



PROGRAM MATERIALS

Program #2967

April 9, 2019

Art and the Spoils of War: Lessons from the Temple of Ishtar

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TALES FROM THE TEMPLE OF ISHTAR: RECOVERY OF CULTURAL ARTIFACTS

April 9, 2019

12:00 P.M.

Coffee House

Raymond J. Dowd

Partner — Dunnington Bartholow & Miller LLP — NYC



German Museum Loses Attempt To Reclaim Artifact From Estate

BY VESSELIN MITEV

AN ANCIENT gold tablet unearthed in a 1913 dig in modern-day Iraq that mysteriously ended up in the possession of a Holocaust survivor will remain in his estate, a surrogate has ruled, rather than be returned to a German museum.

In a ruling that reads like a script for an Indiana Jones movie, Nassau Surrogate John B. Riordan held that the Berlin museum, where the tablet had been kept for 19 years before its sudden disappearance at the end of World War II, could not stake a claim to the artifact as it had not acted promptly to recover it.

"The court finds that the museum's lack of due diligence was unreasonable," Surrogate Riordan wrote in *Matter of Flamenbaum*, File No. 328416, in holding that the museum's claim was barred by the doctrine of laches.



An ancient gold tablet excavated in Iraq from the site of an ancient Assyrian temple by German archaeologists in 1913 can stay with the estate of a Great Neck Holocaust survivor.

New York Law Journal, (April 5, 2010)

MATTER OF FLAMENBAUM

328146.

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View Case

Cited Cases

Citing Case

27 Misc.3d 1090 (2010)

899 N.Y.S.2d 546

In the Matter of the Accounting of HANNAH K. FLAMENBAUM, as Executor of RIVEN FLAMENBAUM, Deceased. VORDERASIATISCHES MUSEUM, Claimant.

Surrogate's Court, Nassau County.

Decided March 30, 2010.

Attorney(s) appearing for the Case

Hamburger Weinschenk & Fisher, New York City, for Vorderasiatisches Museum, claimant.

Jaspan Schlesinger Hoffman LLP, Garden City, for Hannah K. Flamenbaum, executor.

Reilly & Reilly, LLP, Mineola, for Israel Flamenbaum, objectant.

CONVERSION & REPLEVIN CLAIMS

The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner. See *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384, 626 N.Y.S.2d 472 (1st Dep't 1995). Similarly, a claim for replevin involves an entitlement to property and demand for the return of the property has been made and refused by the possessor of the chattel. See *In re Peters*, 34 A.D.3d 29, 34, 821 N.Y.S.2d 61 (1st Dep't 2006); see also *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 146, 550 N.Y.S.2d 618 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) (determining that the cause of action for replevin against a thief accrues at the theft, but as against a good faith buyer accrues when the demand is made upon the buyer).

Gowen v Helly Nahmad Gallery, Inc., 60 Misc 3d 963, 984 [Sup Ct 2018]

DOCTRINE OF LACHES

To prove laches, Plaintiff must show that: (1) Defendants were aware of their claim, (2) they inexcusably delayed in taking action; and (3) Plaintiff was prejudiced as a result. *Bakalar*, 2006 WL 2311113, at *3; see also *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir.1998).

Bakalar v Vavra, 819 F Supp 2d 293, 303 [SDNY 2011], affd, 500 Fed Appx 6 [2d Cir 2012]

THE TABLET WAS FOUND IN A SAFE DEPOSIT BOX IN GREAT NECK, NY

OPINION OF THE COURT

JOHN B. RIORDAN, J.

An ancient gold tablet, discovered during archaeological excavations in 1913 in the Ottoman Empire, disappeared from a Berlin museum in the immediate aftermath of World War II and reappeared almost 60 years later in the safe deposit box of a Holocaust survivor in Great Neck, New York. Before the court today is a claim filed on behalf of the Vorderasiatisches Museum of the Federal Republic of Germany against the estate of Riven Flamenbaum for the return of that gold tablet. For the reasons set forth below, the claim is denied.



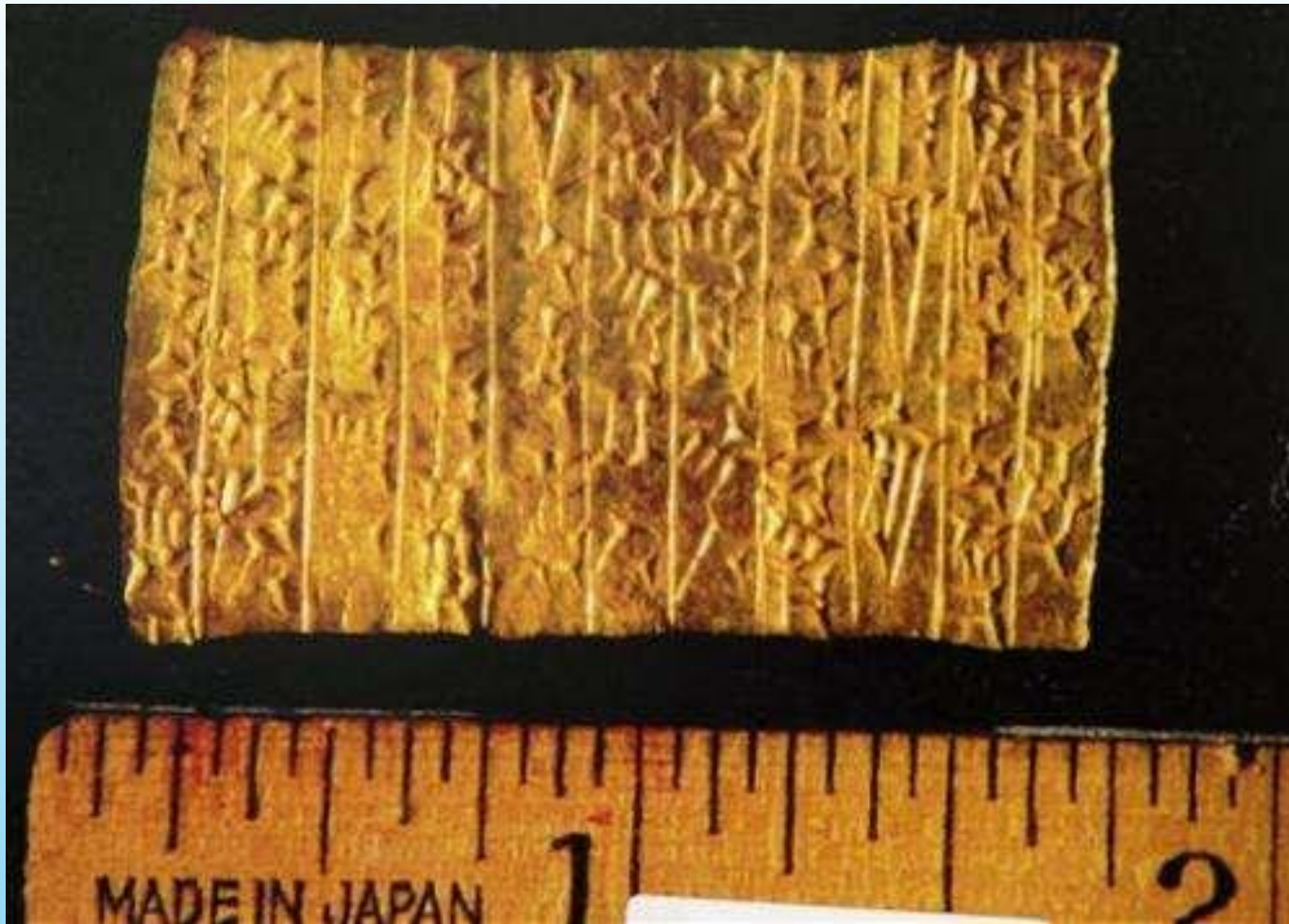
DISPUTE BETWEEN SIBLINGS I

Procedural History

On March 10, 2006, Hannah K. Flamenbaum filed her account as executor of the estate of her father, Riven Flamenbaum. Mr. Flamenbaum died on April 3, 2003, a resident of Great Neck, leaving three children surviving, viz., Hannah (petitioner herein), Israel and Helen, all of whom are named in decedent's will, dated April 27, 1971, as equal residuary beneficiaries. The accounting petition names no other interested parties. The record reflects that Israel was properly served with an accounting citation while Helen filed a knowledgeable waiver and consent.

DISPUTE BETWEEN SIBLINGS II

Israel (objectant herein) filed multiple objections to the account on May 25, 2006, one of which is that the executor failed, in schedule A of her account, to properly account for decedent's coin collection. Objectant states that the decedent possessed, among other gold coins, "one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet and the property of a museum in Germany which has notified objectant's attorney of its claim." A copy of an e-mail dated May 19, 2006 is attached to the objections. It reflects that Israel's attorney had notified the Vorderasiatisches Museum in Berlin about the executor's possession of the "gold tablet." A notice of appearance on behalf of the museum (claimant herein) and a notice of claim for the gold tablet were filed with the Surrogate's Court on October 5, 2006. Pursuant to a subsequent court conference in connection with the executor's accounting and the claim filed on behalf of the museum, it was decided that the court would determine the validity and enforceability of the claim as a preliminary step in the accounting proceeding.



The Ishtar Temple Tablet, which dates to 1243 - 1207 B.C. is inscribed with an exhortation honoring the Assyrian Empire's King Tukulti-Ninurta (I). It was found by German archeologists a century ago in what is now northern Iraq, and weighs less than 10 grams.

TRANSLATION OF THE INSCRIPTION ON THE TABLET



Adapted from A.K. Grayson, *Assyrian Rulers of the Third and Second Millennia, B.C.* (Vol. I) (University of Toronto Press 1987)

(1-4) Tukulti-Ninurta. king of the universe, king of Assyria, son of Shalmaneser king of Assyria:

(5-17) Ilu-shuma, a king who preceded me, built a temple of the goddess Denitu, my mistress. That temple had become dilapidated and old. I cleared away its debris down to the bottom of the foundation pit. I rebuilt it from top to bottom and deposited my monumental inscription.

(18-21) Should a later prince restore it and there inscribe my name, then Assur will listen to his prayers.

What is Assyriology?

Assyriology at its core is the study of cuneiform, one of the earliest forms of writing in human history. Cuneiform is a type of script composed of wedge-like shapes impressed into clay tablets by a reed or reed-like stylus. Many languages in the Ancient Near East adopted this writing method: Sumerian, Akkadian, Ugaritic, Hittite, and Hurrian are only a few examples of the languages that took advantage of this script. Cuneiform was initially logographic, meaning that the signs represented words or grammatical aspects of the language; the invention of representing sounds with said signs, which linguists define as a phoneme, scribes were soon allowed to write nearly anything they could hear or say.

The earliest cuneiform tablets we have are based in an economic context: the clay tablets bore rudimentary signs tallying various numbers of sheep or amounts of barley, for example. The written system became quickly complex after these initial tablets and scribes then began composing treaties, myths, religious songs, and even recipes. When these tablets were incidentally heated, they hardened and became preserved so much so that we are able to find them and read them to this day. Assyriology is the study of these cultures, beginning from the 4th millennium up until the beginning of the current era. Academics strive to read the thousands of cuneiform tablets found across the Middle East in order to better understand life, culture, and history of Ancient Near Eastern civilizations.

Near Eastern Languages & Civilizations

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Eckart Frahm



Eckart Frahm (PhD Göttingen 1996, Habilitation Heidelberg 2007) was appointed Assistant Professor of Assyriology at Yale in 2002 and Professor in 2008. His main research interests are Assyrian and Babylonian history and Mesopotamian scholarly texts of the first millennium BCE. His undergraduate courses at Yale include topics in Mesopotamian history, religion, and literature, and the Bible in its ancient Near Eastern setting.

Frahm is the author of five books: a study of the inscriptions of the Assyrian king Sennacherib (*Einleitung in die Sanherib-Inschriften*, AfO Beih. 26, Vienna 1997); an edition of new historical and historical-literary texts from Assur (*Keilschrifttexte aus Assur literarischen Inhalts* 3, WVDOG 121, Wiesbaden 2009); a volume of hand copies of two hundred Late Babylonian letters and documents from Uruk, co-authored with Michael Jursa (*Neo-Babylonian Letters and Contracts from the Eanna Archive*, YOS 21, New Haven 2011); a comprehensive study of ancient Near Eastern hermeneutics (*Babylonian and Assyrian Text Commentaries: Origins of Interpretation*, GMTR 5, Münster 2011); and a general history of

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DR. FRAHM'S EXPERT REPORT

2.2. History of the object

The excavators discovered the gold tablet, as stated above, on September 25th, 1913, when digging in the foundations of the Ishtar temple in Ashur. Together with a badly eroded silver tablet, it was found in square eA7II, 66 cm under a dais. It lay upon a cushion of beads that formed a so-called foundation deposit dating to the reign of the Assyrian king Tukulti-Ninurta I (1243-1207 BCE).

The excavations in Assur ended in 1914, and the objects destined for Berlin, among them the gold tablet, were transported to Basra and loaded on board of the German freighter "Cheruskia."³ But with the outbreak of World War I, the "Cheruskia" was forced to stop its voyage to Germany in Lisboa, where the objects from Ashur were confiscated and eventually stored in the University of Porto. It took more than a decade before they were finally, in 1926, released and shipped to the Berlin Museum. The inventory book documents that the gold tablet was among the objects from Ashur that reached Berlin in the course of this year.

