# Evolving U.S. Case Law on Cultural Property Disputes

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## 1 Introduction

The value of illegally traded art and antiquities world-wide is estimated to be between $2 billion and $6 billion a year.[1] Not only does one encounter the expected art smugglers and Customs agents, but English aristocrats[2] and venerable museums[3] have become embroiled in the morass of conflicting claims to art and antiquities. A growing number of parties have sought a determination of their rights in U.S. courts. In light of the important role played by the courts in deciding these conflicts, it behooves one to ask what rules, if any, have emerged from prior U.S. case law. If rules of law are fashioned with an eye toward regulating private conduct, what should an owner or purchaser of a work of art or antiquity have to do to prevail in a U.S. court?[4] This question has been raised in several lawsuits wherein a foreign sovereign state has sought the return of cultural property. The answer appears to depend on whether the sovereign knew the cultural property existed, had done something to document its existence and had provided notice to all through national legislation that such cultural property belonged to the state. While it is too early to state that the decisions form a coherent policy toward resolving cultural property disputes, it can be said that settled positions are evolving around which private parties can structure their behavior.

This article focuses on four decisions by U.S. courts that involve competing claims to cultural property. There are at present several cases in various stages in the courts whose resolution will no doubt clarify further this emerging doctrine.[5]

The decided cases are *United States v. Hollinshead*,[6] *United States v. McClain*,[7] *Peru v. Johnson*,[8] and *Jeanneret v. Vichey*.[9] Part I will

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discuss *Hollinshead* and its enlargement of the common law meaning of 'stolen' to include legislative declarations of ownership. Part II will discuss *McClain* and its restriction of the rule in *Hollinshead.* Part III discusses *Johnson* and the corresponding criminal case involving objects from Peruvian sites, *United States v. Swetnam.*[10] Part IV will discuss *Vichey* and the distinction between export laws and ownership laws and the implication of that distinction for *bona fide* purchasers. Part V will develop the doctrinal points of law that have emerged from the above mentioned decisions and identify areas where judicial resolution is still required.

## 2 Part I

*United States v. Hollinshead*

Clive Hollinshead, a dealer in pre-Columbian artifacts, was charged with causing the transportation of stolen property in interstate commerce and conspiring to transport stolen property in interstate commerce in violation of the National Stolen Property Act.[11] Hollinshead arranged with George Alamilla to procure pre-Columbian artifacts in Central America. After excavation, the artifacts were transported to a fish packing plant in Belize City, then British Honduras now Belize, owned by Johnnie Brown Fell. Here the artifacts were packed in boxes marked 'personal effects' and addressed to Hollinshead in California.[12] Hollinshead and Fell supervised the packing of the objects in the presence of Guatemalan officers who were bribed to insure their cooperation.[13]

The artifacts were shipped to Miami, Florida where Fell and another conspirator received the crates and began trying to dispose of the artifacts. Unfortunately for the conspirators, one of the pieces they had dismembered, crated and shipped was a pre-Columbian stela known as Machaquila Stela 2, a rare Mayan ruin from the jungle of Guatemala. The stela had been photographed in the 1960's by an archaeologist, Ian Graham, for the Peabody Museum of Archaeology and Ethnology at Harvard University.[14] Graham documented the stela in photographs and drawings in 1962 and returned to the site in 1968, at which time the stela was still *in situ.* In 1971, Graham was contacted by a curator at the Brooklyn Museum, requesting Graham's opinion about a pre-Columbian stela the Museum had been offered by Clive Hollinshead.[15] Graham recognized the monument and notified the authorities. The government of Guatemala, alerted to the location of the stela, instituted suit for its return.[16] Before the case came to trial, the stela was seized by the FBI for importation without a proper customs declaration.[17]

Hollinshead, Fell and Alamilla were indicted on August 28, 1972 on counts of conspiracy to transport stolen goods and causing the transportation of stolen property in interstate commerce.[18] They were convicted on both counts on March 14, 1973.

