker et al. eds., 6th ed. 2013).

208. LG Ansbach, Oct. 5, 1951, 5 NJW 592, 1952 (Ger.). *But see* ALEXANDER SINDELAR, DAS ABHANDENKOMMEN BEIM GUTGLÄUBIGEN MOBILIARERWERB 125 (2011).

209. BAUR ET AL., *supra* note 47, at para. 52.43; SINDELAR, *supra* note 208, at 120-122; HARTUNG, *supra* note 1, at 277; ANTON, *supra* note 62, at 98.

210. 4 BGHZ 10 (39) (Ger.); Oechsler, *supra* note 207, at § 935 para. 7.

211. Oechsler, *supra* note 207, at § 935 para. 12. *But see* 5 NJW 592 (Ger.).

212. 1 SJZ 36 (Ger.); *see also* Finkenauer, *supra* note 79, at 98; Susanne Schoen, *Kulturgüterschutz bei – illegaler – Rückkehr kriegsbedingt verbrachter Kulturgüter aus Russland nach Deutschland*, 54 NJW 537, 542 (2001); Reich & Fischer, *supra* note 10, at 1420; Anton, *supra* note 173, at 418; ANTON, *supra* note 62, at 111.

1938 because they were deemed "*entartete Kunst*," is hotly contended. Some argue that section 935(1) of the BGB is applicable with the consequence that a *bona fide* acquisition is not possible.[213]

In those cases in which the asset does not count as being lost under the meaning of section 935(1) of the BGB, the issue turns on whether the acquisition happened in good faith regarding the ownership of the person who transferred the property to the acquirer.[214] According to section 932(2) of the BGB, the acquistion "is not in good faith if he [the acquirer] is aware, or as a result of gross negligence he is not aware, that the thing does not belong to the alienor." Thus, gross negligence precludes a *bona fide* acquisition. Generally, the acquirer does not have a duty to investigate the legal position of the other party.[215] One would assume that, consequently, the acquirer does not act grossly negligent if he does not research the provenance of what he acquires, and that he only has a duty to undertake such research under special circumstances.[216] Indeed, according to how section 932(2) of the BGB is phrased, there is a presumption of good faith, and the original owner has the burden of proving that the acquirer acted in bad faith.[217]

However, with respect to art, there are some special considerations that one needs to be aware of. First, it is widely believed that in the international art trade, there is a general duty to look into the provenance of what is bought because the provenance of a piece of art is of great importance.[218] Furthermore, with respect to art lost during the Nazi regime, the open databases will have an impact on the question of whether the acquisition was made in good faith.[219] Nevertheless, there are further factors that may influence the question of whether the acquirer acted grossly negligent:[220] the importance or value of the piece of art; whether the acquirer is a first time buyer or is

213. Oechsler, *supra* note 207, at § 935 para. 12; Wolfgang Wiegand, *in* J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, § 935 para. 18 (new ed. 2011); KUNZE, *supra* note 4, at 184-88.

214. BAUR ET AL., *supra* note 47, at para. 52.25.

215. Oechsler, *supra* note 207, at § 932 paras. 40, 42.

216. Finkenauer, *supra* note 79, at 99; *see also* Siehr, *supra* note 101, at 89.

217. Finkenauer, *supra* note 79, at 97.

218. Anton, *supra* note 172, at 419; Müller-Katzenburg, *supra* note 189, at 2556; Thomas von Plehwe, *Verjährung des dinglichen Herausgabeanspruchs und Ersitzung in Fällen abhanden gekommener Kulturgüter*, 3 KUR 49, 53 (2001); Finkenauer, *supra* note 79, at 98; Armbrüster, *supra* note 81, at 3585-3586; Hanisch, *supra* note 78, at 222.

219. *See* discussion in *supra* note 156; SCHACK, *supra* note 52, para. 508.

220. Anton, *supra* note 172, at 419-421; Finkenauer, *supra* note 79, at 98; Oechsler, *supra* note 207, at § 932 para. 64; KUNZE, *supra* note 4, at 165-84; OLG Celle, Sept. 17, 2010, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT. RECHTSPRECHUNGS-REPORT 24 (2011)(Ger.).

acquainted with the art trade; and the location where the piece of art is bought – for example, at a flea market, there is, generally speaking, no duty to investigate the provenance of what one buys even if it turns out to be a valuable piece of art.

The original owner who has lost his property through *bona fide* acquisition is, of course, not without any rights:[221] he has a claim for unjustified enrichment arising from section 816(1) of the BGB against the party who transferred his property to the *bona fide* acquirer. Moreover, if this party acted negligently, there will also be a claim for damages. Additionally, if the legal ground of the transfer was a donation then the original owner has a claim in unjustified enrichment arising under section 816 of the BGB against the acquirer for the retransfer of the property.

Let us turn to one of the paintings that has passed through the hands of Hildebrand Gurlitt to see how our findings may apply to the Gurlitt collection: the case involving the painting *Sumpflegende* by Klee.[222] Let us, for reasons of simplification, assume that Sophie Lissitzky-Küppers was a German citizen when the painting had been confiscated in the *Provinzialmuseum* as being a work of "*entartete Kunst.*" Of course, she did not lose ownership through transfer under section 929(1) of the BGB. She might have lost ownership through a valid act of confiscation. It would be determinative if a court would consider the Act of 1938 to be invalid under the *Radbruchsche Formel.* If it does not invalidate the act, then it would not be of any help to Lissitzky that the Bavarian draft bill aims to lengthen the statute of limitations of a claim arising under section 985 of the BGB; Lissitzky does not have such a claim. If a court applied the *Radbruchsche Formel* to the Act of 1938, then the decisive factor would be what has subsequently happened to the painting. In 1941, Hildebrand Gurlitt bought the painting from the *Reich.* Did Lissitzky-Küppers lose her ownership at this point? The answer is clearly in the negative, as Gurlitt would have been a bad faith acquirer. However, Gurlitt later sold the painting. Did the person who bought the painting from Gurlitt acquire *bona fide* ownership? The answer to this question would depend on the facts of the case. Furthermore, *bona fide* acquisition would be precluded if a court were to decide—the unsettled question—that the painting was lost under the meaning of section 935(1) of the BGB because it was confiscated under the Act of 1938. However, even if

221. *See* DIRK LOOSCHELDERS, SCHULDRECHT BESONDERER TEIL, paras. 1074-1085 (9th ed. 2014); BAUR ET AL., *supra* note 47, at para. 52.33.