PERGAMON MUSEUM



The tablet was placed in the Vorderasiatisches Museum, part of the Pergamon Museum, in 1926, and went missing in 1939, when the Nazi regime closed the museum. In 1945 the museum was occupied by Stalin's troops.

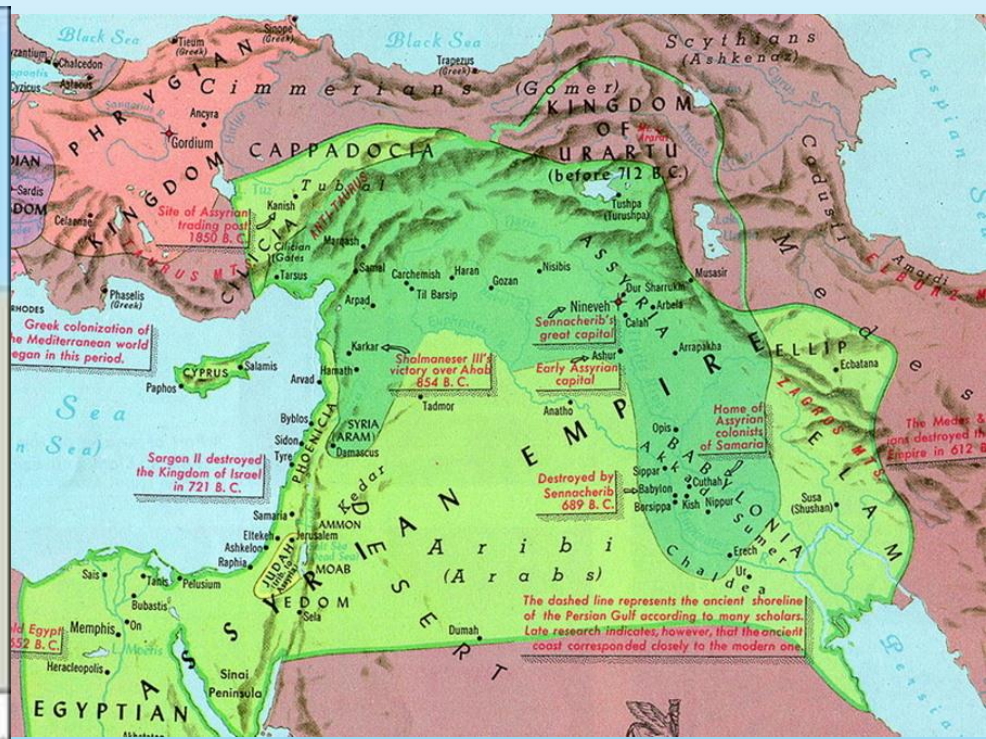
ISHTAR GATE



- Eighth gate to the inner city of Babylon
- Constructed around 575 BCE by order of King Nabuchadnezzar II



ANCIENT CITY OF ASHUR, ASSYRIAN EMPIRE





- The first scientific excavations in Ashur were conducted by a German expedition (1903–13) led by Walter Andrae
- Ashur was a name applied to the city, to the country, and to the principal god of the ancient Assyrians.

PARTAGE



- “**Partage**” (From the French “partager” meaning “to share”) was a system of sharing archaeological exploration costs by sharing the ownership of the artifacts that were excavated
- Foreign-led excavation teams provided expertise and materials to conduct excavations
- This practice built the collections at the University of Pennsylvania, Harvard and Yale; the British Museum, the Brooklyn Museum and the Metropolitan Museum of Art

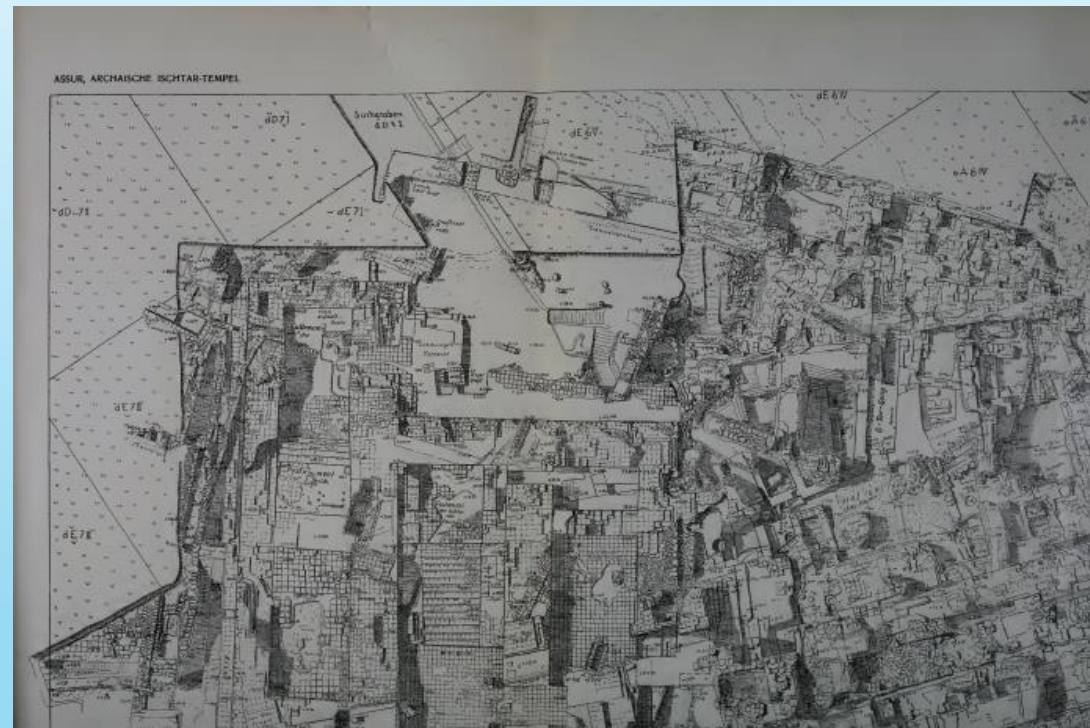
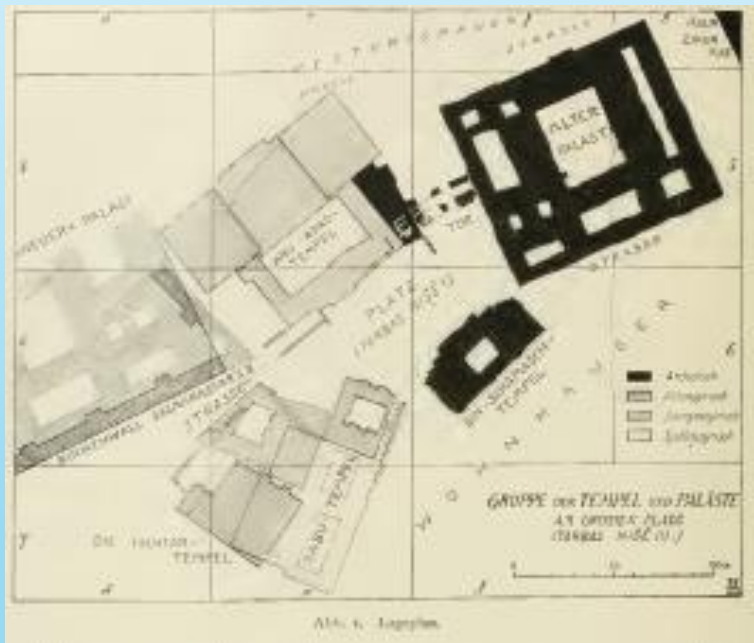
“The Archaic Ishtar Temples in Ashur”



- Book published in 1922 showcasing Andrae's findings
- Digitized by the Internet Archive in 2011 with funding from University of Toronto

“The Archaic Ishtar Temples in Ashur”

Diagrams of the Temple



“The Archaic Ishtar Temples in Ashur”

Photos of the excavation site



“The Archaic Ishtar Temples in Ashur”

Some items excavated



Abb. 2. Terrakotta I.



Abb. 6. Terrakotta II.



Abb. 21. Basreliefs. Steinrelief des Tello (nach Dev. et Chabot, p. 200).



Abb. 10. Jüngere Hohlkannen: 1. 1/2 H. nat. Gr. 2. 1/2 H. nat. Gr. 3. 1/2 H. nat. Gr. 4. 1/2 H. nat. Gr.

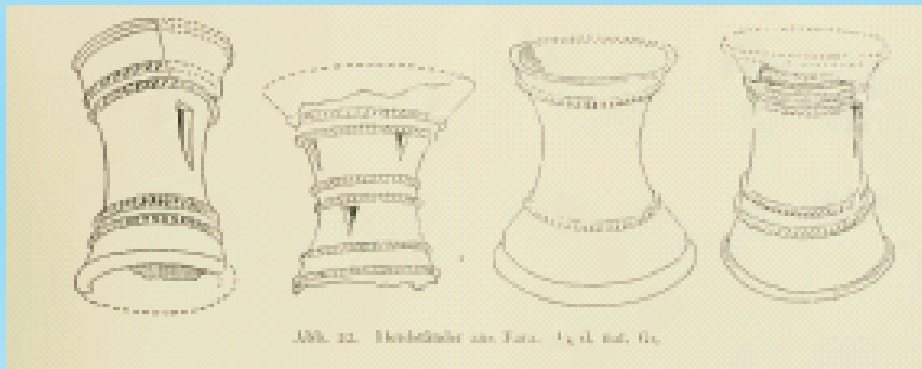


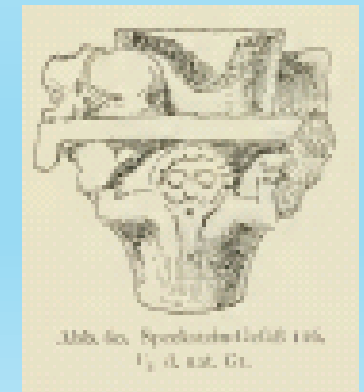
Abb. 12. Hohlkannen aus Tello. 1. 1/2 H. nat. Gr. 2. 1/2 H. nat. Gr. 3. 1/2 H. nat. Gr. 4. 1/2 H. nat. Gr.



a) Ergänzung des Köpfchens Nr. 80 (vgl. Tafel 31)
3:4

“The Archaic Ishtar Temples in Ashur”

Some items excavated



“The Archaic Ishtar Temples in Ashur”

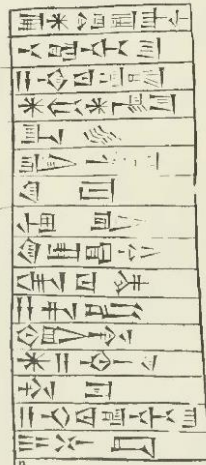
Einem mit Standring und eckiger Schulter, meist in sehr gelanger Linie und sorgfältiger Ausführung, die diese Gefäße von den dickwandigen Vorratstöpfen vorteilhaft unterscheidet. Davon zeigt Tafel 60, B links ein gutes Stück aus dem Grabe 2305. Ein anscheinend älteres Stück ist die Graburne 22578, Seite 110, Abb. 87 und 88, die sehr wohl zu einer Bestattung der E-Zeit gehören kann. Kindbestattung 22540, die in die gleiche Zeit gehören wird, findet man in der Ruine der Räume südlich des G-Hofes. Hier nicht festgestellt.

Die Inschriften der E-Zeit

haben im Gegensatz zu den bisher beschriebenen Funden nur eine Ordnung. Sie stammen nicht aus klaren Schichten, sind aber in der Mitte gefunden. Die eine davon, nämlich die Platten-Inschrift des Zariku (S. 4) bezieht sich auch auf den Tempel eines der Ishtar. Auf einem dreieckigen Kupferblech ziselierter, rechteckiger Schriftform. Wegen des Oxyds haben wir noch nichts bestimmt und wissen daher auch nicht, ob nach einer, sehr wohl möglich auf unseren Tempel Bezügliches herauskommen wird.

155. Die Inschrift des Zariku. (Ass. Nr. 21982. Tafel 64)

Die Inschrift ist bereits in den Mitt. der Deutschen Orient-Gesellschaft Übersetzung mitgeteilt, die, soweit mir bekannt, keinen Widerspruch hat. Ich darf sie also hier so wiedergeben.



bit #NIN-ô-kal-lim
be-la-ti-šû
a-na ba-la-aš
#Bur-#Sin
DA-LUM
šar Ūn-
ki-ma
û šar
ki-ib-ra-tim
ar-ba-im
Za-ri-ku
šakkanak
#A-šip-ki
ardu-šu
a-na ba-la-ti-šû
i-yu-uš

gegeben,
hat Zariku,
der Statthalter
der Stadt Assur,
sein Diener,
für sein Leben
gebaut.

Abb. 78. Inschrift des Zariku.

des verlegt. Es ist dies, wie wir im II. Bande des näheren darzustellen haben werden, jener Raum hinter dem Kultraum der Ishtar von Assur, in dem mehrere der steinernen Symbolsockel gefunden sind. Das Pflaster ist schlecht ausgebessert, muß aber noch aus jungassyrischer Zeit, etwa aus dem 8. Jahrhundert, sein. Ich halte es nicht für bloßen Zufall, daß die Platte in dieser Weise eingefügt worden ist, die uns ihre Inschrift gerade besonders gut erhalten hat. Zweifellos würdigte man ihren historischen Wert, wollte aber doch nicht gerade zeigen, daß es einmal eine Abhängigkeit Assurs von Babylonien gegeben hat.

