Cleveland State Law Review

Volume 25 | Issue 3 Book Review

1976

Book Review

Samuel Sonenfield

Gail M. Schaffer

BOOK REVIEWS

ART ON TRIAL: FROM WHISTLER TO ROTHKO.
By Laurie Adams, with Introduction by Tom Wolfe.
New York: Walker and Company. 1975. Pp. 236. $9.95.

*Reviewed by Samuel Sonenfield and Gail M. Schaffer**

> I never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face.[1]
>
> . . . .
>
> It is as impossible for me to explain to you the beauty of that picture as it would be for a musician to explain to you the beauty of a harmony in a particular piece of music if you have no ear for music.[2]
>
> . . . .
>
> And that [the labor of two days] was the labor for which you asked two hundred guineas?
>
> . . . .
>
> No, . . . it was for the knowledge gained through a lifetime.[3]

The lawyer in general practice is not expected to know everything about everything. But he must be prepared to learn, often at short notice, just about all there is to know about almost anything. A biographer of Edward Marshall Hall, one of the great English barristers of the late nineteenth and early twentieth centuries, relates how Marshall Hall, called upon to defend Harold Greenwood on the charge of murder of his first wife by arsenical poisoning, made himself in a short period of time while preparing for the trial of the accused, thoroughly familiar with every possible aspect of medicinal poisons. He obtained an acquittal in the face of evidence which at the outset appeared overwhelming against Greenwood.

No doubt many other instances could be cited of the lawyer's ability to ingest and succeed in mastering a field of human knowledge outside of either his general or specialized education, because it is neces-

---

* Mr. Sonenfield is a Professor of Law at the Cleveland-Marshall College of Law of Cleveland State University. He also owns a few paintings, none of which will ever find their way into art museums. Mrs. Schaffer is a J.D. graduate of Cleveland-Marshall. She also paints (and sells!) pictures. She hopes that some of them will find their way into art museums.

[1] L. ADAMS, ART ON TRIAL 18 (1975) (quoting the transcript of *Whistler v. Ruskin*).

[2] *Id.* at 21 (quoting the transcript of *Whistler v. Ruskin*).

[3] *Id.* at 25 (quoting the transcript of *Whistler v. Ruskin*).

sary for him to do so in order effectively to try a case which chance and his reputation for forensic skill have brought his way. It seems to be a facility which, while not limited to lawyers, is frequently found among them.

Art in all its manifestations is probably not a subject which would first come to mind if one were considering, *a priori*, a list of subjects which might swim into a lawyer's net. But it does, and has, in some fascinating cases. Mrs. Adams has given us a delightful book about six such cases. Her book is not just for lawyers. It should have interest for artists. art dealers, art lovers, and intellectually curious laymen. Once picked up it is hard to put down.

Specifically enumerated, the historical incidents which the author details are the famous libel action brought in London just short of 100 years ago by Jimmy Whistler against John Ruskin; the brouhaha in the United States Customs Court over whether Constantin Brancusi's bronze sculpture, *Bird in Space*, was and is an "original work of art" (and therefore to be admitted to this country duty free), or a "lump of bronze" and taxable as "manufactured metal"; the protracted litigation in the case of *Hahn v. Duveen* over whether Mrs. Hahn's *La Belle Ferronnière* or the Louvre's *La Belle Ferronnière*, or both, or neither, was by Leonardo da Vinci (the argument is not settled yet); the post-WW II Dutch trial on original charges of treason of Han van Meegeren which turned itself into charges of forgery when the accused astonished his accusers by declaring that the "national treasures" which he had sold to prominent German Nazis had been painted by him; *State v. Radich*, a criminal case involving flag desecration by using American flags in allegedly scatological cloth "sculptures"; and finally, *The Matter of Mark Rothko, Deceased*, in brief, an action to surcharge the executors of abstract painter Mark Rothko's will for all sorts of misfeasance and malfeasance with respect to the principal asset of his estate, a large store of unsold canvasses.

A wide range, indeed, but vital, everyone of them. Questions raised run a gamut from civil rights and freedom of expression, through the validity of literary and artistic criticism, inquiries into what is art and what is beautiful, the value of an attribution by "experts," and what to do and what not to do in liquidating the unsold works of a lifetime of artistic endeavor which are likely to be found among the assets of the estate of any successful artist at his death. One of the effects of the death of a successful artist may be to produce an increase of a substantial nature in the value of his works, whether in private hands, public museums, or still in his estate. The supply is now immutably fixed. Enter a problem for the estate's lawyers and for the Internal Revenue Service. On the other hand, the store of unsold paintings on hand at the artist's death, if put on the market wholesale, may depress the market not only for the paintings in that store, but also for the artist's other paintings, whether for sale or in private hands. More problems for the lawyers and the I.R.S.