222. *See* the text to *supra* notes 188-91.

the painting had been lost under the meaning of section 935(1) of the BGB, the original owner may have lost ownership if the painting was subsequently sold at a public auction.

vii. Loss of ownership in a public auction

Bona fide acquisition of lost property is possible at public auctions. Section 935(2) of the BGB makes clear that section 935(1) of the BGB does not apply to such auctions: "[t]hese provisions do not apply to money or bearer instruments or to things that are alienated by way of public auction or in an auction pursuant to section 979(1a)."[223]

Nevertheless, the acquirer must act in good faith.[224] It is clear that the public interest demands the possibility of a *bona fide* acquisition of lost money and lost bearer instruments. Anything else would impair their fitness for circulation.[225]

Turning to the case of public auctions, it is important to note that there are different kinds of public auctions. There are public auctions as part of a sequestration of an estate. Section 935(2) of the BGB does not apply to such auctions. These are conducted by a court officer and the successful bidder acquires ownership by judicial decree, and not through a private law transaction.[226] In such an auction, the acquirer does not even have to be *bona fide* in order to acquire property; the acquisition of lost property is possible, as well.[227]

Sections 932-36 of the BGB do require such private law transaction.[228] Section 935(2) of the BGB applies to public auctions in the meaning of section 383(3) of the BGB.[229] An auction in the meaning of § 383(3) BGB may be conducted by a court officer, another public official entrusted with auctions, or a public authorized auctioneer.[230] The public authorization of an auctioneer is regulated under section 34b(5) of the Trade Regulation Act (*Gewerbeordnung* (GewO)):[231] an

223. BGB § 935(2).

224. Finkenauer, *supra* note 79, at 99.

225. On the ratio, *see* Oechsler, *supra* note 207, at § 935 para. 14.

226. BAUR ET AL., *supra* note 47, at para. 52.49.

227. BGH, Nov. 11, 1970, 55 BGHZ 20 (25) (Ger.); BGH, July 2, 1992, 119 BGHZ 75 (76-77) (Ger.); FRITZ BAUR, ROLF STÜRNER & ALEXANDER BRUNS, ZWANGSVOLLSTRECKUNGSRECHT para. 29.7 (13th ed. 2006).

228. *See* BGB § 935(2).

229. Oechsler, *supra* note 207, at § 935 para. 18.

230. Rhona Fetzer, *in* 2 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 383 para. 6 (Franz Jürgen Säcker et al. eds., 6th ed. 2012).

231. Gewerbeordnung für den Norddeutschen Bund [Industrial Code for the North German Confederation], June 21, 1869, BGBL I at 245, repromulgated Feb. 22, 1999, BGBL I at 202

experienced and trustworthy auctioneer can receive such authorization. In an auction, under the meaning of section 383(3) of the BGB, the successful bidder will acquire ownership, not through judicial decree, but through a private law transaction under sections 929-36 of the BGB.

The policy judgment underlying the privileged position of public auctions with respect to *bona fide* acquisition is said to be manifold:[232] first, it is the trustworthiness that an auctioneer has in order to receive the public authorization to conduct a public auction. The auctioneer should look into the provenance of what he takes into auction. Whether auctioneers live up to these expectations is a different question. More importantly, it is said that the general public should rely on the authority of a publicly authorized auctioneer. Additionally, section 383(3) of the BGB requires that the auction be publicly advertised.[233] Thus, the original owner who has lost something has the chance to intervene.

There are two fundamentally different situations in which a public auction may be instituted. There are involuntary public auctions and voluntary public auctions. The prime example of the latter is the typical art auction: the seller brings his piece of art to an auction house to have it auctioned off. Some argue that section 935(2) of the BGB should not be applied to such voluntary public auctions even if they are conducted by public authorized auctioneers.[234] They argue that in such a voluntary public auction the buyer does not need special protection.

However, a case of the BGH of 1989 makes this issue clear:[235] the defendant antique dealer had bought at a public auction a seal of the city of Hamburg for slightly over 2,000 marks.[236] It was offered as an 18th-century piece.[237] It was being offered at auction by a couple who had bought it at a flea market.[238] The catalogue of the auction had

(Ger.). On the details, see Wolfram Höfling, *in* KOMMENTAR ZUR GEWERBEORDNUNG – GEWERBERECHTLICHER TEIL, paras. 48-66 (Karl Heinrich Friauf ed., 271st supplement 2013).

232. Oechsler, *supra* note 207, at § 935 para.17; *see also* HANS PETER DÜNKEL, ÖFFENTLICHE VERSTEIGERUNG UND GUTGLÄUBIGER ERWERB 41-46, 56-70 (Karlsruhe, C.F. Muller ed., 31st ed. 1970).

233. *See* Fetzer, *supra* note 230 § 383, para.6.

234. *See* Rainer Frank & Herbert Veh, *Gutgläubiger Erwerb beweglicher Sachen im Wege öffentlicher Versteigerung*, 1983 JURISTISCHE ARBEITSBLÄTTER [JA] 249, 249-55; Ulf Bischof, *Die öffentliche Versteigerung: Waschsalon für Diebesgut?*, 9 KUR 62, 62-65 (2007).

235. BGH, May 10, 1989, 43 NJW 899, 1990 (Ger.); Siehr, *supra* note 101, at 91.

236. 43 NJW 899 (899) (Ger.).