Ich habe diese Platte mit der des Ititi auf eine und dieselbe Tafel zusammengestellt, um zu zeigen, daß hier eine feststehende Form von Weihinschriften vorliegt. Die gut geglättete, quadratische Fläche

Ishtar Temple Tablet



The Monroe Place Courthouse in [Brooklyn](#), [New York City](#), home of the Second Department of the Appellate Division

FLAMENBAUM ARGUMENTS

BRIEF FOR EXECUTOR-RESPONDENT-CROSS-APPELLANT

Of Counsel:

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Seth A. Presser

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- Laches defense bars any claim museum may have to the tablet.
- Surrogate erred in ruling museum had title to the tablet because museum cannot prove it maintained title when the tablet went missing or at the time the action began.

VORDERASIATISCHES MUSEUM'S ARGUMENTS

BRIEF FOR CLAIMANT-APPELLANT-RESPONDENT

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& FISHER
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– and –

DUNNINGTON, BARTHOLOW
& MILLER LLP
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(212) 682-8811

Of Counsel:

FRITZ WEINSCHENK
JOHN C. FISHER
RAYMOND J. DOWD

- There is no basis to conclude that the tablet belonged to Flamenbaum.
- **Laches defense is unavailable** because:
 1. Flamenbaum Estate failed to prove delay or prejudice;
 2. Museums are not required to show any diligence as a prerequisite for recovery of stolen art.
- Flamenbaum Estate waived its laches defense.
- Flamenbaum Estate has unclean hands; equity will not aid a wrongdoer.



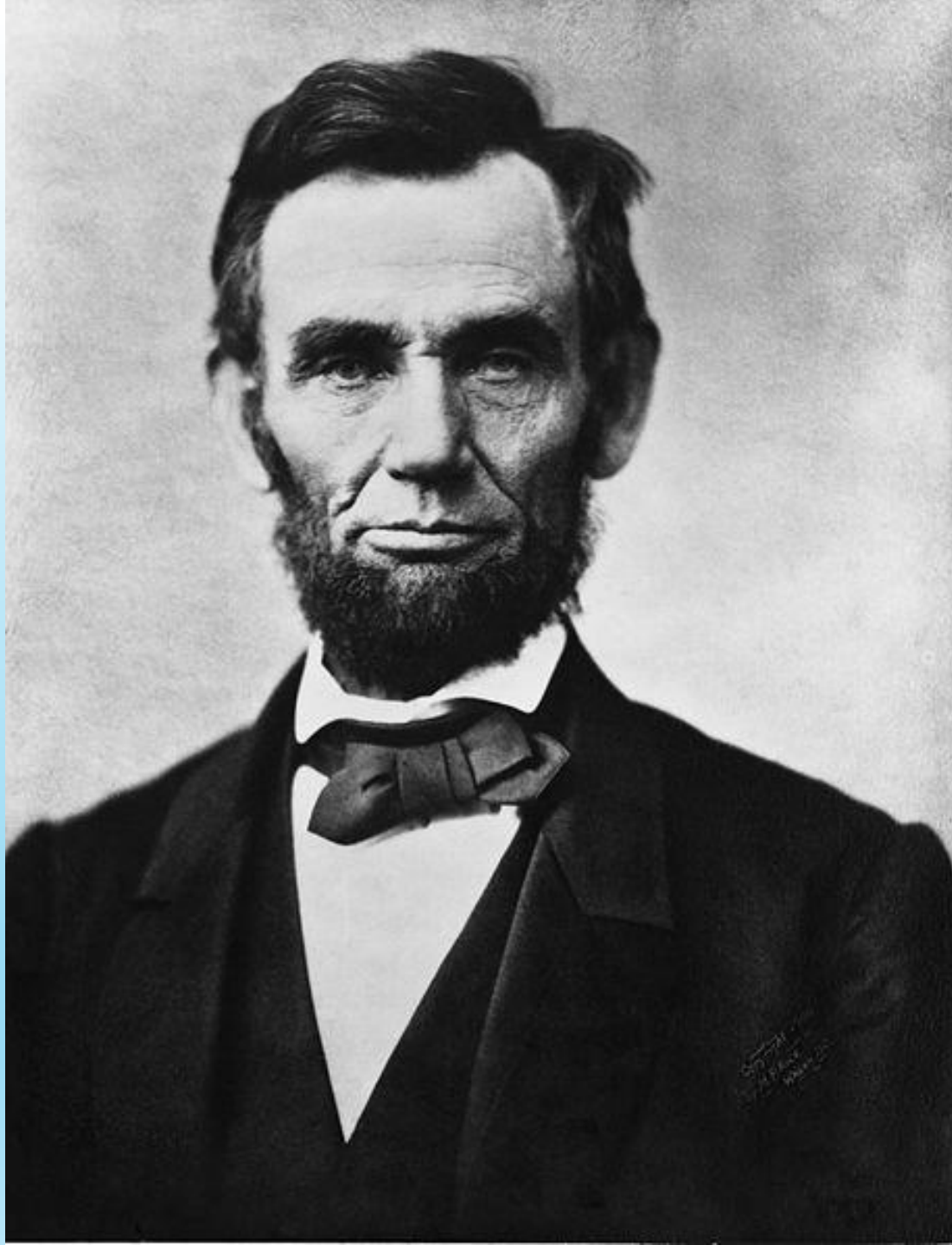
German Jewish Refugee Soldiers of WWII

Fritz Weinschenk – Argued at age 92



The 1842 courthouse of the
New York Court of Appeals in
Albany, Henry Rector, architect





31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character-such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and the churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army or of the United States.

U.S. signed the Hague Conventions of 1899 and 1907 which incorporated the protections of the Lieber Code of public and private cultural property.

AMICUS BRIEF

VORDERASIATISCHES MUSEUM,

Claimant-Respondent,

against

HANNAH K. FLAMENBAUM,

Executor-Appellant,

and

ISRAEL FLAMENBAUM

Objectant-Respondent.

BRIEF OF AMICI CURIAE

Amici are: the Archaeological Institute of America, the American Schools of Oriental Research, the Holocaust Art Restitution Project, the Israelitische Kultusgemeinde Wien (Jewish Community Vienna), the Lawyers' Committee for Cultural Heritage Preservation, the Monuments Men Foundation for the Preservation of Art, the Penn Cultural Heritage Center at the University of Pennsylvania, the United States Committee of the Blue Shield, the State of Baden-Württemberg of the German Federal Republic, the Republic of Cyprus and the Republic of Poland. By Order dated October 18, 2012, this Court granted Amici motion for leave to participate in these proceedings.

Specifically, Amici ask that this Court reject the entreaties of Executor-Appellant Hannah K. Flamenbaum (“Appellant”) that the courts of New York State, long a bastion against entry of looted art into this country, be the first to recognize a “spoils of war” doctrine under which art and cultural objects taken in the course or immediate aftermath of warfare become the property of the taker. This doctrine, more in tune with the mentality and mores of the 1700s than the current era, is at odds with American legal principles dating back at least to the Lieber Code which was written at the request of President Lincoln and placed into effect by the War Department in 1863 to prevent looting of cultural objects by Union soldiers during the Civil War.

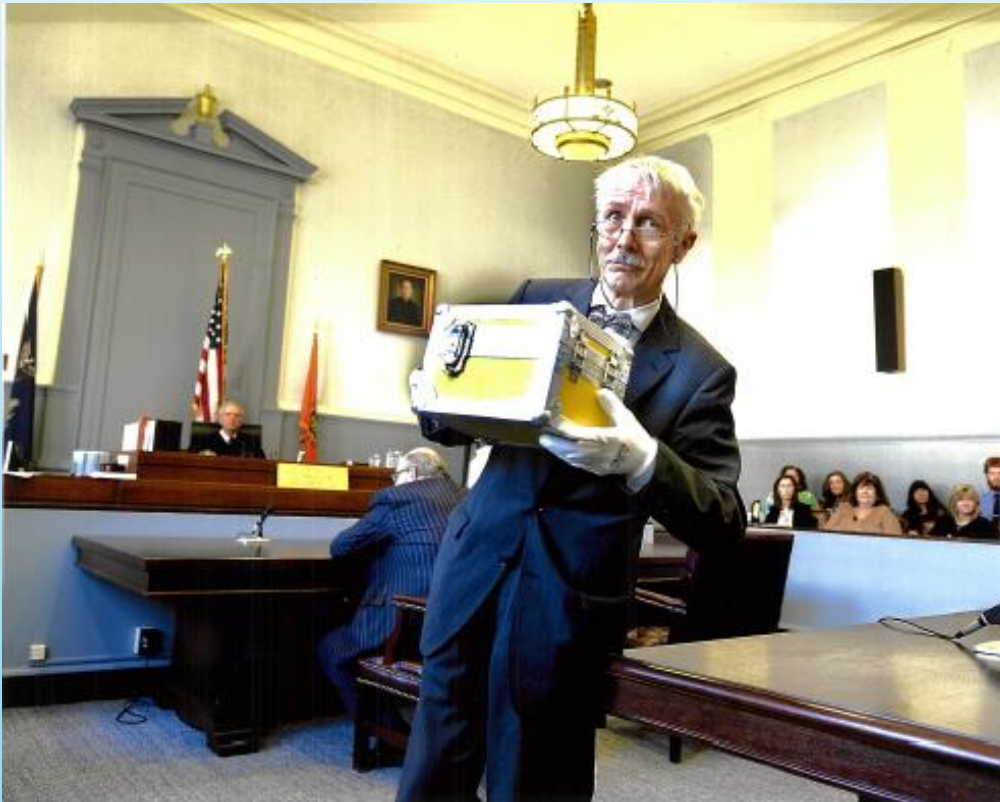
NY COURT OF APPEALS



“We decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force.”

“The ‘spoils of war’ theory proffered by the estate—that the Russian government, when it invaded Germany, gained title to the museum’s property as a spoil of war, and then transferred that title to the decedent—is rejected.”

IN RE FLAMENBAUM



The New York Court of Appeals reversed the Surrogate Court's decision, and ordered the estate of Riven Flamenbaum, holocaust survivor, to return the ancient gold tablet.

SURROGATE MCCARTY — NASSAU COUNTY



Judge Edward W. McCarty III wore white gloves as he presided over a ceremony to transfer ownership of the tablet.

“It represents humankind’s required preservation of a treasure”

RAYMOND DOWD, MUSEUM'S COUNSEL



“New York has really affirmed its moral leadership in protecting true property owners.”

“This decision makes it clear that the rule of finders keepers is not the law in New York.”

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Raymond J. Dowd

Partner – Dunnington Bartholow & Miller LLP – NYC

State Of New York
Court of Appeals

In the Matter of the Account of Proceedings of
Hannah K. Flamenbaum, as Executor of the Estate of

RIVEN FLAMENBAUM,

Deceased

And the Application of Vorderasiatisches Museum for a Determination of the Validity and
Enforceability of a Verified Claim.

VORDERASIATISCHES MUSEUM,

Claimant-Respondent,

against

HANNAH K. FLAMENBAUM,

Executor-Appellant,

and

ISRAEL FLAMENBAUM

Objectant-Respondent.

BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT

Amici, a group of organizations concerned with restitution of stolen and looted art and cultural property, particularly cultural objects taken during times of armed conflict, and nations and other foreign entities that have suffered cultural losses as a result of wartime thefts and have engaged in the restitution process,¹ submit this brief in support of affirmance of the Decision and Order of the Appellate Division, Second Department, dated and entered on May 30, 2012 (“Appellate Order”) which ordered that the property at issue in these proceedings, an ancient tablet (“Tablet”),² be returned to its rightful owner, the

¹ Amici are: the Archaeological Institute of America, the American Schools of Oriental Research, the Holocaust Art Restitution Project, the Israelitische Kultusgemeinde Wien (Jewish Community Vienna), the Lawyers’ Committee for Cultural Heritage Preservation, the Monuments Men Foundation for the Preservation of Art, the Penn Cultural Heritage Center at the University of Pennsylvania, the United States Committee of the Blue Shield, the State of Baden-Württemberg of the German Federal Republic, the Republic of Cyprus and the Republic of Poland. By Order dated October 18, 2012, this Court granted Amici motion for leave to participate in these proceedings.