One can hardly say that any one of the cases, four American, one

English and one Dutch, develops or expounds any startlingly new principles of "abstract" law relating to art. Clearly, this was not Mrs. Adams' purpose in writing her happy book. From at least three of the cases, *Whistler v. Ruskin*, *Hahn v. Duveen*, and *Rothko*, a lawyer can learn a great deal about how and how not to try a case involving art. Avoiding unsuccessful trial techniques is probably more important than learning successful ones. The best teacher, other than one's own mistakes, is someone else's mistakes.

Certainly *Rothko* and, to a lesser extent, *Hahn v. Duveen* are lessons in errors — *Rothko* in the handling of an artist's probate estate, *Duveen* in the trial of a lawsuit for "slander" of authenticity of attribution of a work of art. Mrs. Adams' narration of both is fine — and she is not stated to be a lawyer.[4] In *Rothko*, the surrogate's award against two of the executors was $9,252,000 and, against the third, deemed less in breach of fiduciary duties, $6,464,800.

Contrary to popular belief, a professional artist (as opposed to a "Sunday Painter" as Winston Churchill called himself) is a businessman who creates art to make money. An artist's "reputation" is that amorphous quality which surrounds his work and makes it marketable. Because of this direct relationship between reputation and marketability, damage to the artist's reputation can mean financial disaster to the artist. This is what happened to Whistler when he was awarded one farthing as damages for libel. Whistler won the lawsuit against Ruskin, but the court refused to assess costs. Whistler became bankrupt. An even more disastrous result of this libel suit was the fact that Whistler never again created any major work.[5]

President Lincoln said that "A lawyer's words are his stock in trade." An artist's stock in trade are his ideas put into form and substance by his technical abilities to take various materials such as pigments, metals, plastics, resins, or cloth and make a unique object. When the language of law meets the work of art, a problem arises. Courts of law expect precise definitions and sharply defined issues so that the facts can be clearly presented. Within that framework, a work of art is tried and the presentation of its "facts" will test the skills and patience of the best lawyer. Hilton Kramer, an expert witness in the Radich trial for flag desecration, stated that the trial was a bizarre experience. He was unable to give a serious answer to the questions of "aesthetic intention" or "artistic realization" when these were cast into an alien, legalistic vocabulary. The court in *Brancusi v. United States*,[6] innovatively solved the problem by making a full page photograph of *Bird in Space* part of

[4] Further excellent articles on *Rothko* include: Seldes, *The Passion of Mark Rothko* (subtitled "Art and Money"), ESQUIRE (November, 1974), and the entire volume 11 number 5 (Summer 1976) of ART AND THE LAW, a publication of Volunteer Lawyers for the Arts, which contains a fine note on the legal problems raised by *Rothko* as well as an article on the sculptor, David Smith.

[5] A difference of opinion exists between the reviewers on this point. Professor Sonenfield dissents, and cites Whistler's subsequently executed etchings. They have been favorably compared with those of Rembrandt.

[6] T.D. 43063, 54 Treas. Dec. 428 (1928).

its decision. The court stated "a photographic representation of the importation is made a part of this decision, as it is difficult to describe it with sufficient accuracy to convey to the mind of one who has not seen its actual appearance."[7] Somehow the lawyer must bridge this gap by making legal definitions elastic enough to accommodate the testimony of his experts. Cases arising under the United States' tariff acts demonstrate a great agility and creativity with the English language by counsel in attempting to meet the legal tests of art.

There are two basic areas of art litigation, one dealing with authentication of accepted works of art, which includes the international laws of art acquisition; the other dealing with the fundamental issue of whether an object is art in the legal sense. Today a lawyer has at his disposal an array of scientific tests that will identify all of the components in the work of art. Tests used include chemical analysis of pigments, resins, mixing media, and ground on which the picture is painted. Alterations and understrokes can be revealed by exposure to radiography, infrared and polarized light photography, ultraviolet examination, and microscopic analysis. If the materials identified were not discovered until 1920, one can infer that the painting is not an "Old Master." But as Han van Meegeren said during his trial for forgery, the proof of those forgeries required more time, money, and skill than was required in forging the pictures. In spite of this forensic arsenal, forgers still exist, perhaps because people, for various motives want to buy art and are willing to assume the risk of forgery. Custom within the art world helps the forger because dealers are reluctant to identify either the seller or buyer of the work.

Scientific data, which remains very expensive and time-consuming to obtain, are only part of the evidence of the "facts" of a work of art. Comparative data are also needed to identify the artist. This is the battleground of the experts — those who know. The Federal Rules of Evidence state that an expert is qualified by his knowledge, skill, experience, training, or education.[8] In the art world there is a wide variety of well qualified persons who meet these standards: art historians, dealers, museum curators, connoisseurs, critics, and artists, none of which should be expected to agree. Further complicating the problems of evidence is the fact that there is no central data system of comparative knowledge. These facts of evidence, when they are put into writing, are scattered throughout art publications which include bound volumes, periodicals, bulletins, and newsletters. What is known in California, may not be known in New York.