237. *Id.*

238. *Id.*

been sent to a number of museums, as well as to the Federal Criminal Police Office and it had been advertised in national newspapers.[239] The defendant later wanted to sell the seal for 6,800 marks at an art fair in Cologne.[240] That was when the claimant, the city of Hamburg, took notice of the seal being offered.[241] It turned out that it was the original and official Fourth Hamburg Town Seal that had already been in use in 1306.[242] Shortly after World War II, the seal was stolen.[243] The claimant argued that section 935(2) BGB did not apply to voluntary public auctions.[244] The BGH disagreed.[245] The predominant view in legal literature is in agreement with the case.[246] Again, the original owner will have a claim for unjustified enrichment arising under section 816(1) BGB and possibly a claim for damages against the seller who turned the goods into the auction.[247]

viii. Loss of ownership through usucapio

Finally, there is the possibility to acquire property through *usucapio*. The relevant provision is found in section 937 of the BGB:

> (1) A person who has a movable thing in his proprietary possession for ten years acquires the ownership. . .
> (2) Acquisition by *usucapio* is excluded if the acquirer on acquiring the proprietary possession is not in good faith or if he later discovers that he is not entitled to the ownership.[248]

Acquisition of ownership through *usucapio* is possible even with lost property. Section 935 BGB does not apply in this situation. As a consequence, an acquirer who was not able to acquire property under section 932 of the BGB due to the fact that the thing was lost under the meaning of section 935 of the BGB may, nevertheless, be able to acquire ownership after ten years by *usucapio*.[249]

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239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. Marco Peege, *Gutgläubiger Eigentumserwerb gem. § 935 Abs. 2 BGB*, 9 KuR 111, 111-113 (2007); Armbruster, *supra* note 81, at 3585-86; *see also* Oliver Remien, *Vindikationsverjährung und Eigentumsschutz*, 2001 IPRAX 730, 732-33; Dünkel, *supra* note 232, at 70.
247. *See* the references in *supra* note 221.
248. BGB §937 (author's translation). *Usucapio* is similar to the concept of adverse possession in common law legal systems.
249. Baldus, *supra* note 44, at § 937, para. 5; von Plehwe, *supra* note 218, at 54; BAUR ET AL., *supra* note 47, at para. 52.37.

In order to apply section 937 of the BGB, the question of good faith is once again determinative. If we carefully read section 937(2) of the BGB, we see a distinction.[250] When acquiring the possession, the new possessor must act in good faith.[251] A person cannot act in good faith if he acted grossly negligent.[252] With respect to the question of whether someone acted grossly negligent when acquiring possession, the same considerations apply as in the context of a *bona fide* acquisition.[253] In addition, the acquirer may only acquire property if he remains in good faith throughout the period of ten years after the possession of property.[254] However, in this case, gross negligence is not sufficient to negate *bona fide* possesion. The possessor must also have actual knowledge that he is not entitled to ownership.[255] For the present purpose, there is one more important provision, section 943 of the BGB, which states: "[i]f as a result of succession in title the thing enters the proprietary possession of a third party, the. . .period that has passed in the possession of the predecessor in title benefits the third party."[256]

Only if both the first and the second possessor meet the requirements of section 937, then the statute of limitations will continue to run.

There is one special situation that needs to be discussed in the present context. What happens if an heir acts in good faith, but the deceased person acted in bad faith when devising his property? Does the heir "inherit" the bad faith? At one point this question was largely contested, but today the predominant view holds that the heir in such circumstances can acquire ownership through *usucapio*.[257] In contrast, if the deceased person acted in good faith but dies before the ten year period has passed and his or her heir did not act in good faith

250. Baldus, *supra* note 44, at § 937, para. 36 (providing more details).

251. BGB §937(2).

252. BGB §932.

253. Baldus, *supra* note 44, at § 937 paras. 28-34; Finkenauer, *supra* note 79, at 99; von Plehwe, *supra* note 218, at 54; OLG Celle, Sept. 17, 2010, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT. RECHTSPRECHUNGS-REPORT 24, 24-30 (2011).

254. BGB §937.

255. BGB §892.

256. BGB §943.

257. Thomas Finkenauer, *Gutgläubiger Erbe des bösgläubigen Erblassers*, 51 NJW 960-962 (1998); Finkenauer, *supra* note 79, at 100; BAUR ET AL., *supra* note 47 at para. 53.89; Siehr, *supra* note 101, at 95; Baldus, *supra* note 49 § 943 para. 13-19; Wiegand, *supra* note 213, at § 943 para. 5. *Contra* G. Gerd Krämer, *Bernsteinzimmer-Mosaik*, 50 NJW 2580-2581 (1997); Horst Heinrich Jakobs, *Error falsae causae*, *in* 1 FESTSCHRIFT FÜR WERNER FLUME 43, 84 (Horst Heinrich Jakobs et al. eds., 1978); Rolf Knütel, *Bösgläubiger Erblasser – Gutgläubiger Erbe*, *in* FESTSCHRIFT FÜR HERMANN LANGE 903, 930-32 (Dieter Medicus et al. eds., 1992).

when acquiring the possession of the property, the heir will not be able to acquire ownership through *usucapio*.[258]

These problems in the application of section 943 of the BGB have been controversially discussed when parts of the Bernsteinzimmer (Amber Chamber) were rediscovered. The Amber Chamber was commissioned by Friedrich I, King of Prussia, in the early 18th century. It was built in the Berlin City Palace (*Stadtschloss*). In 1716, it was given by his successor, Friedrich Wilhelm I, to Tsar Peter the Great of Russia. It was built into the Catherine Palace near St. Petersburg. The chamber was lost at the end of World War II, however many believe that it still exists. In 1996, a mosaic from the Amber Chamber was offered for sale in Bremen, Germany. The Bremen police confiscated it in 1997 and it was later returned to Russia. The person acting on behalf the seller told the police that the seller's father allegedly had, as a soldier, brought the mosaic back to Germany. When his father died in 1978, the seller, as heir, discovered the mosaic in the attic of his parents' house. He hung it up in his living room. He claimed that he had acquired ownership through *usucapio*.[259] The case raised the question of when an heir may have acted grossly negligent when acquiring possession of property. Of course, a family member who has seen a painting on display in the family home for years will often have no suspicions as to its provenance, and it is unlikely that the heir could be held to have acted grossly negligent in such a case. However, in the case of the Amber Chamber, there is no doubt that the heir acted grossly negligent:[260] the heir had discovered the mosaic in the attic, along with photos of German soldiers standing in front of the destroyed Catherine Palace, and two newspaper articles from the 1940s depicting images of the Amber Chamber. In subsequent criminal proceedings, it was proven that the son had actual knowledge of the provenance of the mosaic.

