IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:	)	
	)	
ONE POLISH WZ. 38 MM MAROSZEK	)	
SEMI-AUTOMATIC RIFLE,	)	1:13CV691
SERIAL NUMBER 1019	)	
_____	)	
	)	
UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
KRISTOPHER J. GASIOR	)	
	)	
Claimant	)	
	)	
REPUBLIC OF POLAND	)	
	)	
Claimant	)	

GASIOR'S RESPONSE TO POLAND'S OPPOSITION TO GASIOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

Poland's Failure to Dispute Gasior's Claim as a Bona Fide Purchaser for Value Without Notice

Poland's Opposition to Gasior's Motion to Strike seems to discount Gasior's reliance on the cases cited by Gasior with respect to the issue of whether or not Gasior is a bona fide purchaser for value without notice and basically ignores the authorities cited by Gasior.

It is Gasior who brought to the court's attention in his pleading the cases of *Willcox v. Stroup*, 467 F.3d 409 (4th Cir. 2006), *Adams v. State of Maine*, 75 Va. Circ. 41 (2008), and *State of Maine v. Adams*, 277 Va. 230, 672 S.E. 2d 862 (2009), and finally *Brown University v.*

Tharpe, 2013 U.S. Dist., No. 4.10CV167, (E.D.V.A. 6/05/2013). Each of these cases stands for the premise that when a bona fide purchaser for value without notice is in possession of a disputed piece of personal property, that the burden is upon the party claiming a superior possessory right to prove that it lost possession by virtue of theft or unlawful conversion.

Poland ignores the fact that each of the defeated claimants in *Willcox*, *Adams* and *Brown* had a valid claim of possession at the time the articles in question went missing.

In *Brown*, there was no question about the fact that Brown at one time had lawful possession of the sword in question. However, in *Brown* the court properly observed:

> To prove it has the right to immediate possession, Brown must show it has a superior claim to the Sword by proving it was "unlawfully divested" or possession of the Sword at a date prior to Tharpe's possession. See *Vicars*, 205 Va. at 940, 140 S.E.2d at 672. Thus the key fact to be resolved by the trial is what happened to the Sword when it was removed from the Memorial sometime before 1977. Because there is no question the Sword was removed during this time, the dispositive issue is whether its removal was unlawful such that the person removing it conveyed no title to successors, or whether it was due to negligence, mistake, or fraud such that a bona fide purchaser with no notice of the infirmity might take clear title. See *Oberdorfer v. Meyer,* 88 Va. 384, 386, 13 S.E. 756, 756-57 (1891) (bona fide purchaser can take good title from seller with voidable title); *Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc.*, 256 Va. 243, 247, 506 S.E.2d 14, 16 (1998) (thief can never pass title superior to true owner's).

Brown University v. Tharpe at 5.

Indeed Gasior has gone to great lengths in his Memorandum of Law in Support of the Motion to Strike to detail all of the evidence before the court in the *Brown* case which, in the court's view, established the disputed property was indeed stolen, thereby defeating Tharpe's claim of possession as a bona fide purchaser for value. On the other hand, in both the *Willcox*

case and the *Adams* cases, the Fourth Circuit Court of Appeals, the Supreme Court of Virginia, and the Circuit Court of Fairfax County of Virginia, each recognized that the prior possessory claims asserted were defeated by the inability of those claimants to prove that possession was lost as a result of theft or unlawful conversion.

In its pleadings, Poland offers no explanation as to how it lost possession of the rifle in 1945. Poland simply asserts in paragraph 12 of its Claim to Property that as a consequence of Nazi Germany's invasion of Poland, "Rifles likely fell into the hands of occupying German forces which stole the property". This is simply not an assertion of fact, but merely conjecture as to how the rifle was lost by Poland. In fact, as has been noted earlier, Poland itself concedes that "Rather than being captured by the enemy, the Property could have been simply found abandoned in an area not within the contemporary control of Nazi forces; it could have been bartered for by a United States soldier." This concession alone in a pleading filed by Poland should suffice to deny Poland's claim.

Gasior, on the other hand, details his acquisition of the rifle from another dealer by the name of Mark Herrick in 1993. The rifle was purchased from Mr. Herrick by Gasior without any notice to Gasior of any claim that Poland might make regarding possession of the rifle some 20 years later. Mr. Gasior's assertions that he is a bona fide purchaser for value without notice as set forth in the pleadings in this case to date have gone unchallenged by Poland. Inasmuch as Poland has not and cannot set forth any assertions of fact establishing theft or unlawful conversion, Poland's claim should be dismissed on the pleadings.

Poland's Arguments Call Into Question the Ownership of Millions of Collectible Firearms, Including Antiques, Based on Original Government Ownership Without Any Evidence of How They Came Into Private Hands or Subsequent History

Gasior has suggested as a theory of how the rifle was lost to Poland and reached the United States that there is a strong possibility that the rifle was retrieved as a war trophy. (There are certainly many other alternative theories as to how Poland lost possession of the rifle, each of which would not defeat Gasior's claim.)