Every work of art has a history and the more that is known of that history, the easier it is to identify. Comparative data is a term used to describe the facts that are known about a certain artist or a certain work of art. A work of art is in some way comparable to a signature because some aspect of it is unique to the artist. Not all of this will yield to scientific identification because artists are not static and frequently ex-

[7] *Id.* at 429.

[8] FED. R. EVID. 702.

periment with new techniques, styles, or materials as Picasso did in his "Blue Period." The technical procedures used to produce a work of art vary with each artist, period, and locale. By subjecting the work to scientific scrutiny and then comparing those findings with other known evidence, the work can theoretically be identified. But there is always that chance that the artist was experimenting.

Comparative data are obtained from the literature and beliefs of the times, records and inventories of royal families, and comparisons with other authenticated works of the artist. Recently the Cleveland Museum of Art authenticated a panel, "The Birth and Naming of St. John," attributing the work to Juan De Flandes. An excellent explanation of this authentication process using scientific and comparative data can be found in the Bulletin of the Cleveland Museum of Art.[9] This publication will give a lawyer a good starting point in understanding the problems of evidence in art litigation.

The life of the artist, particularly the painter, may be a precarious one. Styles of appreciation change. Appreciation and acceptance may come late or too late. Poor Vincent Van Gogh sold two paintings in his all-too-brief and tragic life. What would that troubled soul not have given just to see the throngs which stand in mute admiration before almost any of his once derided works! In 1865, at an auction in Paris of Impressionist canvasses, paintings by Alfred Sisley brought an average of 100 francs (about $5) apiece. Three months after his death in 1899, in the obscurity of appreciation denied, the public woke up. Prices went up to 4,100 francs apiece (about $200). One year later, "Flood at Pont-Marly" (Paris, Louvre) fetched 43,000 francs at auction ($2,000). How he could have used it!

There must be available for literary exposition such as Mrs. Adams has produced for us in her book many more cases in which Art provided the background and framework of notable cases and trials. Mrs. Adams' narrative of the events leading up to *Hahn v. Duveen* leads the reader to S. N. Behrman's somewhat superficial but very witty and engrossing biography of Joseph Duveen,[10] who made a good thing for himself out of interesting American multi-millionaires such as Altman, Goldman, Hearst, Widener, Morgan, Mellon, Kress, and Frick, in collecting great European Art which now constitutes a large part of our priceless public treasury. Duveen was a super-salesman and seems to have been able to "sell" his stock in trade to tough-minded men whose wealth came from selling dearly, in one way or another, to others after buying cheaply. Behrman frequently mentions Duveen's penchant for getting involved in "expensive" litigation, but gives us only brief glimpses of it. One would relish more details of the cases. Duveen seems to have enjoyed it, and on at least one occasion paid in full the claim of a young artist whom he had defeated in court. The only lawsuit that receives much coverage of a legal nature in Behrman is *Hahn v. Duveen*, but Duveen was also involved in the famous customs case

[9] Bulletin of the Cleveland Museum of Art, vol. LXIII, No. 5 (May, 1976).

[10] S.N. BEHRMAN, DUVEEN (1951).

of 1910 which cost the Duveen organization much more than just the $1,400,000 (raised for them by J. P. Morgan *pere*) in customs duties. Fortunately, this customs case led to a change in the law in 1930, whereby all imported antiques over 100 years old and original works of art are allowed entry into the country duty-free. There was also the 1934 claim by the United States government of $3,089,000 against Andrew Mellon for back taxes and penalties, revolving around whether Mellon's gift of more than three million dollars worth of paintings to the Mellon Foundation was or was not a tax dodge. Most of the paintings had been obtained for Mellon by Duveen and Duveen's testimony about Mellon's *bona fides* helped greatly in carrying the day for Mellon. Duveen simply overwhelmed Robert H. Jackson, who tried the case for the Bureau of Internal Revenue, on whether Andrew Mellon originally intended to give to the United States of America his magnificent collection. He did do so, and anyone who has ever entered that splendid building on Constitution Avenue must be eternally grateful to Duveen and Mellon, as well as to Samuel Kress, Chester Dale and others.

For the purposes of this Review, there needs to be mentioned only one more valuable source. In 1959, Barnett Hollander of the New York Bar brought out a fascinating little book, which does not appear to have been published in this country.[11] Mr. Hollander's range is much wider than Mrs. Adams': Art and cultural property in the Law of Nations; Art in legislation; artists' rights; copyright; auctions; heirlooms; sales, warranties and representations; experts (they are easily fooled sometimes); fakes, forgeries and frauds; slander and libel of property and goods; damages; museums and gifts to museums; stolen art; and art in criminal law. Perhaps a second edition is warranted in the light of the 17 years which have elapsed since its appearance. Besides being interesting in its own right, it is a valuable source book.

CONCLUSION

Mrs. Adams' book is a delight to read. Not the least of its value to these reviewers is that it led them to the other books and sources mentioned in this Review.

[11] B. HOLLANDER, THE INTERNATIONAL LAW OF ART (1959).