There is one final discussion that is of importance in the present context, concerning section 939(2) of the BGB:[261]

> *Usucapio* is also suspended as long as the limitation of the claim to possession [what is meant is a claim arising from § 985 BGB[262]]

258. BGB §854.

259. *"Mr. X" fordert das Bersteinzimmer-Mosaik zurück*, FAZ, May 26, 1997, at 12; Kramer, *supra* note 257, at 2580.

260. BGH, June 26, 2001, ZEITSCHRIFT FÜR WIRTSCHAFTS-UND STEUERSTRAFRECHT [ZWS] 420, 2001 (Ger.).

261. BGB §939.

262. Baldus, *supra* note 44, at §939 para. 4.

> under sections 205 to 207 or its expiry under sections 210 and 211 is suspended.
>
> Section 206 of the BGB states:
>
> Limitation is suspended for as long as, within the last six months of the limitation period, the obligee is prevented by force majeure from prosecuting his rights.[263]

Some argue it is a case of force majeure if property had been confiscated by the Nazi regime and has subsequently been lost. The original owner did not have a chance to enforce his property rights against the possessor without being at fault.[264] However, the case law and most legal commentators have a more restrictive understanding of section 206 of the BGB.[265] According to German law, it is not a requirement that the obligee has knowledge of the identity of the obligor in order to trigger the statute of limitations to start to run. As a consequence, section 206 of the BGB cannot be applied whenever something is lost.

Turning to the Gurlitt collection, it is clear that Cornelius Gurlitt and his heir could not rely on an acquisition of ownership through *usucapio* because Cornelius should have known that parts of the collection may count as *Raubkunst*.[266] Thus, he was not acting in good faith when he acquired possession.

B. The time-bar of a claim arising under § 985 BGB

There are a number of circumstances under which the original owner of lost art may have lost ownership, according to German law. If the original owner has not lost ownership, he or she will have a claim under section 985 of the BGB. Then the issue of the statute of limitations will arise. As a preliminary remark, it is worthwhile to note that public museums in Germany no longer rely on statutes of limitations with respect to Nazi-looted art.[267] The statute of limitations period is 30 years. Section 197(1) of the BGB reads: "Unless otherwise provided, the following claims are statute-barred after thirty years: 1. claims for return based on ownership. . ."[268]

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263. BGB § 206.

264. Reich & Fischer, *supra* note 10, at 1420.

265. *See* Helmut Grothe, *in* 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Franz Jürgen Säcker et al. eds., 6th ed. 2012); *see also* Schoen, *supra* note 212, at 543; von Plehwe, *supra* note 218, at 51-52; Finkenauer, *supra* note 79, at 103; Heuer, *supra* note 101, at 2563; BARBARA PLAMBECK, DIE VERJÄHRUNG DER VINDIKATION 98 (1997).

266. Raue, *supra* note 15, at 4.

267. *See* Ernst, *supra* note 116, at 362; *see also* the references in *supra* notes 137-55.

268. BGB § 197(1).

Section 200(1) of the BGB deals with the question of when the clock starts to run: "Unless another date for the commencement of limitation is specified, the limitation period of claims not subject to the standard limitation period commences when the claim arises."[269]

What is important is that section 200 of the BGB follows an objective approach. Section 199(1) of the BGB which requires that the obligee have knowledge, for example, of the identity of the obligor does not apply.[270] This detail is of special importance in the case of Nazi-era assets: whereas the families of the victims of the Nazi regime might know that they have lost their valuables and they may know exactly what pieces of art they are missing, the problem lays in identifying in whose hands these are. Finally, section 198 of the BGB is in the present context of relevance: "If a thing in respect of which a real claim exists comes into the possession of a third party by succession in title, the part of the limitation period that passed while possession was held by his predecessor in title is deemed to benefit the successor in title."[271]

Section 198 of the BGB seems to be straight forward. However, the application of the provision has caused problems and these problems became apparent in Lissitzky's action for the restitution of Klee's painting, *Sympflegende*.[272] The painting had been confiscated in 1937. One would assume that the statute of limitations period ran out in 1967. Lissitzky filed his action in 1992. This was why the LG München held that the defendant museum was able to rely on the statute of limitations.[273] Yet, from 1962 to 1982, the painting was in Switzerland.[274] According to Swiss law, there is no statute of limitations on the *rei vindicatio*. The question was raised as to (a) whether the statute of limitations period runs out, irrespective of the time that the picture was in Switzerland, (b) whether the 30 year statute of limitations only ran when the painting was in Germany or (c) whether the statute of limitations period began to run anew when the picture was brought back to Germany. The LG München opted for the first option, but mentioned that even with the second possibility, Lissitzky's claim would have been time-barred. The legal literature claims that

269. BGB § 200.

270. BGB § 199(1)(2).

271. BGB § 198.

272. *See supra* text accompanying notes 188-91.

273. Jayme, *supra* note 188, at 43.

274. Gropp, *supra* note 191.

only the third option is in line with section 198 of the BGB and the case law thereunder.[275]

Section 198 of the BGB causes further problems. It presupposes that the claim under section 985 of the BGB arises each time possession changes. There is a new claim under which the statute of limitations period starts to run anew, but under the requirements of section 198 of the BGB, the new possessor can rely on the time that has passed while the object was in the possession of the predecessor.[276] One requirement is a "succession in title."[277] If the object is stolen from the possessor after more than thirty years of possession, there is no "succession in title" under the meaning of section 198 of the BGB.[278] Thus, the original owner was not able to claim the object from the last possessor, but he is now able to claim back the object from the new possessor. The second theft benefits the original owner—a surprising result.[279]

Finally, it should be noted that there is no requirement of good faith in order to rely on the statute of limitations.[280]

Once the statute of limitations period has expired, the possessor remains as possessor, only. He does not, as in many common law jurisdictions[281] and as under the principles of *usucapio* in German law, acquire ownership.[282] The statute of limitations is rather a personal defense: the original owner retains ownership but the possessor has a defense against a claim arising under section 985 of the BGB.[283] This legal effect of the statute of limitations becomes clear from section 214(1) of the BGB: "[a]fter limitation occurs, the obligor is entitled to refuse performance."[284]

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275. Jayme, *supra* note 188, at 43.