On appeal, Fell and Hollinshead raised nine claims of error.[19] Eight of the claims related to evidentiary issues that the court reviewed and found to be without merit. The ninth claim centered around a jury charge in which the trial judge instructed the jury that, 'there is a presumption that every person knows what the law forbids.'[20] The defendants correctly pointed out that it was the law of Guatemala that characterized the stela as stolen property and that there was no presumption that the defendants knew Guatemalan law.[21] The court, however, found adequate evidence in the record as to the law of Guatemala pertaining to artifacts such as the stela. It also found 'overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stela and that the stela was stolen.'[22] The laws of Guatemala under which the country claimed title included Articles 107 and 129 of its 1965 Constitution, Congress Decree No. 425 of 19 September 1947 as amended by Decree-Law No. 437 of 24 March 1966.[23] The court found that Guatemalan law declared that 'all such artifacts are the property of the Republic and may not be removed without permission of the government.'[24]

In addition to determining the Guatemalan law, the court's instruction to the jury included that the offense charged required three elements. These were: first, an act of transporting or causing to be transported the Mayan artifact known as Machaquila Stela 2 in interstate commerce; second, with the knowledge that the artifact had been stolen; and third, that the Mayan artifact had a value of $5,000 or more.[25] The judge also had to provide a definition of the term 'stolen' for purposes of the National Stolen Property Act.[26] The definition used by the court was borrowed from the National Motor Vehicle Theft Act.[27]

The appellate court found the instructions proper, stating that 'while the government was required to prove that the appellants knew that the stela was stolen, ... it was not required to prove that appellants knew where it was stolen.'[28] Therefore, 'it was not necessary for the government to prove that appellants knew the law of the place of the theft.'[29] Any error in the trial judge's instruction was not, in the court's opinion, prejudicial. After the criminal convictions, Guatemala sued to recover the stela and the court ordered its return.[30] Neither the trial court nor the Court of Appeals felt any need to parse the actual language of the Guatemalan laws.[31]

The criminal case engendered comment mainly for its integration of Guatemalan law as the basis for the criminal conviction of U.S. citizens for something not a crime under the laws of the United States.[32] The case, however, is not really that remarkable. Guatemala had declared ownership of this class of monuments, the stela had been documented *in situ* and it was now outside the territory of Guatemala without the knowledge or permission of the sovereign. This, the court found, was sufficient for the imposition of criminal liability.

It should be noted that, because the stela was connected with a documented site, had the 1970 UNESCO Convention been applicable, the stela would have fallen within Article 7(b) of the Convention and any signatory nation would have been bound to return the object once seized.[33] While the United States had not yet implemented the UNESCO Convention in 1974, the Senate had ratified the UNESCO Convention in 1972.[34] Guatemala ratified the UNESCO Convention in 1985.[35]

The statement by the Court of Appeals, that it was not necessary that the defendant know the provisions of the foreign law, has been limited by the language of the *McClain* and *Johnson* cases. At base, *Hollinshead* today stands for the proposition that U.S. courts will allow both criminal and civil suits to insure the return of cultural property documented *in situ* without requiring an in depth examination of the terms of the foreign law.[36]

## 3 Part II

*United States v. McClain*

*McClain* was the second important prosecution brought under the National Stolen Property Act as applied to cultural property.[37] Unlike *Hollinshead*, the artifacts at issue in *McClain* had never been documented prior to their illegal export and it is fair to assume that they were not part of any private or public collection.

The assumption of all parties to the *McClain* case was that the objects were either purchased from whoever discovered them or that the individuals charged had excavated the objects themselves with the intent to sell them outside the country.[38] The defendants were arrested while trying to sell the objects to various museums. One of the cultural institutions contacted by the group was an official arm of the Mexican government.[39] The Mexican Cultural Institute contacted the FBI, who purchased $115,000 worth of the objects leading to the charges of transportation and receipt of stolen goods under the NSPA.[40]

The *McClain* court defined stolen as 'any dishonest transaction whereby one person obtains that which rightfully belongs to another and deprives the owner of the rights and benefits of ownership.'[41] The defendants were convicted by the U.S. District Court for the Western District of Texas. That decision was reversed by the U.S. Court of Appeals for the Fifth Circuit which remanded the case for further proceedings to determine when the pre-Columbian artifacts were exported in light of the Appeals Court's finding that the only Mexican law that clearly declared national ownership of all artifacts was that of 1972.[42]

On remand, the District Court again convicted the defendants on the grounds of violating the NSPA and conspiring to violate the

NSPA. The Fifth Circuit reversed the conviction for violation of the NSPA because the District Court had allowed the jury to decide the issue as to when Mexico had declared ownership, a question that is committed to the judge under the Federal Rules of Civil Procedure.[43] The conspiracy conviction was upheld.