Poland argues: "There Is No Presumption of Ownership-by-Possession Because Mr. Gasior Concedes the Property Was Created for The Polish Government and Pleads It Was Captured from Poland Without Its Permission." Br. 2. That argument calls into question the ownership of literally millions of firearms, including antiques that are centuries old. It would justify the seizure of muskets dated to the American Revolution if marked with the British Crown, or indeed of millions of old military firearms with U.S., Russian, Chinese, German, Dutch, French, or countless other markings. Current owners could not possibly have original records showing how these firearms got into private hands and the chain of custody since then.

Federal law recognizes the legitimacy of such firearms. Restrictions exist on the import of "surplus military firearms," but the Attorney General is required to authorize the import of "[a]ll rifles and shotguns listed as curios or relics by the Attorney General pursuant to section 921(a)(13) . . . ." 18 U.S.C. § 925(d)(3), (e)(1). A "collector" is defined as a person "who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define," for whom a license may be issued. §§ 921(a)(13), 923(b). Mr. Gasior has such a license.

The term "curio or relic" refers to firearms "of special interest to collectors by reason of some quality other than is associated with firearms intended for sporting use or as offensive or defensive weapons," including firearms that are at least 50 years old, firearms certified by a curator "to be curios or relics of museum interest," and firearms deriving monetary value because "they are novel, rare, bizarre, or because of their association with some historical figure, period, or event." 27 C.F.R. § 478.11. Poland bases its claim partly on such qualities, which exist for *all* curio or relic firearms.

Indeed, the official list of collector firearms includes items such as: "All original military bolt action and semiautomatic rifles mfd. between 1899 and 1946." *Firearms Curio or Relic List*, ATF Pub. 5300.11, p. 17 (2007).[1] It includes specific models, such as "French Military Rifle Model 1949/56," and "U.S. Rifle, cal. .30 M1, original military issue only . . . ." *Id*. at 23, 30. The updated list includes "Polish Model P64 pistols, 9x18 mm Makarov caliber, all serial numbers,"[2] which was previously issued to the Polish military and police.[3] Under Poland's argument, all of these firearms are subject to confiscation.

Oblivious to the above, Poland argues that Gasior failed to plead that whoever imported the rifle met the requirements of 18 U.S.C. § 925(a)(4)(A), which relates to import of firearms by members of the Armed Forces. Br. 6 n.2. Yet any records related thereto are not among the

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[1]http://www.atf.gov/files/publications/firearms/curios-relics/p-5300-11-firearms-curios-or-relics-list.pdf.

[2]http://www.atf.gov/publications/firearms/curios-relics/update-january-2009-june-2010.html.

[3]http://en.wikipedia.org/wiki/P-64_(pistol).

records that are required to be retained. 27 C.F.R. § 478.129. Moreover, the predecessor to that provision was not even enacted until 1968. Gun Control Act, P.L. 90-617, 82 Stat. 1213, 1224-25 (1968). No such import provision existed under prior law. Federal Firearms Act, 52 Stat. 1250 (1938); 26 C.F.R. § 177.1 et seq. (1957). In short, Poland has failed to present a scintilla of evidence that any law was broken at any time in relation to the rifle.

The Hague Convention Recognizes the Capture and Retention of Arms During War and Provides No Basis for the Return Thereof

Poland asserts that the rifle was "stolen" as a consequence of the 1939 German invasion, because it "fell into the hands of the occupation forces." Br. 3-4. This is speculative, given that the rifle could have been given to a private person to prevent such capture, and could have simply been abandoned. At any rate, the capture of arms is not theft under Article 53 of the Hague Convention: "An army of occupation can only take possession of . . . depots of arms . . . ."

Poland frivolously states that "Article 53 does not apply to Mr. Gasior because he is not an 'army of occupation.'" Br. 5. Turning to the possibility that the rifle was captured by German forces and not those of Russia or other invaders, Poland claims that the Hague Convention "does not permit an occupying army to take ownership of arms . . . ." Br. 5. But such capture extinguishes prior ownership - under Article 53, "an occupying force is permitted to seize public movable property and *appropriate such property for its own uses . . . ." United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp.2d 617, 643 (E.D. Va. 2005) (emphasis added). Nothing in the Hague Convention requires the return of captured property to the enemy.

While lost in history, the rifle could have been captured by the Germans, and it could have been thereafter captured by the U.S. military, which then would have full authority under

the Hague Convention to determine its disposition. Contrary to Poland, Br. 5-6, that would include allowing an American serviceman to keep it as a war trophy. Or the military force of another country may have done the same, and the rifle later found its way to the United States through the collector market.

Poland completely misreads *Menzel v. List*, 49 Misc.2d 300, 305, 267 N.Y.S.2d 804 (1966). Poland cited this case in its opening brief without so much as mentioning that it distinguished the lawful seizure of war booty such as arms from the looting of private property such as art. It now asserts that such cases do not "uphold a private right to treat military armaments as war trophies." *Id*. at 6. But *Menzel* referred to the capture of arms and other state property that could "be treated as *lawful* booty of war by conquering armies" under the Hague Convention. 49 Misc.2d at 305 (emphasis added). The conquering army could then decide what to do with such arms when no longer needed, or a conquering army after that could do so. In sharp contrast, "Where pillage has taken place, *the title of the original owner is not extinguished*." *Id*. at 307 (emphasis added). Obviously, the title of the original owner is extinguished in the case of lawfully-seized war booty.[4]

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[4]The issue of captured enemy property is dealt with at length in the article written by William Gerald Downey, Jr., Chief International Law Branch, Judge Advocate General's Office, Department of the Army, Titled *Captured Enemy Property: Booty of War and Seized Enemy Property* found at 44 Am. J. Int'l L. 488 (1950).