276. BGB § 198.

277. *Id.*

278. Finkenauer, *supra* note 19, at 483; PLAMBECK, *supra* note 265, at 129; Frank Peters & Florian Jacoby, *in* J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, § 198 para. 6 (new ed. 2009).

279. Jörn Eckert, *"Verjährung" des Eigentums in einem halben Jahr?*, in 43 MONATSSCHRIFT FÜR DEUTSCHES RECHT 135, 135-37 (1989); *see also* Remien, *supra* note 246, at 740-741; Finkenauer, *supra* note 79, at 102; THOMAS FINKENAUER, EIGENTUM UND ZEITABLAUF – DAS DOMINIUM SINE RE IM GRUNDSTÜCKSRECHT 158-93 (2000); Robert Magnus & Hannes Wais, *Unberechtigter Besitz und Verjährung*, 18 NJW 1270, 1270-75 (2014).

280. SCHACK, *supra* note 52, at para. 498.

281. Limitation Act 1980, c. 58, § 3(2) (Eng.), http://www.legislation.gov.uk/ukpga/1980/58. But cf. Schönenberger, *supra* note 45, at 130-43, for a comparative overview.

282. SCHACK, *supra* note 52, at para. 493; PLAMBECK, *supra* note 265, at 182; von Plehwe, *supra* note 218, at 53; *see also*, Finkenauer, *supra* note 79, at 101.

283. BGB § 985.

284. BGB § 214(1).

III. THE BAVARIAN DRAFT BILL

In reaction to the *Gurlitt* case, the Bavarian State Government concluded that the present statute of limitations is unsatisfactory. The Bavarian State Government is not the first one to see problems with the time-bar of a property based claim. In the past, scholars have argued again and again in favor of abolishing or restricting the statute of limitations of claims arising under section 985 of the BGB;[285] the legislature, too, has discussed the issue repeatedly without following the critics.[286] The Bavarian Government does not want to go as far as abolishing the statute of limitations for property based claims altogether. The Draft Bill proposes a new subparagraph into § 214 of the BGB. The new section 214(2) of the BGB would state:

> The obligor cannot refuse the performance of a claim arising from § 985 as well as of claims serving to assert the claims for return arising from § 985 even though limitation has occurred if the object has been lost [in the meaning of § 935] and if the possessor was not in good faith [in the meaning of § 932(2)] when he acquired possession of the object.[287]

The Draft Bill aims to introduce the requirement of bad faith at the time of the acquisition of possession and requires that the object

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285. Frank Peters & Reinhard Zimmermann, *Verjährungsfristen*, *in* 1 GUTACHTEN UND VORSCHLÄGE ZUR ÜBERARBEITUNG DES SCHULDRECHTS 77, 186, 287 (Bundesminister der Justiz ed., 1981); REINHARD ZIMMERMANN, THE NEW GERMAN LAW OF OBLIGATIONS 131-32 (2005); Reinhard Zimmermann, *Das neue deutsche Verjährungsrecht*, *in* SCHULDRECHTSMODERNISIERUNGSGESETZ 2002, at 9, 19-21 (Ingo Koller et al. eds., 2002); Reinhard Zimmermann et al., *Finis Litium? Zum Verjährungsrecht nach dem Regierungsentwurf eines Schuldrechtsmodernisierungsgesetzes*, 56 JZ 684, 693 (2001); Heinz-Peter Mansel, *Die Reform des Verjährungsrechts*, *in* ZIVILRECHTSWISSENSCHAFT UND SCHULDRECHTSREFORM 333, 366-370 (Wolfgang Ernst & Reinhard Zimmermann eds., 2001); Christian Armbrüster, *Verjährbarkeit der Vindikation?—Zugleich ein Beitrag zu den Zwecken der Verjährung*, *in* FESTSCHRIFT FÜR HARM PETER WESTERMANN 53-66 (Lutz Aderhold et al. eds., 2008); Remien, *supra* note 246, at 754; Kurt Siehr, *Verjährt ein Anspruch auf Herausgabe des Eigentums?*, *in* KUNSTDIEBSTAHL VOR GERICHT 53, 58-75 (Michael H. Carl et al. eds., 2001); Kurt Siehr, *Verjährung der Vindikationsklage?*, 34 ZRP 346-347 (2001); von Plehwe, *supra* note 218, at 55-58; Armbrüster, *supra* note 81, at 3586-87. See also ANDREAS PIEKENBROCK, BEFRISTUNG, VERJÄHRUNG, VERSCHWEIGUNG UND VERWIRKUNG EINE RECHTSVERGLEICHENDE GRUNDLAGENSTUDIE ZU RECHTSÄNDERUNGEN DURCH ZEITABLAUF (Mohr Siebeck Tübingen ed. 2006), for a more fundamental proposal for the realignment of the statute of limitations.

286. 1 DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH FÜR DAS DEUTSCHE REICH 513-14, 772 (Benno Mugdan ed., 1899); Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG [BT], May 14, 2001, 14/6040, http://dip21.bundestag.de/dip21/btd/14/060/1406040.pdf (Ger.); Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG [BT], Oct. 10, 2001, 14/7052, http://dip21.bundestag.de/dip21/btd/14/070/1407052.pdf (Ger.). For discussions leading to the BGB of 1900, with a focus on the position of immoveable property, see FINKENAUER, *supra* note 279, at 33-36, 46-51, 65-73.