Unlike *Hollinshead*, where the court felt it unnecessary to construe the actual language of the Guatemalan law before accepting its applicability, the *McClain* decisions involved careful exegesis of the various Mexican laws. Mexico had first enacted a law protecting its cultural heritage in 1897. Article 1 of the Law on Archaeological Monuments, May 11, 1897 made 'archaeological monuments the property of the Nation.'[44] No one could 'remove them ... without the express authorization of the Executive of the Union.'[45] While this law appeared to vest ownership of such monuments in the government, private individuals were allowed to possess pre-Columbian artifacts. The class of artifacts at issue in *McClain* were covered by Article 6 of the 1897 law which provided only for a prohibition on export.[46] There was nothing in this language that could lead the court to a determination that the artifacts were owned by the state.

In 1930 Mexico enacted a broader statute.[47] The 1930 law covered objects of 'artistic, archaeological or historical value, whether movable or immovable.' An object was declared to be a monument if it came under the auspices of the Secretariat of Public Education or was declared to be a monument by the Department of Artistic, Archaeological and Historic Monuments. Monuments were to be protected, but could be privately owned and alienated subject only to a right of first refusal in the government.[48] This law was also determined not to amount to a declaration of ownership.

A third law, with still broader impact, was enacted in 1934.[49] The definition of monuments was expanded to include 'all vestiges of the aboriginal civilization dating from before the completion of the Conquest.'[50] All immovable archaeological monuments were declared to belong to the nation including 'objects which are found [in or on] immovable archaeological monuments.'[51] The 1934 law continued to recognize private ownership of archaeological monuments. Privately owned objects had to be registered and all transfers were to be recorded.[52] The court concluded that artifacts found in or on immovable monuments were a subset of all pre-Columbian artifacts. If an object was not within the subclass it was not owned by Mexico.

The 1934 regime continued until the passage of the Federal Law Concerning Cultural Patrimony of the Nation of December 16, 1970.[53] This law restated the provisions of the 1934 law and added an export prohibition for those objects that were declared to form part of the Cultural Patrimony of the Nation. Private ownership survived, as did the registration and recording requirements of the 1934 law. Article 54 provided that movable artifacts that were not 'unique, rare specimens or of exceptional value for their aesthetic

quality or for their other cultural qualities... can be the object of transfer of ownership.'[54] Article 55 created a presumption that unregistered, movable archaeological objects 'are the property of the Nation.'[55] This amounted to a declaration of ownership in the state for a certain class of objects, upon a failure to show compliance with the registration requirements of the law.

The final law considered by the court was the Federal Law on Archaeological, Artistic and Historic Monuments and Zones of May 6, 1972.[56] For the first time the law declared unequivocally that 'archaeological monuments, movables and immovables, are the inalienable and inprescriptable property of the Nation.'[57] Article 28 defined archaeological monuments as '[m]ovable and immovable objects, products of the cultures prior to the establishment of the Spanish culture in the National Territory.'[58] Prior to the passage of the 1972 law, there had been 'a bitter constitutional debate' regarding the validity of extending public control over previously private property.[59] The 1972 law 'extended national ownership of the cultural patrimony to private collections and forbade absolutely the export of pre-Columbian items.'[60]

The 1972 law still protected private ownership rights to the extent these had been previously created by registration under the 1934 and 1970 laws.[61] Thus, there was a dual ownership system with the same types of objects owned by the state through legislation, or by private persons through registration. The Appeals Court held that before the NSPA could be applied to an item, that item had to be determined to be stolen. As the objects in question had never been reduced to physical possession the court required a clear declaration of national ownership. It rejected the idea that export restrictions alone would be sufficient. There had been no determination from the evidence presented as to when the objects had been exported. 'If the exportation occurred before 1972, but after the effective date of the 1934 law, it would be necessary to show that the artifact was found in or on an immovable archaeological monument' for the article to be considered stolen.[62] 'If the exportation occurred before the effective date of the 1934 law, it could not have been owned by the Mexican government, and illegal exportation would not subject the receiver of the article to the strictures of the NSPA.'[63]

On remand, the defendants were convicted on both the substantive charge and the conspiracy count.[64] There was additional testimony on the five Mexican laws and a provision of the 1917 Mexican Constitution.[65] The witnesses presented by the Mexican government testified that, regardless of the exact wording or specific provisions of the laws, the Mexican government had intended to own pre-Columbian artifacts from the passage of the 1897 law.[66] The expert witness for the government of Mexico maintained that the combination of the default ownership provisions and the Constitution was a sufficient declaration of ownership. The defendant's witness testified that the Fifth Circuit's analysis of the Mexican laws in the prior

Appeals case had been correct, that is, that there had been no clear declaration of ownership until passage of the 1972 law. The trial judge submitted the resolution of this conflict in meaning to the jury.