² Amici note that this gold disc was one of three that were excavated in foundation deposits at the corners of the great ziggurat at the site of Assur, located in northern Iraq. The two examples that went to the Berlin Museum were apparently both stolen during World War II, while the third example was sent to Istanbul (and is still there). The discs measure 5cm in diameter and so look more like large gold coins than foundation deposits to an untrained eye. Walter Andrae, *Die Grosse Zikurra von Assur*, in *Die Heiligtümer Des Gottes Assur Und Der Sin-Samaš-Tempel In Assur* 2, 3 and Plate 3; A. Kirk Grayson, *Assyrian Rulers of the Third and Second Millennia BC (to 115 BC)* 211-12 (1987). The inscribed discs are of immense historical and archaeological value, as they were the sole in situ documentation for the builder of this structure, identified by the inscription as one of the rulers of Assyria named Shalmaneser (probably Shalmaneser I). We believe that these discs belong in the Museum and their story exemplifies the reason that the law of the United States throughout the twentieth and into the twenty-first centuries has forbidden the plunder of cultural heritage collections during wartime. These objects are perfect examples of the value of documented context and of keeping such finds, together with their documentation,

Vorderasiatisches Museum Berlin (“Museum”). Specifically, Amici ask that this Court reject the entreaties of Executor-Appellant Hannah K. Flamenbaum (“Appellant”) that the courts of New York State, long a bastion against entry of looted art into this country, be the first to recognize a “spoils of war” doctrine under which art and cultural objects taken in the course or immediate aftermath of warfare become the property of the taker. This doctrine, more in tune with the mentality and mores of the 1700s than the current era, is at odds with American legal principles dating back at least to the Lieber Code which was written at the request of President Lincoln and placed into effect by the War Department in 1863 to prevent looting of cultural objects by Union soldiers during the Civil War.

INTRODUCTION

Appellant’s core defense in this case, laches, requires her to make a showing of unreasonable delay on the part of the original owner of the property which caused prejudice to her, such as by interfering with her ability to present her case. *Vineberg v. Bissonnette*, 548 F.3d 50, 56 (1st Cir. 2008); *Sotheby’s, Inc. v. Shene*, No. 04 Civ. 10067 (TPG), 2009 U.S. Dist. LEXIS 23596, at *13 (S.D.N.Y. Mar. 23, 2009). Appellant bases her laches defense on the bold and unsupported assertion that if the Museum’s claim had been brought while Riven Flamenbaum

in the museum that made the discovery, for the benefit of scholarship and to allow museum visitors to experience related objects together.

(“Flamenbaum”) was still alive, he would have had the opportunity to prove he had acquired good title to the Tablet under a “spoils of war” theory, either by stealing the Tablet himself from the Museum or by acquiring it from Soviet troops, who had previously stolen the Tablet from the Museum. However, neither U.S. nor international law recognizes any such “spoils of war” doctrine which would have conferred title to the Tablet on Flamenbaum under either factual scenario. Under U.S. common law, stolen property remains stolen property and a theft never transfers title either to the thief or to a subsequent good faith purchaser. *See Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982); *Sotheby’s, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596, at *7-*8; *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966), *modified on other grounds*, 279 N.Y.S.2d 608 (1967), *modification rev’d*, 298 N.Y.S.2d 979 (1969). Neither international nor U.S. law allows theft of cultural objects during wartime to result in title.

INTEREST OF AMICI

Amici include organizations dedicated to the preservation of cultural heritage and, in particular, include several that were and are still involved in efforts to protect cultural heritage during times of armed conflict. Amici also include foreign entities that have themselves been victims of wartime cultural losses and have engaged in the restitution process to recover cultural objects. Amici are sympathetic to victims of violence, such as Flamenbaum and members of his

family, abhor the persecution and murders carried out by the Nazi regime during the Second World War and condemn the destruction of cultural heritage perpetrated by the Nazis against individuals of Jewish descent and many others. Nonetheless, no such principle of U.S. or international law as a supposed doctrine of “spoils of war” has been recognized in this country for well over a century, at the very least; as detailed below, U.S. courts, when called upon to consider the status of cultural objects taken during wartime, have consistently rejected any such doctrine. In alleging the existence of such a doctrine, Appellant fails to cite any source of international or U.S. law in support of this theory (Appellant’s Letter Brief at 16). Nor can any be found. Amici urge this Court not to be the first to depart from these universal and well-settled principles and not to open the door to approving the types of looting and pillage of cultural artifacts that all too often accompany armed conflict, conquest and military occupation.

ARGUMENT

Appellant’s suggestion that looting and illegal removal of cultural objects during wartime by a conquering or occupying military force or by individuals is anything other than outright theft is contrary to United States’ domestic law and to international law – international principles which the United States has played a leading role in developing. In the nineteenth century, the United States was the first nation to codify what had been an evolving principle – that cultural objects

were not to be treated as lawful war booty, that is, spoils that could be freely taken during wartime. The Lieber Code, drafted for the Union Army by Francis Lieber at the request of Abraham Lincoln in 1863, stated:

If [classical] works of art, libraries, [or] collections ... can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

*In no case shall they be sold or given away, if captured by the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.*³

³ *The Lieber Code: Instructions for the Government of Armies of the United States in the Field* Art 36 (emphasis added) (1863) available at www.civilwarhome.com/liebercode.htm. Lieber was likely influenced by the actions of the Duke of Wellington and Viscount Castlereagh after their victory in 1815 at the Battle of Waterloo (at which Lieber was present) when they refused to accept as “spoils of war” the works of art and other cultural objects that Napoleon had earlier stolen from several European nations. See Margaret M. Miles, *Art As Plunder: The Ancient Origins of Debate About Cultural Property* 349-51 (2008). A few years earlier, a British judge refused to allow the British to keep a cargo of paintings that they had seized from a ship, the *Marquis de Somerueles*, that was carrying paintings from Italy to Philadelphia during the War of 1812. *The Marquis de Somerueles*, Nova Scotia Stewart’s Vice-Admiralty Reports 482 (Vice-Admiralty Court of Halifax 1813).

The recognition that art works and cultural objects deserved a special status and should not be subject to the same rules that applied to other types of property can be traced to Greek and Roman times. The Greek historian Polybius condemned the wanton destruction of cultural works without military justification as the product of a “frenzied mind at the height of its fury.” The Roman orator Cicero condemned the actions of Gaius Verres, the Roman governor of Sicily, whom Cicero prosecuted for corruption, including the looting of cultural objects. See Sen. Exec. Rep. No. 110-26, *The Hague Cultural Property Convention*, at 1-4 (Sept. 16, 2008), available at <http://www.gpo.gov/fdsys/pkg/CRPT-110erpt26/html/CRPT-110erpt26.htm>; Miles, *supra*, at 82-86, 96-99; Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 Cardozo Public Law, Policy & Ethics J. 677, 680 (2009).

The Lieber Code, written for a military advisory committee led by General Henry Halleck, greatly influenced the development of two international legal instruments that codified principles for the conduct of warfare during the two World Wars of the past century: the Hague Conventions of 1899 and 1907. Articles 23, 28 and 47 of the Annex to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land outlawed pillage and seizure by invading forces. Likewise, Article 56 of the 1907 Hague Convention respecting the Laws and Customs of War on Land (of which the United States is a State Party) forbids “seizure of, destruction or willful [sic] damage done to institutions . . ., historic monuments, works of art and science . . .”. The 1954 Hague Convention on the Protection of Cultural Property During Armed Conflict, 249 U.N.T.S. 215 (May 14, 1954), which was based on orders issued by General Eisenhower for the Allies’ conduct of war in Europe, continued these prohibitions. In particular, Article 4(3) of the 1954 Convention states:

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property.

The United States signed this Convention in 1954, indicating its general acceptance of these principles (although only ratifying it in 2009). The United States had, however, adopted and followed the core provisions of the 1954 Hague Convention as a matter of practice, regarding it as customary international law.

For example, during the wars in Iraq and Afghanistan, the United States military has been subject to General Order No. 1A, which prohibits the looting of cultural sites or removal of cultural objects from either country. *Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR* (Dec. 19, 2000) Para. g (prohibiting “[r]emoving, possessing, selling, defacing or destroying archeological artifacts or national treasures”), available at <http://www.cemml.colostate.edu/cultural/09476/pdf/GeneralOrderGO-1A.pdf>. See also Dick Jackson, *Cultural Property Protection in Stability Operations*, 2008 *The Army Law* 47, 48 (2008).

During the Allied invasion of Europe and post-War occupation of Germany, the United States expended considerable effort in protecting cultural objects from theft and ensuring that they were returned to their rightful pre-War owners or to the nations from which the objects originated. See Lynn Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1994). Through the efforts of the Monuments, Fine Arts and Archives Officers, United States military forces sought to protect these artworks and cultural objects from local citizens and survivors of Nazi persecution, as well as from members of the armed forces themselves. It was the official policy of the United

States and the other western Allied nations to protect – not to take – cultural objects and to prohibit their troops from taking such objects.⁴

Military law put in place by the United States for its occupation zone of Germany at the end of the Second World War explicitly forbade “the sale, transfer and export of works of art and other cultural material. Its purpose is to make possible the restoration to their rightful owners of loot taken from other countries. In furtherance of this purpose, personnel of the Allied Expeditionary Forces in occupied German territory will not purchase or otherwise traffic in such objects.” Military Government of Germany, *Proclamations, Laws and Ordinances*, Law 52, Article II, para. 3(d). The United States itself refused to accept any objects from the German collections and returned to Germany art works taken to the United States for temporary display. Nicholas, *supra*, at 369-405. This policy that stolen

⁴ The Rules of Land Warfare of the United States War Department applicable during World War II stated:

321. Two classes of movable property. – All movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader’s government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated.

Quoted in *Menzel*, 267 N.Y.S.2d at 810 n.10. An order issued by General Eisenhower stated that “souvenir hunting, writing on walls or damage in any form will be dealt with as military offences”. Quoted in Robert M. Edsel, *Rescuing Da Vinci: Hitler and the Nazis Stole Europe’s Great Art – America and Her Allies Recovered It* 130 (2006). An order issued by Lt. General Omar N. Bradley stated: “We are a conquering army, but we are not a pillaging army.” *Id.* at 136. There are examples in which it seems that U.S. servicemen may have improperly appropriated cultural objects from Germany. However, these takings were never sanctioned by the United States or the U.S. military and should be viewed as rogue, illegal actions – nor have they been validated by any court in this country. See, e.g., *Kunstsammlungen zu Weimar*, 678 F.2d 1150; *Shene*, 2009 U.S. Dist. LEXIS 23596, at *9.

cultural objects should be returned to their rightful owners has been consistently recognized in court decisions since the War. *See Kunstsammlungen Zu Weimar*, 678 F.2d 1150; *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (1990 7th Cir.); *Shene*, 2009 U.S. Dist. LEXIS 23596, at *13.

In the post-War Nuremberg trials, the United States joined in the prosecution of members of the Nazi leadership for crimes against humanity and for violating customary international law that, among other things, prohibited the theft and pillage of cultural objects. Alfred Rosenberg, as director of the Nazi Einsatzstab Reichsleiter Rosenberg (“ERR”), organized the theft and confiscation of art works throughout occupied Europe. After the War, he was convicted of war crimes and crimes against humanity, including his involvement with the ERR’s plunder of both public and private property, and was subsequently executed. Nicholas, *supra*, at 132-42. This history demonstrates that both international law and U.S. law, policy and practice strenuously condemn the theft and looting of cultural artifacts during war and armed conflict, with World War II as no exception.

U.S. courts have also consistently held that the theft of cultural objects taken during wartime does not transfer title either to the thief or to a subsequent good faith purchaser. This principle was first addressed in the context of Nazi art looting in *Menzel*, in which the court allowed a victim of Nazi persecution to

recover a Chagall painting stolen by the Nazis; the Chagall had been found in the collection of a New York collector who had purchased it in good faith. The court held that the collector had not acquired title. The court there stated, "*Pillage, or plunder, . . . is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful. Where pillage has taken place, the title of the original owner is not extinguished.*" *Menzel* 267 N.Y.S. 2d at 811.

In *Kunstsammlungen Zu Weimar*, the U.S. Court of Appeals for the Second Circuit allowed a German museum to recover two portraits by Albrecht Dürer that were stolen from a German museum, probably by a U.S. serviceman. In *Shene*, a volume of sixteenth century drawings and etchings was stolen from the Staatsgalerie Stuttgart apparently by a U.S. serviceman in 1945. The court recognized the continuing validity of Baden-Württemberg's title (the Staatsgalerie's successor-in-interest), stating that the thief could not pass valid title of the book to a subsequent purchaser.⁵

More recent is the decision, *United States v. Aleskerova*, 300 F.3d 286 (2d Cir. 2002), in which the U.S. Court of Appeals for the Second Circuit affirmed a criminal conviction for possession of and conspiracy to possess stolen property; the

⁵ In both *Kunstsammlungen Zu Weimar* and *Shene*, the court refused to bar the claim of the German institutions under the statute of limitations and in *Shene* also refused to bar the claim under the doctrine of laches. *Kunstsammlungen*, 678 F.2d at 1160-65; *Shene*, 2009 U.S. Dist. LEXIS 23596, at *10-*13.

defendant, an Azerbaijani, had transported a group of drawings to the United States from Baku, including drawings that had been stolen by Soviet troops from the Bremen Kunstverein during World War II.⁶ See Thomas R. Kline, *Vorderasiatisches Museum Berlin Loses World War II Trophy Art Case in New York*, 2 Kunst Und Recht 61, 62 (2010). The U.S. Customs Service returned these works to the Bremen Museum. See U.S. Customs Service Press Release, *U.S. Customs Service Returns Renaissance Drawings Valued at \$15 Million to Germany* (Jul. 19, 2001), available at www.cbp.gov/hot-new/pressrel/2001/0719-01.htm. The United States thus recognized the validity of the Bremen Museum's

⁶ Appellant never states what law she is relying on to assert that the Soviet Union (or Flamenbaum) might have acquired title to the Tablet through theft. Appellant describes the looting of German institutions carried out by the Soviet forces, pursuant to a decree signed by Josef Stalin (Appellant's Letter Brief at 13-15). Although Appellant fails to cite any law or legal doctrine that would support the idea that the Soviets might have obtained title to the Tablet pursuant to this decree, to the extent that she may be implying that the Soviet Union could have acquired title to the Tablet under the act of state doctrine, that doctrine cannot apply to these facts. According to the act of state doctrine, the courts of the United States will not question the legality of an official act taken by another nation *within its own territory*. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The doctrine, which can be applied in the context of appropriations of property, requires that: (1) the taking must be carried out by a sovereign foreign government; (2) the property must be located within the territory of the appropriating nation at the time of the appropriation; (3) the government must be extant and recognized by the United States, and (4) the appropriation must not be in violation of a treaty obligation owed to the United States. See, e.g., *Menzel* at 812-13 (rejecting application of the act of state doctrine to the expropriation of a Chagall painting carried out by the Nazis in Belgium); *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) (rejecting application of act of state doctrine when, during World War II, the Soviet Union expropriated an Archive belonging to the Agudas Chasidei Chabad and located in Poland at the time of the expropriation). If the armed forces of the Soviet Union, acting on behalf of a foreign sovereign and not merely as individuals engaged in opportunistic looting, carried out the expropriation of the Tablet, that fact would have no bearing on the Museum's retention of title to the Tablet.

title to the works, despite a theft carried out by Soviet troops at the end of World War II.