287. Regierungsentwurf, BR 2/14, at 1 (Ger.) (author's translation).

has been lost. With lost art it applies, thus, to situations in which a *bona fide* acquisition has not been possible because the object was lost and in which *usucapio* has not been possible because the possessor acted in bad faith.

The Bavarian Government argues that after the time-bar of a claim arising under section 985 of the BGB, ownership and possession permanently fall apart. Ownership turns into a *nudum ius*, a naked right.[288] Those who have in the past argued in favor of abolishing the possibility that a property based claim may lapse have relied on this effect of the statute of limitations, too.[289] However, the Bavarian draft does not remedy this problem completely: if the possessor does not acquire ownership through *usucapio* because later, but still before the completion of the ten year period, he finds out that he is not entitled to the object, then he may keep the object, even according to the draft bill. The draft bill requires bad faith at the time of the acquisition of the possession, whereas according to section 937 of the BGB, *usucapio* is excluded even if the possessor later acquires positive knowledge that he is not entitled to the object. Thus, even with the draft bill, we may end up with situations where the owner is left with a *nudum ius*. Furthermore, every time-bar has the result that an entitlement is not enforceable. That is the very nature of the statute of limitations in German law. In every case, the holder of the right is left with a *nudum ius*. With section 985 of the BGB, we only see it as unsatisfactory because we regard ownership to be a right of special importance. We generally accept the phenomenon of a naked right, but only with some rights do we believe that it is problematic. Finally, one could solve the problem of the *nudum ius* by simply taking the opposite approach to the draft bill by saying that after the statute of limitations has passed, the possessor becomes the owner of the object – some are in favor of this approach.[290]

The Bavarian Government, secondly, argues that it is hardly tolerable that the injustice caused by the Nazi regime is perpetuated by the statute of limitations.[291] Indeed, this is true. However, the Bavarian proposal still does not remedy this problem completely: tort based claims may be barred under the statute of limitations even if the tort was committed by the Nazi regime. The possibility to avoid enforcing a contract that was entered into during the Nazi regime for

288. *Id.* at 3-4.

289. *See* sources cited *supra* note 285.

290. *See, e.g.*, Finkenauer, *supra* note 79, at 101.

291. Regierungsentwurf, BR 2/14, at 6 (Ger.).

collective threats is excluded under section 124 of the BGB. It is still possible to acquire Nazi-era assets through *usucapio*. Similarly, it is still possible to acquire Nazi-era assets in public auctions. One could say that in these situations, too, the injustice caused by the Nazi regime is perpetuated. Nevertheless, the Bavarian Government does not want to remedy those problems.

The Bavarian Government also notes the rationale behind the statute of limitations.[292] In essence, there are three points discussed as the rationale of this legal tool:[293] with the lapse of time, it becomes harder and harder to prove relevant facts. The party who has to defend himself or herself against a claim may run into a position where he or she faces a *Beweisnot*—an inability to prove his or her facts. In addition, the statute of limitations is said to help to create Rechtsfrieden. Rechtsfrieden literally translates as legal peace. This means that the parties should at one point in time end their quarrels about claims. Indeed, in the case of Nazi-era art, the Rechtsfrieden seems rather to be infringed if no restitution is granted to the victims. Finally, it is argued that it is a positive side-effect of the statute of limitations when the parties have to enforce their claims with undue delay. The discussion of the rationale of the statute of limitations also has a constitutional spin to it: many who argue that the time-bar of property based claims should be abolished say that such limitation is an unconstitutional interference with ownership, and the Draft Bill refers to this argument, too.[294] The argument is based upon Art. 14(1) of the German Constitution (Grundgesetz – GG).[295] The provision reads:

> Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.[296]

Those, who argue in favor of abolishing the possibility that a property based claim can lapse, argue that time-barring such claims, in practice, only works in favor of thieves. All others will have acquired ownership through *usucapio*.[297] The Bavarian Government argues in a similar direction.[298] It points to the fact that there is no reason to pro-

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292. *Id.* at 4.

293. *See* 1 KARL SPIRO, DIE BEGRENZUNG PRIVATER RECHTE DURCH VERJÄHRUNGS-, VERWIRKUNGS- UND FATALFRISTEN 8-32 (1975); HARTMUT OETKER, DIE VERJÄHRUNG 33 (1994) for a discussion the rationale of the statute of limitations.

294. Regierungsentwurf, BR 2/14, at 4 (Ger.); *see also* Martin Klose, *Vindikationsverjährung: Gewogen und für verfassungswidrig befunden!*, 5 RECHTSWISSENSCHAFT 228 (2014).

295. GRUNDGESETZ [GG] [BASIC LAW], art. 14(1), *translation at* http://www.gesetz-im-internet.de/englisch-gg/index.html (Ger.).

296. *Id.*

297. Siehr, *supra* note 285, at 346-347.

298. Regierungsentwurf, BR 2/14, at 4-5 (Ger.).

tect a possessor of lost property who already acted in bad faith when he acquired the possession. A thief or a person who acquired possession while acting in bad faith on the one side, and an owner who has innocently lost possession on the other—it seems as if the arguments clearly work in favor of the owner: article 14 GG and the Rechtsfrieden would rather demand to abolish the statute of limitations, and there is no need to protect a thief against a *Beweisnot*.

However, what is required according to the draft bill is not bad faith in the sense that the possessor must have had positive knowledge that he is not entitled to what he is in possession of. Gross negligence is sufficient. We have seen that in the art trade, the predominant position is to construe an obligation to investigate into the provenance of what is bought. Thus, we quickly hold that the possessor acted grossly negligent. The question of balancing out the interests of the parties does not seem to be as easy, then.