"War booty, strictly defined, is limited to movable articles on the battlefield and in besieged towns. Private property which may be taken as booty is restricted to arms, munitions, pieces of equipment, horses, military papers, and the like. Public enemy property which may be seized as war booty is limited to movables on the battlefield, and these need not be for military operations or necessity." *Id.* at 489

"The concept of war booty is an old as recorded history. It has developed over a period of many centuries from the ancient practice by which the individual soldier was considered to be entitled

to take whatever he could find and carry away, to the modern rule under which only the state is entitled to seize property as war booty" *Id*. at 490.

"It is generally held that title to captured enemy public property susceptible of becoming war booty passes from the losing Power to the capturing Power immediately upon the effective seizure, that is, as soon as the property is placed under substantial guard and is in the firm possession of the captor, or at the latest, within 24 hours after the seizure, without the necessity of adjudication by a court as is required in the case of prizes captured at sea."

"It is further generally held that when such a capture becomes perfect, i.e., when title to the property is vested, a subsequent sale is good even against the former owner. The principle is thus established that whatever divests the possession of the original owner and substitutes the military in his place is good capture." *Id.* at 492.

"Military papers, arms, horses and the like can be seized as war booty whether they can be used for military operations or not, and the mere fact that enemy private property has been found on a battlefield entitles a belligerent to seize it." *Id*. at 494 – 495.

"By virtue of the authority of the war powers of the President and in order to improve the morale of United States forces in theaters of operations, the War Department published Circular 353 on August 31, 1944, which authorized: … the retention of war trophies by military personnel and merchant seamen and other civilians serving with the United States Army overseas … under the conditions set forth in the following instructions. Retention by individuals of captured equipment as war trophies in accordance with the instructions contained herein is considered to be for the service of the United States and not in violation of the 79th Article of War." *Id.* at 500 -501.

"Based upon the Declaration of London, claims against the United States for the restitution of items of military equipment were made by several foreign governments, including Hungary, Poland, Yugoslavia, Belgium and Norway. Each of these governments assumed that whatever property was seized by the German armed forces was to be considered as "looted" under the terms of the Declaration of London."

"The case of the captured Hungarian horses is a fair illustration of the difficulties encountered. Certain Hungarian horses, belonging to private and public owners, were taken from Hungary by the retreating German Army early in 1945. Later they were captured in combat by the United States Army on German army farms and were reduced to firm possession. The best of them were brought to the United States for use at the United States Army breeding farms. In 1947 the Hungarian Government requested their return under the provisions of the Declaration of London. The United States Army, believing the horses to be captured enemy property, desired to retain them, while the Department of State, anxious to prove the international good faith of the United States, desired to return the horses to Hungary. After extended hearings before a subcommittee

Contrary to its speculation that the rifle was captured by the German army, Poland suggests that it could not be a war trophy because Gasior's Answer denied that Germany seized the rifle. Br. 9. To the contrary, Gasior stated: "Deny that the rifle was 'looted by an invading army from the manufacturing facility in Warsaw following the September 1939 invasion of Poland and outbreak of World War II.' *Claimant is without information to admit or deny the contentions* of the Republic of Poland and denies that the Republic of Poland is entitled to the rifle." Answer ¶6(a) (emphasis added). Gasior simply does not know, and neither does Poland.

Finally, Poland faults Gasior for failing "to address adequately the U.S. military's prohibition on the 'sale or barter' of war trophies in the United States." Br. 9. But Poland has cited no law or policy that would prohibit the sale of what a soldier may have brought to the United States as a war trophy many years after being brought back. The soldier's widow may have given it to a relative, who may have given or sold it to someone else. It is not required that a war trophy be buried with the soldier when he dies, or that it be returned to the United States government.

In sum, Poland's arguments illustrate the speculative character and hopelessness of questioning the ownership of items of property left over from long-ago wars and scattered throughout the globe. It would introduce wholesale uncertainty about settled property interests in anything that is old and from a foreign country. Its claim should be rejected.

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of the Armed Services Committee of the United States Senate, where all the relevant facts were brought to light, it was finally decided by the Department of State and Army that the horses were captured enemy property, title to which was vested in the United States, and that such horses could not be sent to Hungary, or otherwise disposed of, without the specific authorization of an Act of Congress." *Id.* at 503 – 504.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Poland's Opposition to Motion for Judgment on the Pleadings was served, via ECF, on Karen Taylor, Assistant United States Attorney; David B. Smith, Esq.; Nicholas Smith, Esq., and Tai-Heng Cheng this 23rd day of September, 2013

/S/ John A. Keats
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