On this point the conviction of the defendants for violating the NSPA was reversed. As noted above, foreign law, under the Federal Rules of Civil Procedure is a question of law to be decided by the judge. The court held that in view of the evidence presented in the trial, the jury could have based its conviction of the defendants on the belief that Mexico had declared itself owner of all artifacts as early as 1897.[67] By doing so, the jury had applied laws that were too vague, when measured by American constitutional standards, to serve as the basis for criminal liability.[68] While Mexico may have considered itself the owner of all pre-Columbian artifacts for almost 100 years, the laws were not expressed with 'sufficient clarity to survive translation into terms understandable by and binding upon American citizens.'[69] The court held that '[t]he National Stolen Property Act... cannot be properly applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature.'[70]

There was sufficient evidence in the record to allow the court to uphold the conspiracy conviction. The defendants had demonstrated that they intended to continue their trafficking in pre-Columbian artifacts from Mexico in the future. They possessed enough general knowledge of the post-1972 ownership claims to understand that the objects would be considered stolen by the Mexican government.

It is interesting to note that the prosecution was unable to present evidence as to how or when the objects in dispute had been acquired in Mexico, or even as to whether Mexico was in fact the country of origin.[71] The initial District Court decision appeared to place the burden of proof on the defendant to demonstrate the source of the artifacts and the date of export. This was rejected by the Court of Appeals and the burden of proving origin has remained consistently with the sovereign in later cases.

In retrospect, it is questionable whether the conspiracy convictions should have been sustained without some determination of the origin of the objects. As is clear in the *Johnson* decision, the courts will now require the prosecution/plaintiff to demonstrate two things: first, that the foreign law provides a clear declaration of ownership by the sovereign and second, that the items were initially discovered or documented within the jurisdiction of the sovereign to ensure that the proper nation's law is being recognized.

*McClain* has been interpreted in radically different ways by different groups. Prosecutors and the Customs Service have chosen to interpret *McClain* as introducing the proposition that forfeiture upon illegal export vests ownership in the foreign sovereign.[72] Under this interpretation, illegal export of cultural property transforms that property into stolen property. Not surprisingly, art dealers have

interpreted *McClain* somewhat differently. As stated in the *amicus* brief filed in the *Swetnam* proceeding, *McClain* stands for the proposition that:

> Export restrictions guard... jurisdiction [over property] and power [to regulate its use or disposition]. But, except for this effect on jurisdiction, restrictions on exportation are just like any other police power restrictions. They do not 'create ownership' in the state. The state comes to own property only when it acquires such property in the general manner by which private persons come to own property, or when it declares itself the owner...[73]

Courts following *McClain* appear to have accepted the position articulated by the art dealers.

It should be noted that at the time of the *McClain* decisions the United States and Mexico had already signed a treaty committing each country to 'employ the legal means at its disposal to recover and return ... stolen ... cultural property.'[74] The Attorney General of the United States is authorized to institute civil proceedings for the return of such property. The treaty pre-dates the 1972 Mexican law and therefore would not incorporate that law as the basis for a determination that specific cultural property had been stolen.[75] Further, the Treaty is limited to property deemed to be 'of outstanding importance to the national patrimony.'[76] Arguably the kind of objects at issue in *McClain* would not have fallen within the Treaty's purview.

## 4 Part III

*United States v. Swetnam, Peru v. Johnson*

In *United States v. Swetnam*, the Customs Service initially seized the disputed artifacts under a host of customs and criminal regulations including 18 U.S.C. § 371 (conspiracy to commit offense or to defraud the United States); § 542 (entry of goods by means of false statements); § 545 (smuggling goods into the United States); § 1001 (statements or entries generally); §§ 2314 and 2315 (National Stolen Property Act); and Title 19 U.S.C. § 1595 (searches and seizures) and § 2606 (import restrictions) (Cultural Property Implementation Act). The indictment against Swetnam, a dealer in pre-Columbian artifacts, was limited to 18 U.S.C. § 2 (aiding and abetting), § 371, § 545, and § 1001. The NSPA charges were dropped, presumably owing to the difficulty of proving ownership by Peru on the basis of Peruvian law.[77] Swetnam pleaded guilty to smuggling and aiding and abetting. He was able to reclaim the majority of the artifacts confiscated by the Customs Service except for pieces that were returned to the Peruvian government as part of a settlement agree-

ment.[78] The exact disposition of the majority of the artifacts is unclear.