Furthermore, it is not only a thief or a *mala fide* possessor in whose favor the statute of limitations works. The protection of a thief and a *mala fide* possessor are only one side effect of protecting those who have acquired property through a valid transfer of property, through *bona fide* acquisition or through *usucapio*, but who cannot prove their case any longer.[299] Of course, the original owner who claims back his property bears the burden of proof. Yet, factual presumptions may work in his or her favor. Let us, by way of example, return to the case involving the painting *Waldrand* by Macke.[300] After more than 75 years, it has proven impossible to find out how the painting ended up in the hands of the Kahle family. Did they receive a painting that had been lost by Karl Oberländer? Did Karl Oberländer voluntarily give up his possession when he had to flee Germany in 1938? Had friends of Karl Oberländer given the painting to the Kahle family so that they keep it safe for the true owner to return one day? Or did the Kahle family receive the painting as a gift for their help of a Jewish possessor of the painting? After more than 75 years, the findings of the court will necessarily be speculative, and everything will turn on in whose favor factual presumptions work. Thus, even someone who received assets as a donation for his or her help may be held to have acted in bad faith or, at worst, a thief. And the statute of limitations is introduced to not put defendants at risk of such findings on the basis of a pure *Beweisnot*.

299. Finkenauer, *supra* note 19, at 482.

300. *See supra* notes 62, 197 and accompanying text.

Thus, we may conclude that the arguments in favor of the Bavarian draft bill are not as clear as they might initially seem. However, even if one holds that the arguments of the Bavarian State Government in favor of legal reform are valid, there are still further problems.

There is a heated discussion as to whether the Bavarian draft bill is unconstitutional. The discussion turns on a possible retrospective effect of the draft bill. With Nazi-era assets, an owner's property based claim, today, against the present possessor would already be barred by the statute of limitations. Yet, the Bavarian draft bill seeks to exclude that possibility. The Bavarian Government argues that this does not result in any retrospective effect of the draft.[301] The Bavarian Government points to the nature of the statute of limitations in German law. According to section 214(1) of the BGB, it is a personal defense, and all the draft bill does is exclude the *mala fide* possessor from relying in the future on this personal defense. However, it has already been argued that this is a position that is too formalistic.[302] After the property based claim has lapsed, the possessor has a secured legal position that the draft bill will question again. Nevertheless, the Bavarian Government hopes to be on the safe side,[303] as the prohibition of retrospective laws is said to protect only a justifiable reliance that the law will not be changed, and a *mala fide* possessor has no such justifiable reliance. Yet, we have already seen that the draft bill will also affect the position of those who have acquired possession acting grossly negligent and of those who were *bona fide* acquirers, but cannot prove any longer that they were *bona fide.*

The draft bill may have effects that the drafters have not foreseen. The question of whether the possessor was acting in good faith when acquiring the possession of the lost object will be asked with every possessor anew. Section 214(2) will be a personal bar to relying on the statute of limitations. Thus, if the owner makes the fact that he is entitled to the lost object known to the general public, for example by listing it on a database of lost art, then the possessor will not be able to sell the piece of art, as the new possessor will be held to have acted grossly negligent when acquiring possession, and he will therefore be acting in bad faith. Consequently, the present possessor will not be able to sell it. The draft will not have the effect that art will be

301. Regierungsentwurf, BR 2/14, at 7-11 (Ger.).

302. Finkenauer, *supra* note 19, at 482.

303. *See* Regierungsentwurf, BR 2/14, at 7-11 (Ger.); *see also* von Plehwe, *supra* note 218, at 58-59.

returned to their owners, but it will rather have the unwanted effect that such pieces of art are taken off the market.

Furthermore, German courts will have to face the problem of what happens if an heir acquires possession. If the *mala fide* heir will not be precluded from relying on the statute of limitations under section 214(2) of the draft bill as long as his predecessor has been *bona fide*, then we will see no restitution of lost art to the original owners but rather the phenomenon that lost art will stay in the families where they are now. However, we have seen that section 943 of the BGB German law follows a different reading. A *bona fide* heir can acquire ownership through *usucapio* even if the predecessor had been *mala fide*. And a *mala fide* heir cannot acquire ownership through *usucapio* even if the heir was *bona fide*. If we read section 214(2) of the draft bill in the same way, then an heir will not be able to rely on the statute of limitations if he or she was acting in bad faith when acquiring possession, even if the predecessor was acting in good faith. Such a reading would not have the effect that lost art will be taken off the market and stay in the families where it is now. Rather, the opposite will happen. If the true owner makes it known to prospective heirs that he or she is the original owner, the heir will be acting in bad faith when he acquires possession through inheritance. As a consequence, the lost object will return to the true, rightful owner. One cannot say that the *rei vindicatio* is still exposed to a statute of limitations period, and that only in very problematic cases the reliance on the statute of limitations is excluded. In practice, the return of the lost art to the true owner will only be postponed until the next change in possession. If this is the result of section 214(2), then there may be value in retaining the statute of limitations for property based claims. It would seem to be more straightforward to entirely preclude the lapse of claims arising under section 985 of the BGB, altogether.

In addition, the draft bill does not seem to find a just balance between the interests of the original owner and the interests of the present possessor because it focuses solely on the present possessor by requiring him or her to have acted in bad faith when acquiring possession. However, should it not be relevant whether or not the original owner has taken efforts to duly pursue his or her rights?

However, all of this presupposes that the original owner still has a claim arising under section 985 of the BGB. The draft bill seems to be a hopeful sign to the victims of the Nazi regime and their heirs that their claims about lost property are now open again. However, we have seen that the original owners may have lost their property in

many ways: through valid transfer, through an act of confiscation, through *bona fide* acquisition, in a public auction or through *usucapio*. It may be anticipated that only in very rare cases can victims or their heirs actually be able to prove the requirements of a claim arising under section 985 of the BGB.

There is a further problem that the Bavarian Government did not take into consideration: in 2012, the BGH qualified the settled case law that a claim based on section 985 of the BGB is precluded if the restitution laws of the Allied Forces were applicable, but the victim of the Nazi regime did not file his or her claim under them. A claim under section 985 of the BGB will, according to the BGH, not be precluded if the victim of the Nazi regime believed that his or her property had been lost and thus was not able to identify it. Nevertheless, the original owner's claim is time-barred. If the Bavarian draft bill reopens these claims, German courts will have to give justice to the victims of the Nazi regime by applying the provisions of the BGB. In the late 1940s, there was a widely shared sentiment that the provisions of the BGB were not sufficient to accomplish true justice in the extraordinary context of Nazi-looted art. And that was why the restitution laws of the Allied Forces were introduced in the first place.