Amici submit that rejection of a “spoils of war” doctrine is fundamental to the law, policies and practices of the United States, as applied to its military and to its citizens, and to principles of international law, as ratified by the United States and the international community. Appellant has failed to cite to any legal sources to support the idea that such a spoils of war doctrine exists or existed any time during the twentieth century as applied to actions taken by the United States or actions considered in U.S. courts. Nor does Appellant explain why, with American forces engaged in armed conflict in the Middle East, adoption of a spoils of war policy would be beneficial at this time. As General Eisenhower recognized shortly before the Allied invasion of Europe,

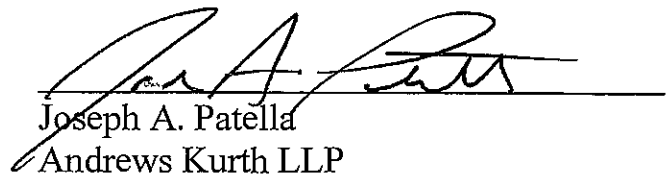
Shortly we will be fighting our way across the continent of Europe Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve. It is the responsibility of every commander to protect and respect these symbols whenever possible.

Quoted in Edsel, *supra* note 4, at 127. The belief that preservation of and respect for cultural heritage of all people is fundamental to fulfillment of U.S. goals and responsibilities, even during wartime, is as valid today as it was when General Eisenhower made this statement. In urging the full Senate to ratify the 1954 Hague Convention in September 2008, the Senate Foreign Relations Committee wrote

CONCLUSION

For all of the foregoing reasons, Amici ask that the Court affirm the Appellate Order to the extent it provided that Appellant was not prejudiced by any delay on the part of the Museum because no set of facts could have established title to the Tablet based on a spoils of war doctrine.

Respectfully submitted,



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CERTIFICATE OF SERVICE

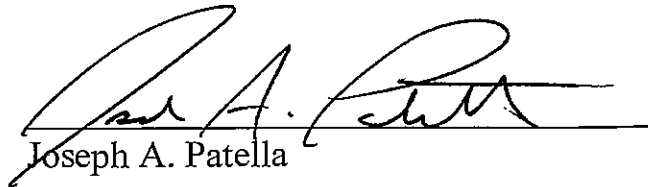
I hereby certify that three copies of the foregoing were, this 4th day of January, 2013, served by overnight delivery upon the following:

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
In the Matter of the Account of Proceedings of
Hannah K. Flamenbaum, as Executor of the Estate of

RIVEN FLAMENBAUM,

File No. 328146

Deceased,

and the Application of Vorderasiatisches Museum
for a Determination of the Validity and Enforceability
of a Verified Claim.
-----X

An ancient gold tablet, discovered during archaeological excavations in 1913 in the Ottoman Empire, disappeared from a Berlin museum in the immediate aftermath of World War II and reappeared almost sixty years later in the safe deposit box of a Holocaust survivor in Great Neck, New York. Before the court today is a claim filed on behalf of the Vorderasiatisches Museum of the Federal Republic of Germany against the estate of Riven Flamenbaum for the return of that gold tablet. For the reasons set forth below, the claim is denied.

HISTORICAL BACKGROUND

During excavations around the city of Ashur, now Qual'at Serouat, Iraq, during the early years of the twentieth century, a German team of archaeologists led by Dr. Walter Andrae discovered a small inscribed gold tablet. This tablet, sometimes referred to as a coin or amulet but in actuality the equivalent of a modern-day construction document, was found in the foundation of the Ishta Temple and dates to the reign of the Assyrian King Tukulti-Ninurta I (1243-1207 BCE). With the conclusion of the excavations in 1914, the gold tablet and other artifacts were transported to Basra and loaded on a freighter bound for Germany. The outbreak of World War I forced the freighter to change course for Lisbon, Portugal, where the items were

stored until 1926. The artifacts were then released and shipped to a national museum in Berlin. The gold tablet was inventoried, assigned the number VA Ass 994 and was placed on display by the museum, beginning in 1934. Five years later, in the looming shadow of World War II, the museum was closed, and the gold tablet, along with other antiquities and works of art, was placed in storage. At the end of the war, it was discovered that the tablet was no longer in the museum, as reflected in a 1945 inventory. Today, the gold tablet is among the assets of Riven Flamenbaum's estate.

PROCEDURAL HISTORY

On March 10, 2006, Hannah K. Flamenbaum filed her account as executor of the estate of her father, Riven Flamenbaum. Mr. Flamenbaum died on April 3, 2003, a resident of Great Neck, leaving three children surviving, viz., Hannah (petitioner herein), Israel and Helen, all of whom are named in decedent's will, dated April 27, 1971, as equal residuary beneficiaries. The accounting petition names no other interested parties. The record reflects that Israel was properly served with an accounting citation while Helen filed a knowledgeable waiver and consent.

Israel (objectant herein) filed multiple objections to the account on May 25, 2006, one of which is that the executor failed, in schedule A of her account, to properly account for decedent's coin collection. Objectant states that the decedent possessed, among other gold coins, "one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet and the property of a museum in Germany which has notified objectant's attorney of its claim." A copy of an email dated May 19, 2006 is attached to the objections. It reflects that Israel's attorney had notified the Vorderasiatisches Museum in Berlin about the executor's possession of the "gold tablet." A notice of appearance on behalf of the museum (claimant herein) and a notice of claim

for the gold tablet were filed with the Surrogate's Court on October 5, 2006. Pursuant to a subsequent court conference in connection with the executor's accounting and the claim filed on behalf of the museum, it was decided that the court would determine the validity and enforceability of the claim as a preliminary step in the accounting proceeding.

Claimant filed a note of issue on January 22, 2008, but in a decision issued by this court on May 27, 2008 (Dec. No. 66), the court granted the estate's motion to vacate claimant's note of issue on the grounds that there were special circumstances warranting additional discovery. In a second decision, issued on September 18, 2008 (Dec. No. 615), the court declined to sign an order to show cause brought by objectant concerning the valuation of decedent's coins and other property, stating that the ownership of the gold tablet would first be tried as a discrete issue, prior to the trial on the issue of valuation and the other objections to the executor's account. A second note of issue was filed on January 7, 2009.

A hearing was held before this court on September 17, 2009. The director of the museum, Dr. Beate Salje, was the sole witness to testify at the hearing. The following exhibits, numbered (1) through (7), were admitted into the record: (1) the gold tablet; (2) a copy of the registration book showing the 1926 entry of VA Ass 994; (3) a picture of VA Ass 994; (4) excerpts from Dr. Walter Andrae's diary from the 1903-1914 excavations; (5) a report from Dr. Eckart Frahm, a professor of Assyriology at Yale University, dated August 17, 2006, confirming the authenticity of the gold tablet discovered in the decedent's estate; (6) Dr. Eckart Frahm's curriculum vitae; and (7) a color photo of the gold tablet. Following the proceeding, post-trial briefs and replies were submitted.

ANALYSIS

Claimant seeks recovery of the gold tablet currently in the possession of the estate of Riven Flamenbaum. In response, the estate has raised the following defenses, which the court will address seriatim:

- (A) the proceeding is barred by claimant's failure to file objections to the executor's account;
- (B) claimant's rights were lost under the doctrine of spoils of war;
- (C) claimant failed to meet its burden of proving legal ownership or a superior right of possession;
- (D) the claim is barred by the statute of limitations; and
- (E) the claim is barred by the doctrine of laches.

(A) Failure to file objections

The first argument put forth by the executor is that the museum's failure to file and serve objections to the account is fatal to the claimant's proceeding. The executor's final account was filed on March 10, 2006, at which time, as reflected in schedule D, there were no outstanding claims filed against the estate. Accordingly, the museum was not named as a party to the accounting proceeding nor did it receive service of a citation.

After the museum was advised of the estate's possession of the gold tablet, counsel for the museum appeared on the citation return date and subsequently filed a notice of appearance and notice of claim. As conceded in the estate's post-trial memorandum, claimant properly followed the procedure set forth in SCPA 1803, and its claim was then deemed rejected, pursuant to SCPA 1806 (3), by the fiduciary's failure to accept or reject the claim within 90 days from the

date of its presentation. SCPA 1808 provides that “whenever a fiduciary rejects a claim . . . all issues related to the validity and enforceability of the claim shall be tried and determined upon the judicial settlement of his account.” Once a claim is filed and rejected, it is at issue to be decided by the Surrogate in the accounting proceeding, unless the claimant timely commences an action in another court (*Matter of Schorer*, 272 NY 247, 251 [1936]). While the statute provides that a claimant may file objections, it is the presentation of the claim under SCPA 1803 that serves as claimant’s institution of a proceeding for the determination of the claim. Accordingly, claimant’s rights in this proceeding are not affected by its failure to file objections.

(B) The spoils of war doctrine

The executor argues that the spoils of war doctrine applies, based upon the possibility that the former Union of Soviet Socialist Republics acquired the gold tablet along with other museum artifacts following the end of World War II. In support of this position, the executor cites the testimony of the museum director at the hearing. Dr. Salje testified that Russian troops took valuables out of the museum at the conclusion of World War II, and returned some, but not all, of the objects in 1957 (Transcript at 73). She further testified that the museum has no record or list of the objects taken by the Russian troops, which may have included the gold tablet (Transcript at 73-74). The estate claims that under the applicable laws of the Soviet Union and its successors in interest, cultural property taken by Russian troops during the occupation of Berlin after World War II was lawfully transferred from one sovereign to another and that this taking of the gold tablet by Russian troops extinguished the rights of the museum pursuant to international law. Thus, a party subsequently acquiring the tablet could obtain good title and transfer good title to others.

The museum maintains, however, that the spoils of war doctrine does not affect its right to the tablet because international authorities as well as the Hague Convention of 1907 forbid pillaging and plundering. Among other cases, the museum cites *Menzel v List* (49 Misc 2d 300 [Sup Ct, New York County 1966], *mod* 28 AD2d 516 [1st Dept 1967], *partially revd on the issue of damages only*, 24 NY2d 91 [1969]), a replevin action for recovery of a painting confiscated by the Nazis. In *Menzel*, the court distinguished illegal plunder and pillage from lawful booty, the latter referring to conquered objects taken for military operations (*id.* at 305).

In reviewing the executor's assertion that the tablet was taken by Russian troops, the court notes that support for the estate's theory is largely circumstantial; the estate has not introduced evidence to raise this theory above the level of conjecture. However, as discussed more fully below, the estate's inability to present relevant proof in response to a claim filed more than 60 years after an event may be considered in the context of laches.

The court finds that the estate has not adequately established facts upon which the court might consider the applicability of the spoils of war doctrine. Consequently, the court need not address the complex international law issues and conventions raised by learned counsel in this matter.

(C) Burden of proof and title

In order to prevail in an action for replevin, a claimant bears the burden of proof to show legal title or a superior right of possession (*Batsidis v Batsidis*, 9 AD3d 342 [2d Dept 2004]; *Matter of Barrett*, 82 NYS2d 137 [Sur Ct, Westchester County 1948]). The executor argues that despite the museum's control of the tablet in the years prior to 1945, title to the tablet during that period of time may actually have rested with Turkey, which had dominion over the geographical

area of the excavations. After World War II, the estate maintains that title may have been held by the Union of Soviet Socialist Republics, pursuant to the spoils of war doctrine, discussed above. On this basis, the estate asserts that the museum never had legal title to the tablet and therefore cannot have an immediate superior right of possession, which is required to successfully bring an action in replevin.

The museum disputes this argument. Claimant established by testimony and documentary evidence that an agent for the museum discovered the gold tablet during an authorized excavation of the city of Ashur in 1913, after which the tablet was transferred to the museum and remained there for 19 years until its disappearance at the end of World War II. The museum maintains that in connection with its replevin action it need not prove title superior to anyone other than the estate.