The civil case brought by Peru against Benjamin Johnson, an art dealer, was resolved in Johnson's favor on the ground that Peru failed sustain its burden of proving that it was entitled to the return of the objects.[79] The decision in *Johnson* should be contrasted with the failure of any of the *McClain* decisions to address or resolve what would seem to be a very important precondition to bringing suit in American courts, namely demonstrating standing based on having suffered an injury in fact. If the sovereign never knew of the existence of the objects and cannot prove that the objects were excavated within its territory, it has suffered no actual injury when such objects enter the stream of commerce outside the nation's borders. If the sovereign has not documented or actually possessed the objects in question, it must demonstrate that it has at least 'done something' to exercise ownership rights in the objects. Enforcing penalties and sanctions against nationals who violate the domestic laws is one way of demonstrating that the sovereign had met this 'do something' requirement.[80] The conclusion drawn by at least one commentator is that Peruvian nationals may not have been subject to penalties or sanctions for failure to comply with their own national laws.[81] U.S. courts should be leery of enforcing foreign laws in this country without a clear demonstration that the same laws are given effect domestically. Moreover, the Peruvian expert witness, while able to identify the items as recognizable examples of Peruvian pre-Columbian culture could not link the objects with a particular site in Peru.[82] The defendant, however, was able to produce export certificates showing that he had purchased the disputed items in good faith over the course of several years from various countries.[83] Therefore, Peru's claim to superior title failed.

The court, *in dicta*, went on to analyze the Peruvian laws in detail. The first law examined was Law No. 6634 of June 13, 1929.[84] The Peruvian government's interpretation was that the 1929 law provided that archaeological objects found before 1929 belonged to the finder while objects found after that date belonged to the state. Privately owned pre-Columbian artifacts were to be registered in a book maintained at the National Museum of History.[85] An object not so registered after one year, beginning on the day the book was opened, was considered to be property of the state. The court was unable to determine from the evidence presented whether such a book had ever been opened.[86]

The 1929 law remained in effect until it was repealed and replaced by Law No. 24047 on January 5, 1985.[87] After the passage of this law, private persons were required to register their archaeological objects. If an owner did not comply with this registration obligation, the law *could* be interpreted to mean that the objects belonged to the state.[88]

The President of Peru issued a Supreme Decree on February 27, 1985 that proclaimed pre-Hispanic artistic objects belonging to the

nation's cultural wealth were untouchable and their removal from the country was categorically forbidden.[89] The trial court considered this language too vague to be a declaration of state ownership. On June 22, 1985 a statute provided specifically that all archaeological sites belonged to the state.[90] It was the contention of the Peruvian witness that this meant that a private person who dug at a site and excavated its objects would be taking someone else's property.[91] The law does not appear to claim as state property objects not found at an archaeological site. This leaves a potentially large class of objects within the domain of private ownership.[92] The court, reading the Supreme Decree and statute together determined that any artifacts privately excavated between January 5 and June 22, 1985 would constitute private property.[93]

While the laws of Peru asserted the interest of the government in preserving its cultural heritage and prohibiting the export of artifacts, this assertion was not equivalent to a declaration of national ownership.[94] The 1929 law that pronounced 60th historical monuments and unregistered artifacts property of the state, did not preclude possession of artifacts by private parties and their subsequent transfer. There was no testimony that Peru had ever tried to exercise its laws against its own citizens as long as the objects remained within Peruvian territory. The court thus concluded that the effect of the laws was that they amounted to restrictions on export. Citing *McClain* for the proposition that export restrictions do not create ownership,[95] the court found the Peruvian laws lacked sufficient clarity to be understandable by and binding upon American citizens.[96]

In *United States v. Swetnam* and *Peru v. Johnson* the United States and Peruvian governments tried to convict alleged smugglers under U.S. laws and return to Peru objects claimed to be stolen and illegally exported in violation of Peruvian laws. While Swetnam did plead guilty to a smuggling charge and was sentenced to six months in prison,[97] most of the disputed artifacts remained with their current possessors. These cases raise many questions about the effectiveness of such lawsuits when compared to legislative solutions to the problem of illicit trade in cultural property.