A final problem with the draft bill concerns its general applicability, combined with its retrospective effect. The Bavarian Government thinks that the general applicability is an advantage, and that the retrospective effect is not a problem. If we assume that many pieces of art and other collectables, especially those that are very old, have been "lost" at one point of time, we may see a flood of claims. To give just one example: the relics of the three Magi are housed in the Cologne Cathedral. Until 1164, they were housed in Milan, Italy.[304] After the Emperor of the Holy Roman Empire of German Nations, *Frederik I Barbarossa* (1122-1190), conquered Milan in 1162, he gave the relics to the Archbishop of Cologne, Rainald von Dassel (1114/20-1167), in 1164, and they have been kept in Cologne ever since.[305] Rainald von Dassel knew how the relics came into the hands of *Frederik I.*[306] Thus, the diocese acted in bad faith when it came into possession of the relics. If the Bavarian draft bill were enforced, the diocese would not be able to rely on the statute of limitations any longer. The question of whether the Archbishop of Milan could suc-

304. 4 THE GROVE ENCYCLOPEDIA OF MEDIEVAL ART AND ARCHITECTURE 443 (Colum P. Hourihane ed., 2012).

305. *Id.*

306. *Id.*

cessfully raise a claim against the Archbishop of Cologne for the restitution of the relics would depend on the question of how *Frederic I* or Rainald von Dassel had acquired the property. This question would need to be solved by a German court after the relics had been safely housed in Cologne for 850 years. I do not want to say that there would be anything wrong with granting restitution in this case. However, the draft bill does not even discuss these issues. That may be an indication that the drafters of the bill have not fully looked into the possible consequences of the draft bill.

IV. CONCLUSION

The recent case of *Cornelius Gurlitt* has brought back to the general public's mind the problem of the restitution of Nazi-looted art by private individuals and private entities. The position, according to German law, is clear. Property based claims lapse after thirty years. Thus, there is little hope that the original owners will today have an enforceable claim for the restitution of *Raubkunst* that is in the hands of private individuals and entities. In January 2014, the Bavarian State Government proposed a reform of the BGB.[307] The draft bill hopes to re-open property based claims: anyone who, in bad faith, acquires the possession of lost property will, according of section 214(2) of the draft bill, be barred from relying on the statute of limitations to bar claims arising under section 985 BGB.[308] The draft bill is a direct reaction to the case of *Cornelius Gurlitt*. However, will the Bavarian draft bill give hope to Nazi victims and their heirs, that they will finally have enforceable claims against the present possessors of what is, or was, rightfully theirs?

In order to answer this question, we analyzed the availability of property based claims for the restitution of Nazi-looted art under German law. The conclusion was that in many cases, the original owners will have lost their ownership by now: either through a valid transfer, through a valid act of confiscation, through *bona fide* acquisition, through acquisition in a public action or through *usucapio*. In those cases in which the original owners, or their heirs, have not lost ownership, there is a further hurdle to overcome and bring a successful claim: the owner has to prove that he falls under the exception as it was formulated by the BGH in 2012, that his property based claim is not precluded by the restitution laws of the Allied Forces.

307. Regierungsentwurf, BR 2/14 (Ger.).

308. *Id.*

Thus, the Bavarian State Government's draft bill will only be of help in a limited number cases. This conclusion is not encouraging for the original owners of Nazi-looted art. Furthermore, the Bavarian draft bill suffers from a number of defects. It is based on false assumptions, it plays down constitutional problems, and it seems as if the Bavarian State Government has not fully researched the draft bill's consequences.

Where do we go from here? In the beginning, I posed the question of whether it is not clear that lost property must be returned to its rightful owners, regardless of what the applicable law is, regardless of the history of the lost property, and no matter what kind of property it is. However, seventy years after the collapse of the Nazi regime, we sadly cannot undo everything that has happened since. In a rule of law system, we simply cannot retrospectively undo an acquisition of ownership that has taken place between 1945 and today—at least, that is the position that most German lawyers would share. It is doubtful whether, in a rule of law system, we can retrospectively abolish the statute of limitations—and that is what the Bavarian draft bill hopes to do. This boils down to what has been observed by commentators in the late 1940s and early 1950s: incidents taking place in a non-rule-of-law state can hardly be captured with rule-of-law concepts like the BGB. Or to put it differently: in a functioning rule-of-law state, the rules about the transfer of ownership, on confiscation, on *bona fide* acquisition, on acquisition in public auctions, on *usucapio*, and on statute of limitations function well. Each legal institution provides a just balance between the interests of the parties. However, these rules are not designed to remedy the kind of horrific injustice that was caused by the Nazi regime. What is needed is specialized legislation. However, the time to introduce such special legislation to return Nazi-era assets should have occurred in the late 1940s. Sadly, back then, lawmakers were not able to foresee that the short statutes of limitations they introduced would cause further injustice for Nazi victims.

However, these issues will not affect the original owners of pieces of art in the Gurlitt collection because Cornelius Gurlitt and the *Kunsthalle* Bern Foundation agreed that all pieces of *Raubkunst* will be returned to their original owners. In cases comparable to the *Gurlitt* case, section 242 of the BGB may be of help: "[a]n obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."[309]

309. BGB § 198.

Many argue that a possessor will not be able to rely on the statute of limitations under section 242 of the BGB, if he hides lost property in order to later take advantage of the time period lapsing.[310] However, there is hardly any case law on this point.[311] In most other cases, a smooth avenue to restitution may be to simply approach the present possessors of Nazi-looted art, and to find a fair and just solution by way of negotiations.

310. Raue, *supra* note 15, at 4; Finkenauer, *supra* note 19, at 484; Finkenauer, *supra* note 79, at 102; von Plehwe, *supra* note 218, at 54; RUDOLPH, *supra* note 3, at 289.

311. OLG Stuttgart, June 20, 2000, 53 NJW 2000, 2683 (Ger.).