The court agrees with claimant that it need only prove that the museum's right to the tablet is superior to that of the estate (77 CJS, Replevin § 38). "[P]laintiff need not establish good title against the whole world, but need only show good title as against the defendant" (*id.* at § 23). The estate's claim that a third party might have a claim to title is not a valid defense to the claim (*id.* at § 40). The court finds that claimant met its initial burden of proof based upon the testimony and evidence introduced at the hearing.

(D) Statute of limitations

The parties agree that pursuant to CPLR 214 (3), the applicable statute of limitations in a replevin action is three years; the parties disagree on whether the statute began to run in 1945, at the time the tablet initially disappeared, or 61 years later, when claimant's demand for the tablet was made and refused. Under New York Law, a cause of action to recover a chattel against a

party who has lawfully obtained the property arises not when the property is initially taken but, rather, when there is a demand for the return of the property and the demand is refused (the demand rule) (see *Solomon R. Guggenheim Found v Lubell*, 77 NY2d 311 [1991]; see also *Menzel v List* (49 Misc 2d 300, 304 [Sup Ct, New York County 1966], *mod* 28 AD2d 516 [1st Dept 1967], *partially revd on the issue of damages only*, 24 NY2d 91 [1969]); and *Kunstsammlung zu Weimar v Elicofon*, 678 F2d 1150 [2d Cir 1982]). The museum filed its claim within three years after the estate rejected its demand. Accordingly, this proceeding is not barred by the statute of limitations. This approach does not mean, however, that in New York, where application of the demand rule is generally protective of owners (77 Am Jur POF 3d 259, Proof of a Claim Involving Stolen Art or Antiquities § 32), an original owner may be lax in searching for missing or stolen property or may delay unreasonably in making a demand. The owner must be diligent, because even where the statute of limitations has not run, the claim may be barred by the doctrine of laches (*Solomon R. Guggenheim Foundation v Lubell*, 77 NY2d 311, 321 [1991]).

(E) The doctrine of laches

The doctrine of laches is an equitable defense based on an unreasonable delay by a victim in bringing a claim, which in turn causes prejudice to the possessor (*Czartoryski-Borbon v Turcotte*, NYLJ, Apr. 28, 1999, at 27, col 2 [1st Dept]). The executor asserts that laches bars the museum's claim. In support of the application of this equitable remedy, the executor cites the conduct of the museum, which took no steps to report the tablet missing or to investigate or attempt to recover the tablet from the time it was discovered absent from the museum in 1945 until the present action was commenced in 2006. The tablet was never reported to any legal

authority in any country as stolen; it was never listed as missing on any international art registry. Even after the museum learned in 1954 that the tablet was seen in the hands of a New York dealer, the museum made no attempt to contact the dealer, the New York City Police Department or Interpol or to otherwise seek recovery of the tablet. Instead, the museum allowed an additional 51 years to pass before reporting the tablet missing or making inquiry as to its whereabouts.

In *Solomon R. Guggenheim Found. v Lubell* (77 NY2d 311 [1991]), the Court of Appeals considered whether a failure by the Guggenheim Museum to take reasonable action to locate a missing work of art over the course of twenty years was relevant to defendant's (a) statute of limitations defense and (b) defense based upon laches. The court specifically noted that the Guggenheim Museum failed to "inform other museums, galleries or artistic organizations of the theft, and additionally, did not notify the New York City police, the FBI, Interpol or any other law enforcement agencies" (*id.* at 315-316). While the court refused to impose a duty of diligence on the museum in the context of the statute of limitations defense, it noted that the lack of reasonable diligence would be considered by the trial judge in connection with laches (*id.* at 321).

In defense of the museum's failure to act, claimant cites *Sotheby's, Inc. v Shene* (2009 WL 762697, 2009 US Dist LEXIS 23596 [SD NY 2009]), which found no grounds for laches despite the fact that claimant waited 60 years to begin pursuing its claim (*id.* at 4). However, in that case, the court found that claimant's lack of action stemmed from its reasonable but erroneous belief that the object had been destroyed, noting that claimant only learned, 60 years later, that the object still existed, at which time it promptly took action to recover it (*id.*).

The museum argues that in the period immediately following World War II, its delay in searching for the gold tablet or reporting it stolen was entirely reasonable in the context of the political and financial restraints imposed by the museum's geographical location in East Berlin, which shortly thereafter became a part of the German Democratic Republic, a Soviet satellite state. However, claimant's post-trial brief cites *Kunstammlung zu Weimar v Elicofon* (678 F2d 1150 [2d Cir 1982]), which also involved a claimant museum located in the German Democratic Republic in 1945. The contrast between the conduct of the plaintiff museum in *Elicofon*, in which the court returned the paintings, with that of the claimant in the case at bar, is striking. As described by the court in *Elicofon*, the director of that museum

“discovered the theft [in 1945], immediately reported the theft and thereafter engaged in diligent efforts to locate the paintings. These efforts included contacting various German museums and administrative organs, the Allied Control Council, the Soviet Military Administration, the United States State Department, and the Fogg and Germanic museums at Harvard (which were active in locating stolen art), all to no avail”

(*id.* at 1156). In *Elicofon*, the museum's immediate, diligent and ongoing search for the missing artwork precluded its opponent from successfully asserting a laches defense. Moreover, the political justification offered by claimant for its failure to act after World war II has no application once Berlin was reunified. In the years subsequent to Germany's reunification in 1989, the record reflects that the museum still made no effort to report the tablet missing or stolen.

The application of laches must be based upon the particular facts and circumstances of each case. The estate established by the museum's own admission that the disappearance of the tablet was only noted in the museum's internal records; it was not reported to authorities or listed

on any registries. Further, although counsel for the museum repeatedly asserts that claimant had “no inkling of the whereabouts of the Object until . . . 2006” (Post-trial brief dated Nov. 23, 2009, p. 11), the evidence shows that the museum took no action after being given information about the tablet’s whereabouts in 1954. It is not the length of the delay that is dispositive; rather, the issue is whether the delay was reasonable under the circumstances (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311 [1991]). The court finds that the museum’s lack of due diligence was unreasonable.

The estate must then meet the second prong of the test for laches by demonstrating prejudice to the possessor (*Wertheimer v Cirker’s Hayes Storage Warehouse, Inc.*, 300 AD2d 117 [1st Dept 2002]). A defense of laches “is deficient if it fails to include allegations showing not only a delay, but also injury, change of position, intervention of equities, loss of evidence, or other disadvantage resulting from such delay” (*Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2d Dept 1971] [internal citation omitted]). In *Wertheimer*, the court applied the doctrine of laches because although the original owner had knowledge of the location and possessor of the property, he failed to take any action to recover the painting for almost fifty years. The court held that this lack of due diligence prejudiced the defendant art gallery by making it impossible to prove that any of the gallery’s predecessors in interest held good title to the painting (*Wertheimer v Cirker’s Hayes Storage Warehouse, Inc.*, 300 AD2d 117, 118 [1st Dept 2002]); see also *The Greek Orthodox Patriarchate of Jerusalem v Christies, Inc.*, 1999 WL 673347, 1999 US Dist LEXIS 13257 [SD NY 1999], in which the court noted in dicta that under New York law, a delay of almost seventy years in bringing the case prejudiced the family that possessed the manuscript by making it almost impossible to prove ownership). The court in

Wertheimer further noted that laches applied even in the face of an allegation that the gallery had failed to inquire about the painting's background before purchasing it (*Wertheimer v Cirker's Hayes Storage Warehouse, Inc.*, 300 AD2d 117, 118 [1st Dept 2002]).

In the case at bar, the museum did not act even after it was provided with reasonably reliable information concerning the tablet's whereabouts in 1954. As a result of the museum's inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good-faith purchasers over the course of more than sixty years were not given notice of a blemish in the title. That, coupled with the fact that Riven Flamenbaum's death has forever foreclosed his ability to testify as to when and where he obtained the tablet, has severely prejudiced the estate's ability to defend the museum's related claim to the tablet. These are precisely the circumstances in which the doctrine of laches must be applied.

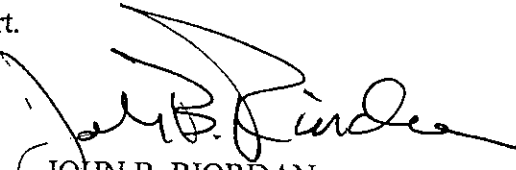
CONCLUSION

The court finds that the museum's claim is barred by the doctrine of laches.

Counsel for the executor and counsel for objectant are directed to appear for a conference on the accounting proceeding on April 7, 2010, at 2:45 p.m.

This is the decision and order of this court.

Dated: March 30, 2010


JOHN B. RIORDAN
Judge of the
Surrogate's Court



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Panel Upholds State's Reversal On Legality Of Moxie Mania

BY JOEL STASHENKO
ALBANY

THE "MOXIE Mania" computerized betting game the state initially authorized for installation in some 500 taverns throughout New York is a game of chance and not of skill and therefore illegal under New York's anti-gambling statutes, a state appeals court ruled last week.

The Liquor Authority did not abuse its discretion when in November 2008 it reversed an earlier opinion of the authority's counsel and decided that the Moxie Mania Empire Edition game represented an impermissible form of casino gaming that is illegal in New York, the Appellate Division, Third Department, ruled unanimously.

The game involves an initial one-second-long playing of a tic-tac-toe like puzzle and then a more extended "post-moxie" period in which a patron given from 10 to 19 seconds to pick a symbol on the screen to solve a numeric problem. Prize payouts are randomly selected by the computer. Players advance to a "per-play" mode with 15 correct answers.

The court last week held that the initial lightning-round of the game may constitute a game of chance.



Justice McCarthy

German Museum Loses Attempt To Reclaim Artifact From Estate

BY VESSELIN MITEV

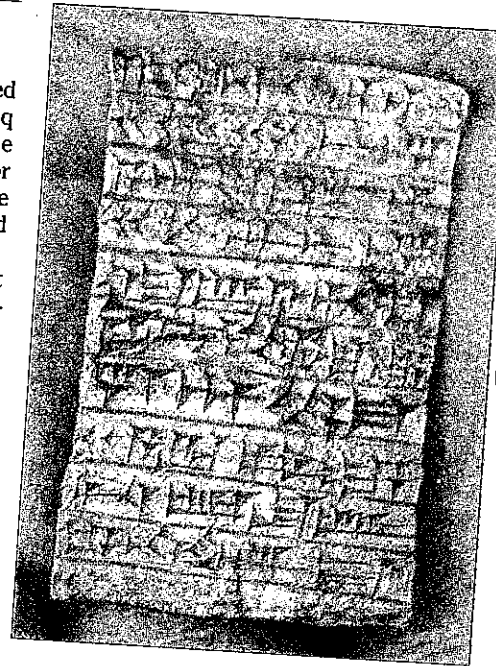
AN ANCIENT gold tablet unearthed in a 1913 dig in modern-day Iraq that mysteriously ended up in the possession of a Holocaust survivor will remain in his estate, a surrogate has ruled, rather than be returned to a German museum.

In a ruling that reads like a script for an Indiana Jones movie, Nassau Surrogate John B. Riordan held that the Berlin museum, where the tablet had been kept for 19 years before its sudden disappearance at the end of World War II, could not stake a claim to the artifact as it had not acted promptly to recover it.

"The court finds that the museum's lack of due diligence was unreasonable," Surrogate Riordan wrote in *Matter of Flamenbaum*, File No. 328416, in holding that the museum's claim was barred by the doctrine of laches.

The gold tablet was found during an excavation around the city of Ashur, now Qal'at Seruat, Iraq, by a team of German archeologists led by Walter Andrae. The inscribed tablet, which was discovered in the foundation of the Ishta Temple, is actually a construction document, according to the judge. It dates to the reign of the Assyrian King Tukulti-Ninurta I (1243-1207 BCE) who expanded the Assyrian empire but was later killed by his son.

When the excavations finished in 1914, the tablet was packed up



An ancient gold tablet excavated in Iraq from the site of an ancient Assyrian temple by German archaeologists in 1913 can stay with the estate of a Great Neck Holocaust survivor.

along with other artifacts and sent to Basra, where it was loaded on a Germany-bound freighter. The outbreak of World War I forced the ship to change course to Portugal where the artifacts were stored until 1926, when they finally arrived in Berlin.

In 1934, the tablet was put on display at the Vorderasiatisches Museum, known for its collection of Southwest Asian art. Five years later, with World War II looming, the museum was closed and the tablet was put in storage along with other antiques and works of art. At the end of the war in 1945,

an inventory discovered that the tablet was missing.

Nearly 60 years later, in April 2003, the tablet was discovered among the possessions of Riven Flamenbaum, of Great Neck, after his death at the age of 92. Mr. Flamenbaum left behind three children, Israel, Hannah and Helen. In a 1971 will, he left the tablet to his three children, said Steven Schlesinger, the attorney who

» Page 2

The Surrogate Court decision appears on page 17.

Also at nyli.com

Appellate Court Finds Exception to Incompatibility Of Intentional Conduct and Depraved Indifference

Artifact

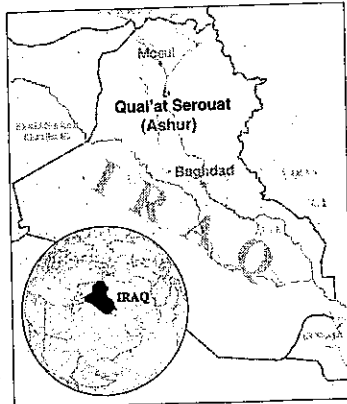
« Continued from page 1
represented Hannah, the executor of the estate.

In May 2006, Israel notified the German museum that his father's estate had the tablet. The museum then sought its return.

At a Surrogate Court hearing in September 2009, the director of the museum, Beate Salje, testified that Russian troops had taken valuables from the museum at the end of World War II and had returned some but not all of the objects in 1957. Ms. Salje told the court that the museum had no record of the items taken, but the tablet may have been among them.

Mr. Schlesinger argued that under the "spoils of war" doctrine, cultural property removed by Russian troops during the occupation of Berlin after World War II was "lawfully transferred from one sovereign to another and that this taking of the gold tablet extinguished the rights of the museum pursuant to international law."

The estate also contended that the museum's claim was barred by laches as it had waited too long to pursue its stake in the tablet. It pointed out that the museum had never reported the tablet as stolen and had never listed it as missing on any international art registry, even after a University of Chicago professor reported



A TABLET identified as an ancient construction document was excavated by German archaeologists in 1913 from an Iraqi site that was then part of the Turkish Ottoman empire.

that he had seen the artifact in New York.

The museum countered that both international authorities and the Hague Convention of 1907 prohibit "pillaging and plundering."

The museum's director testified that in post-war Berlin, it "just didn't make sense" to fill out a report or alert the authorities, given the chaotic nature of the occupation and the separation of East and West Berlin.

As the museum was located in East Berlin, a "Soviet satellite state," the political and financial restraints imposed on it made its delay "entirely reasonable," the museum argued in court papers. At trial, Ms. Salje also said the expect-

tation at the time was that the Russians would return every artifact after the occupation ended.

Diligence Questioned

Surrogate Riordan acknowledged that the museum had complied with the statute of limitations by filing its replevin claim within three years after the estate rejected its demand to return the tablet. However, he pointed out that, even where a statute of limitations has not run, an owner's claim still may be defeated by the doctrine of laches.

Under New York law, the original owner may not be "lax in searching for missing or stolen property or...delay unreasonably in making a demand," Surrogate Riordan wrote. "The owner must be diligent, because even where the statute of limitations has not run, the claim may be barred by the doctrine of laches."

The surrogate noted the museum's admission that the disappearance of the tablet was only noted in the museum's internal records and that no efforts were made to recover it after the uncorroborated 1954 report of its location.

The museum's "inexplicable failure to report the tablet as stolen, or take any other steps toward recovery" resulted in no notice of a "blemish in the title" to the tablet's owners over the last 60 years, the court concluded.

Surrogate Riordan characterized the theory that Russians had

taken the tablet as "largely circumstantial" and not "above the level of conjecture." Moreover, he said that Mr. Flamenbaum's death had "forever foreclosed his ability to testify as to when and where he obtained the tablet," thus prejudicing the estate's ability to defend against the museum's claim.

"These are precisely the circumstances in which the doctrine of laches must be applied," the court concluded.

Hannah Flamenbaum, an assistant New York attorney general, said that after surviving Auschwitz her Polish-born father came to the United State in 1949 and worked in a liquor store on New York City's Canal Street, which he eventually bought and ran.

"I told the court, our understanding was that he got it from the Russians on the black market," said Mr. Schlesinger, of Jaspán Schlesinger in Garden City. "That was what he had always told his children."

Mr. Schlesinger said there had been six tablets in the world like the one acquired by the estate, but that two had disappeared.

Ms. Flamenbaum said the family would like to keep the artifact. "It represents my father's hardships," she said.

John C. Fisher of Hamburger, Weinschenk & Fisher in Manhattan represented the museum. He could not be reached for comment.

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Smoking

« Continued from page 1
violating the smoking ban range from revoking inmate privileges to writing up for insubordination guards and employees who repeatedly break the rule.

A subsequent medical exam revealed that Mr. Reid indeed had a "serious respiratory condition and should be away from second hand smoke." A cell with a solid door and a private window was recommended by the prison nurse but Mr. Reid was not immediately transferred, resulting in another filed grievance.

After a doctor recommended that Mr. Reid be reassigned from working as a prison porter due to exposure to dust and chemicals, he was moved to a medical cell block that had solid doors and ventilated windows.

In March 2002, Mr. Reid was moved to the Auburn Correctional Facility which had no cells with

told to report smoking violations "to the unit officer or area supervisor...for appropriate action."

Mr. Reid did not dispute that he was treated for his condition and eventually granted accommodations but limited his claim to the periods when he was not accommodated.

And while the state did not dispute his medical conditions, it argued that Mr. Reid had suffered nothing worse than "mild asthma" and had not sought treatment for secondhand smoke. The state also claimed that Mr. Reid had failed to establish a causal connection between his alleged exposure to smoke and aggravation of his condition.

Harm From Exposure

In allowing Mr. Reid's suit to proceed, Magistrate Judge McCarthy rejected both of these arguments.

First, he wrote, Mr. Reid's medical records "belie" the assertion of a mild reaction, citing the

The court agreed with the state that Mr. Reid's reliance on medical literature to show a link between secondhand smoke exposure and asthma attacks was insufficient to establish specific causation.

But the judge held that Mr. Reid's medical records were enough to raise a triable issue of fact, noting that shortly after the smoking ban was implemented, a prison nurse had recommended that Mr. Reid be moved to a cell with a solid door and a private window.

Magistrate Judge McCarthy observed that the 42,000 infractions recorded by the state—953 in prisons housing Mr. Reid—could be interpreted to show the state's vigilance in cracking down on smoking. But he added that the statistics "can be equally interpreted to demonstrate that there was a lack of compliance with the smoking ban."

Such an interpretation would also be "consistent with plaintiff's testimony that correctional officers would 'a lot of times..."

banned, cigarettes still are sold at prison commissaries. Smoking is permitted in exercise yards and other outdoor locations.

Mr. Kriss added that a new voluntary program helps inmates quit smoking by giving them a nicotine patch.

Benjamin Dwyer of Nixon Peabody represented Mr. Reid pro bono. Mr. Dwyer said he was pleased that the court "sided with us" on the secondhand smoke issue.

Assistant Attorney General George Zimmermann represented the Department of Correctional Services.

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DECISIONS WANTED!

The editors of the New York Law Journal are eager to publish court rulings of interest to the bench and bar. Submissions must include a sentence or two on why the decision would be of significance to our readers. Also include contact information for each party's attorneys.

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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Argued - February 27, 2012

PETER B. SKELOS, J.P.
RANDALL T. ENG
ARIEL E. BELEN
JEFFREY A. COHEN, JJ.

2010-04400

DECISION & ORDER

In the Matter of Riven Flamenbaum, deceased.
Vorderasiatisches Museum, appellant-respondent,
Hannah K. Flamenbaum, respondent-appellant;
Israel Flamenbaum, objectant-respondent.

(File No. 328146)

Hamburger, Weinschenk & Fisher, New York, N.Y. (John C. Fisher of counsel), and
Dunnington, Bartholow & Miller, LLP, New York, N.Y. (Raymond J. Dowd and
Luke McGrath of counsel), for appellant-respondent (one brief filed).

Jaspan Schlesinger, LLP, Garden City, N.Y. (Steven R. Schlesinger and Seth A.
Presser of counsel), for respondent-appellant.

Reilly & Reilly, LLP, Mineola, N.Y. (David T. Reilly of counsel), for objectant-
respondent.

In a probate proceeding in which Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, petitioned to judicially settle her final account of the estate, the Vorderasiatisches Museum appeals from an order of the Surrogate's Court, Nassau County (Riordan, S.), dated March 30, 2010, which, after a hearing, denied its claim for the return of certain personal property in the possession of the estate of Riven Flamenbaum as barred by the doctrine of laches, and Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, cross-appeals, as limited by her brief, from so much of the same order as determined that the Vorderasiatisches Museum had met its prima facie burden of proving legal title or a superior right of possession to the subject property.

ORDERED that the cross appeal is dismissed; and it is further,

ORDERED that the order is reversed, on the law, with costs, the claim of the Vorderasiatisches Museum for the return of certain personal property in the possession of the estate of Riven Flamenbaum is granted, and the matter is remitted to the Surrogate's Court, Nassau County, for further proceedings including the entry of a decree, inter alia, directing Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, to turn over the subject property to the Vorderasiatisches Museum.

The Vorderasiatisches Museum (hereinafter the museum) seeks to recover from the estate of Riven Flamenbaum (hereinafter the estate) a small inscribed gold tablet (hereinafter the tablet) excavated prior to World War I by a German team of archaeologists from the foundation of the Ishtar Temple, around the city of Ashtur, in what is now northern Iraq and was then part of the Ottoman Empire. The tablet, which describes the construction of the Ishtar Temple, dates to the reign of King Tukulti-Ninurta I of Assyria (1243-1207 BCE).

After the excavations ended in 1914, the tablet and other artifacts were transported to Basra, Iraq, and loaded on a freighter bound for Germany. With the outbreak of World War I, the freighter was forced to stop in Lisbon, Portugal, where the items were stored until 1926. The tablet eventually arrived in Germany in 1926 and ultimately was put on display in the museum from 1934 until the outbreak of World War II in 1939, when it was inventoried and placed in storage. The tablet was discovered to be missing from the museum's inventory sometime around the end of the war in 1945.

In 2003, Riven Flamenbaum died in possession of the tablet. Neither his will nor the accounting filed by the executor of his estate made specific mention of the tablet. During the instant accounting proceeding, Riven Flamenbaum's son, Israel Flamenbaum, filed objections to the accounting and informed the museum of the possession of the tablet by the estate, which was the first time since 1945 the museum had direct knowledge of the tablet's whereabouts. Shortly thereafter, the museum filed a notice of appearance and claim with the Surrogate's Court seeking to recover the tablet. After a hearing, the Surrogate's Court found that the museum established its prima facie burden of proving legal title or a superior right of possession to the tablet, but that its claim was barred by the doctrine of laches. The museum appeals and Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, cross-appeals.

For the executor to establish, on behalf of the estate, an affirmative defense on the basis of the doctrine of laches, she must demonstrate that the museum failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the estate (*see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 321). The executor did not establish that the museum failed to exercise reasonable diligence to locate the tablet (*id.*; *cf. Bakalar v Vavra*, 619 F3d 136, 147). The executor's contention that the museum failed to exercise reasonable diligence by not reporting the tablet stolen to law enforcement authorities or listing it on an international stolen art registry is not, under the circumstances of this case, dispositive. The executor's argument that, had the museum taken such steps, the tablet would have surfaced earlier, is mere conjecture and, moreover, is not supported by expert or other evidence.

In any event, the executor also did not demonstrate that the museum's failure to report the tablet as missing to authorities or list it on a stolen art registry prejudiced the estate in its ability to defend against the museum's claim (*see generally Bakalar v Vavra*, 619 F3d at 140-141; *Kunstsammlungen Zu Weimar v Elicofon*, 678 F2d 1150, 1164; *cf. Matter of Peters v Sothebys's Inc.*, 34 AD3d 29, 38; *Wertheimer v Cirker's Hayes Stor. Warehouse*, 300 AD2d 117). Further, there is no proof that the estate changed its position to its detriment because of the delay (*see Rivers v Rivers*, 35 AD3d 426, 428). Moreover, the equities favor the return of the tablet to the museum over its retention by the estate. Accordingly, the Surrogate's Court should have granted the museum's claim against the estate for the return of the gold tablet and directed the executor, on behalf of the estate, to return the tablet to the museum. We therefore remit the matter to the Surrogate's Court, Nassau County, for further proceedings including the entry of a decree, inter alia, directing the executor to turn over the subject property to the museum.

The executor's cross appeal on behalf of the estate must be dismissed, as the executor challenges only the Surrogate Court's findings of fact and conclusions of law that the museum met its prima facie burden of proving legal title or a superior right of possession to the subject gold tablet in the possession of the estate, which are not independently appealable (*see Ramirez v City of New York*, 90 AD3d 1009; *Granata v City of White Plains*, 88 AD3d 948, 949; *Verderber v Commander Enters. Centereach, LLC*, 85 AD3d 770; *Matter of Noelia T.*, 70 AD3d 957; *Lester & Assoc., P.C. v Eneman*, 69 AD3d 906; *Zoref v Glassman*, 44 AD3d 1036; *Clark v Weiner*, 254 AD2d 322). To the extent that, in light of our determination on the appeal, the executor's argument made on the cross appeal could be viewed as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545), such argument is without merit as the museum established that it had legal title and a superior right of possession to the tablet (*see generally Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143, 153, *aff'd* 77 NY2d 311).

The executor's remaining contentions are either unpreserved for appellate review or without merit.

SKELOS, J.P., ENG, BELEN and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Aprilanne Agostino
Clerk of the Court

Matter of Flamenbaum
2012 NY Slip Op 04165
Decided on May 30, 2012
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on May 30, 2012

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT**

PETER B. SKELOS, J.P.

RANDALL T. ENG

ARIEL E. BELEN

JEFFREY A. COHEN, JJ.

2010-04400

[*1]In the Matter of Riven Flamenbaum, deceased. Vorderasiatisches Museum, appellant-respondent, Hannah K. Flamenbaum, respondent-appellant; Israel Flamenbaum, objectant-respondent. (File No. 328146)

Hamburger, Weinschenk & Fisher, New York, N.Y. (John C. Fisher of counsel), and Dunnington, Bartholow & Miller, LLP, New York, N.Y. (Raymond J. Dowd and Luke McGrath of counsel), for appellant-respondent (one brief filed).

Jaspan Schlesinger, LLP, Garden City, N.Y. (Steven R. Schlesinger and Seth A. Presser of counsel), for respondent-appellant.

Reilly & Reilly, LLP, Mineola, N.Y. (David T. Reilly of counsel), for objectant-respondent.

DECISION & ORDER

In a probate proceeding in which Hannah K. Flamenbaum, as executor of the estate of

Riven Flamenbaum, petitioned to judicially settle her final account of the estate, the Vorderasiatisches Museum appeals from an order of the Surrogate's Court, Nassau County (Riordan, S.), dated March 30, 2010, which, after a hearing, denied its claim for the return of certain personal property in the possession of the estate of Riven Flamenbaum as barred by the doctrine of laches, and Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, cross-appeals, as limited by her brief, from so much of the same order as determined that the Vorderasiatisches Museum had met its prima facie burden of proving legal title or a superior right of possession to the subject property.

ORDERED that the cross appeal is dismissed; and it is further,

ORDERED that the order is reversed, on the law, with costs, the claim of the Vorderasiatisches Museum for the return of certain personal property in the possession of the estate of Riven Flamenbaum is granted, and the matter is remitted to the Surrogate's Court, Nassau County, for further proceedings including the entry of a decree, inter alia, directing Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, to turn over the subject property to the Vorderasiatisches Museum.

The Vorderasiatisches Museum (hereinafter the museum) seeks to recover from the estate of Riven Flamenbaum (hereinafter the estate) a small inscribed gold tablet (hereinafter the tablet) excavated prior to World War I by a German team of archaeologists from the foundation of [*2]the Ishtar Temple, around the city of Ashtur, in what is now northern Iraq and was then part of the Ottoman Empire. The tablet, which describes the construction of the Ishtar Temple, dates to the reign of King Tukulti-Ninurta I of Assyria (1243-1207 BCE).

After the excavations ended in 1914, the tablet and other artifacts were transported to Basra, Iraq, and loaded on a freighter bound for Germany. With the outbreak of World War I, the freighter was forced to stop in Lisbon, Portugal, where the items were stored until 1926. The tablet eventually arrived in Germany in 1926 and ultimately was put on display in the museum from 1934 until the outbreak of World War II in 1939, when it was inventoried and placed in storage. The tablet was discovered to be missing from the museum's inventory sometime around the end of the war in 1945.

In 2003, Riven Flamenbaum died in possession of the tablet. Neither his will nor the accounting filed by the executor of his estate made specific mention of the tablet. During the instant accounting proceeding, Riven Flamenbaum's son, Israel Flamenbaum, filed objections

to the accounting and informed the museum of the possession of the tablet by the estate, which was the first time since 1945 the museum had direct knowledge of the tablet's whereabouts. Shortly thereafter, the museum filed a notice of appearance and claim with the Surrogate's Court seeking to recover the tablet. After a hearing, the Surrogate's Court found that the museum established its prima facie burden of proving legal title or a superior right of possession to the tablet, but that its claim was barred by the doctrine of laches. The museum appeals and Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, cross-appeals.

For the executor to establish, on behalf of the estate, an affirmative defense on the basis of the doctrine of laches, she must demonstrate that the museum failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the estate (*see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 321). The executor did not establish that the museum failed to exercise reasonable diligence to locate the tablet (*id.*; *cf. Bakalar v Vavra*, 619 F3d 136, 147). The executor's contention that the museum failed to exercise reasonable diligence by not reporting the tablet stolen to law enforcement authorities or listing it on an international stolen art registry is not, under the circumstances of this case, dispositive. The executor's argument that, had the museum taken such steps, the tablet would have surfaced earlier, is mere conjecture and, moreover, is not supported by expert or other evidence.

In any event, the executor also did not demonstrate that the museum's failure to report the tablet as missing to authorities or list it on a stolen art registry prejudiced the estate in its ability to defend against the museum's claim (*see generally Bakalar v Vavra*, 619 F3d at 140-141; *Kunstsammlungen Zu Weimar v Elicofon*, 678 F2d 1150, 1164; *cf. Matter of Peters v Sothebys's Inc.*, 34 AD3d 29, 38; *Wertheimer v Cirker's Hayes Stor. Warehouse*, 300 AD2d 117). Further, there is no proof that the estate changed its position to its detriment because of the delay (*see Rivers v Rivers*, 35 AD3d 426, 428). Moreover, the equities favor the return of the tablet to the museum over its retention by the estate. Accordingly, the Surrogate's Court should have granted the museum's claim against the estate for the return of the gold tablet and directed the executor, on behalf of the estate, to return the tablet to the museum. We therefore remit the matter to the Surrogate's Court, Nassau County, for further proceedings including the entry of a decree, inter alia, directing the executor to turn over the subject property to the museum.

The executor's cross appeal on behalf of the estate must be dismissed, as the executor

challenges only the Surrogate Court's findings of fact and conclusions of law that the museum met its prima facie burden of proving legal title or a superior right of possession to the subject gold tablet in the possession of the estate, which are not independently appealable (*see Ramirez v City of New York*, 90 AD3d 1009; *Granata v City of White Plains*, 88 AD3d 948, 949; *Verderber v Commander Enters. Centereach, LLC*, 85 AD3d 770; *Matter of Noelia T.*, 70 AD3d 957; *Lester & Assoc., P.C. v Eneman*, 69 AD3d 906; *Zoref v Glassman*, 44 AD3d 1036; *Clark v Weiner*, 254 AD2d 322). To the extent that, in light of our determination on the appeal, the executor's argument made on the cross appeal could be viewed as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545), such argument is without merit as the museum [*3] established that it had legal title and a superior right of possession to the tablet (*see generally Solomon R. Guggenheim Found. v Lubell*, 153 AD2d 143, 153, *affd* 77 NY2d 311).

The executor's remaining contentions are either unpreserved for appellate review or without merit.

SKELOS, J.P., ENG, BELEN and COHEN, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

[Return to Decision List](#)

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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 178

In the Matter of Riven
Flamenbaum, Deceased.

Vorderasiatisches Museum,
Respondent,
Hannah K. Flamenbaum,
Appellant,
Israel Flamenbaum,
Respondent.

Steven R. Schlesinger, for appellant.
Raymond J. Dowd, for respondent Vorderasiatisches
Museum.
Archaeological Institute of America et al., amicus
curiae.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs, and the certified question should be answered in the affirmative.

In this probate proceeding, the Vorderasiatisches Museum in Berlin, Germany (the Museum), seeks to recover a 3,000-year-old gold tablet from the estate of Riven Flamenbaum (the Estate).

The tablet was first discovered prior to World War I by a team of German archeologists excavating at the foundation of the Ishtar temple in Ashur, Iraq. The tablet dates back to the reign of Assyrian King Tukulti-Ninurta I (1243-1207 BCE) and bears an inscription written in Assyro-Babylonian language and Middle-Assyrian cuneiform script. The tablet was shipped to the Berlin Museum (now the Vorderasiatisches Museum) in 1926. The Museum's inventory book catalogs the arrival of the gold tablet and provides a description and a sketch. In 1939, the Museum was closed because of World War II, and objects from Ashur were put in storage. In 1945, at the end of the war, the gold tablet was missing.

The tablet resurfaced in 2003, when it was discovered among the possessions of the decedent, a resident of Nassau County and a holocaust survivor. When Hannah K. Flamenbaum, the decedent's daughter and executor of the Estate, petitioned to judicially settle the final account, she listed a "coin collection" as an asset of the Estate. Israel Flamenbaum, the decedent's son and Hannah's brother, filed objections to the accounting, wherein he claimed that the value of the coin collection was understated "and includes one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet and the property of a museum in Germany." Israel also notified the Museum about the tablet, and the Museum responded that the gold tablet is part of its Assyrian collection and had been missing since the end of

World War II.

The Museum thereafter filed a notice of appearance and claim with the Surrogate's Court, Nassau County, to recover the tablet. The Surrogate held a hearing, at which the Museum's director, Dr. Beate Salje, was the sole witness to testify. Dr. Salje testified that the tablet, along with many other objects, disappeared from the Museum sometime near the end of World War II. Russian troops removed some objects at the end of the war, brought them to Russia, and then back to the Museum in 1957. Dr. Salje stated that she did not know if the tablet was taken by Russian troops, German troops, or people who came to the Museum to take refuge.

The Museum also submitted the report of Dr. Eckart Frahm, Assistant Professor of Assyriology at Yale University. As explained by Dr. Frahm, a 1983 article written by A.K. Grayson, entitled "Antiquities from Ashur; A Brief Description of Their Fate with Special Reference to the Royal Inscription," published in the *Annual Review of the Royal Inscriptions of Mesopotamia Project*, stated that "Professor H.G. Guterbock [a professor at the Oriental Institute of the University of Chicago] in a private communication told [Grayson] of having seen a gold tablet. . . which was in the Berlin Museum before the war . . . in the hands of a dealer in New York in 1954." There is an entry in the Museum's record that reads "seen by Guterbach 1954 in New York," and underneath it says "Grayson." This entry is undated, and

nothing in the record indicates when the Museum first learned that the tablet was reportedly sighted in 1954.

After the hearing, Surrogate's Court determined that, although the Museum met its prima facie burden of proving legal title or superior right of possession to the tablet, its claim was barred by the doctrine of laches because the Museum had failed to either report the tablet's disappearance to the authorities or list the tablet on any international stolen art registries. This inaction, according to the court, prejudiced the Estate's ability to defend against the Museum's claim to the tablet.

The Appellate Division, among other things and as relevant here, reversed the Surrogate's Court order on the law, granted the Museum's claim for the return of the tablet, and remitted the matter to Surrogate's Court for further proceedings (see Matter of Flamenbaum, 95 AD3d 1318 [1st Dept 2012]). The Appellate Division concluded that the Estate had not established that the Museum failed to exercise reasonable diligence to locate the tablet, or that the Museum's inaction had prejudiced the Estate. That court granted the Estate's motion for leave to appeal pursuant to CPLR 5602 (b) (1) and certified the following question: "Was the decision and order of this Court dated May 30, 2012, properly made?" We now affirm and answer the certified question in the affirmative.

We agree with the Appellate Division that the Estate failed

to establish the affirmative defense of laches, which requires a showing "that the museum failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the [E]state" (95 AD3d at 1320, citing Solomon R. Guggenheim Found. v Lubell, 77 NY2d 311, 321 [1991]; see also Sotheby's, Inc. v Shene, US Dist Ct, SD NY, 04 Civ 10067, Griesa, J., 2009). While the Museum could have taken steps to locate the tablet, such as reporting it to the authorities or listing it on a stolen art registry, the Museum explained that it did not do so for many other missing items, as it would have been difficult to report each individual object that was missing after the war. Furthermore, the Estate provided no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent's death, that he was in possession of the tablet (compare Matter of Peters v Sotheby's Inc., 34 AD3d 29, 37-38 [1st Dept 2006], lv denied 8 NY3d 209 [2007] [laches barred claim where owner had actual knowledge of the identity of the party in possession but did not demand return of the property]). As we observed in Lubell, in a related discussion of the defense of statute of limitations, "[t]o place a burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in stolen art" (77 NY2d at 320).

Additionally, the Estate failed to demonstrate "the essential

element of laches, namely prejudice" (Matter of Barabash, 31 NY2d 76, 82 [1972]). While the Estate argued that it had suffered prejudice due to the Museum's inaction, there is evidence that at least one family member (decedent's son) was aware that the tablet belonged to the Museum. And, although the decedent's testimony may have shed light on how he came into possession of the tablet, we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.

The "spoils of war" theory proffered by the Estate -- that the Russian government, when it invaded Germany, gained title to the Museum's property as a spoil of war, and then transferred that title to the decedent -- is rejected. The Estate's theory rests entirely on conjecture, as the record is bereft of any proof that the Russian government ever had possession of the tablet. Even if there were such proof, we decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force (see Menzel v List, 49 Misc2d 300, 305-308 [Sup Ct New York County 1966], modified as to damages, 28 AD2d 516 [1st Dept 1967], revd as to modification, 24 NY2d 91 [1969])).¹ Allowing the Estate to

¹ Notably, it was the official policy of the United States during World War II to forbid pillaging of cultural artifacts. The Rules of Land Warfare of the United States War Department provided that "[a]ll movable property belonging to the State directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not directly susceptible of military use, must be respected and cannot be appropriated"

retain the tablet based on a spoils of war doctrine would be fundamentally unjust.

* * * * *

Order affirmed, with costs, and certified question answered in the affirmative, in a memorandum. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott, Rivera and Abdus-Salaam concur.

Decided November 14, 2013

(Rules of Land Warfare, War Department of the United States, Basic Field Manual (FM 27-10, 1940), 77, 82, 84, quoted in Menzel, 49 Misc2d at 306 n.1).