Peru and the United States have signed an executive agreement entitled Respecting the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties.[98] In June 1989, Peru requested the imposition of import restrictions under Section 2603 of the Cultural Property Implementation Act[99] for artifacts from the Sipan II site.[100] The request was granted in May 1990.[101]

## 5 Part IV

*Jeanneret v. Vichey*

Both the *McClain* and *Johnson* courts refused to enforce any foreign law that could be characterized as a restriction on export. Commen-

tators have noted repeatedly that the illegal export of cultural property does not affect the property's legal importation into a second jurisdiction. The strength of that proposition was initially tested in *Jeanneret v. Vichey*.

The question facing the court was this: did the claim of the Italian government – that a painting had been illegally removed from Italian territory by the legal owner of the painting – cast a sufficient cloud on the title of a subsequent *bona fide* purchaser so as to allow the *bona fide* purchaser to rescind the sale for breach of warranty of title.

The trial court held that the jury could easily have determined that the Italian government had made a legitimate claim on the title of the painting.[102] The court cited U.C.C. § 2–312 that 'there is in a contract for sale a warranty by the seller that ... the title conveyed shall be good.'[103] The Court of Appeals for the Second Circuit reversed and remanded for a clearer determination of the law to be applied. While ducking both the narrow issue and the broader implications of the question,[104] the Court of Appeals refuted the proposition that the Italian government could seize the painting or hold the *bona fide* purchaser responsible for any fines or penalties arising out of the illegal export.[105]

In *Vichey* the defendant, Anna Vichey, who was an American citizen, had inherited a one third interest in a Matisse painting from her father in 1970.[106] The painting was part of an extensive and internationally recognized collection belonging to her father, located in Milan, Italy. A letter from Bank Gut Streiff in Zurich dated July 24, 1970 indicated that the painting had been deposited with the bank by that date.[107] There was uncontroverted proof that no export license or permit had ever been obtained from the Italian government.[108]

Mme. Vichey and her husband sold the painting to Mme. Jeanneret, an internationally known Swiss art dealer, in 1973. In 1974 Mme. Jeanneret was informed that the Italian government considered the painting to have been illegally exported.[109] Mme. Jeanneret maintained that because of this she was no longer able to sell or show the painting and proposed returning the painting to the Vicheys for repayment of the purchase price.[110] The Vicheys refused and Mme. Jeanneret instituted suit for breach of express and implied warranties of title, false and fraudulent misrepresentation, breach of contract and a claim that the defendant had used the plaintiff as part of a tax evasion scheme.[111]

Much of the testimony heard by the trial court involved two different sets of provisions of Italian law that governed the export requirements relating to works of art. The earliest were the Regulations for the Execution of Law No. 364 of June 20, 1909, Approved by Royal Decree No. 363 of January 30, 1913.[112] Article 129 required 'anyone desiring to export objects of historical, archaeological, paleontological, artistic or numismatic interest to present them to a

royal office for the exportation of antiquities and art objects.'[113] Persons seeking export licenses had to file a declaration of the value of the objects to be exported. Government officials then inspected the objects and could ban their export or purchase the items for the Italian government at their declared value.[114]

A second provision of the 1913 regulations, Article 130, provided that:

> Paintings, sculpture and any works of art made by living artists or not more than 50 years old, including copies and imitations, must be submitted to Export Offices or to the offices specifically set up pursuant to Art. 46 of Law No. 386 of June 27, 1907, in order to obtain an export permit.[115]

The permit requirements were more informal than the license requirements and primarily fiscal in character. There was no requirement of a declaration of value and the export officer was without authority to deny a permit. Penalties for non-compliance included a fine, and seizure of the objects until the exporter paid the storage and transport expenses.[116]

The second set of provisions dated from 1939.[117] Article 1 of the 1939 law lists the same types of objects covered by Article 129 of the 1913 regulations. Works by living artists, or works not more than 50 years old are specifically excluded from the 1939 law's coverage.[118]

Article 2 the 1939 law sets up a notification process by which the Minister of Public Instruction gives administrative notice to owners of works enumerated in Article 1 that the works are of particular interest to the Italian government. This notice was considered to be binding on any successor in ownership, holder or possessor of a beneficial interest in a work of art.[119]

Article 35 prohibited the export of objects covered in Article 1 provided that the items were of 'such importance that their export would represent a tremendous loss to the national patrimony.'[120] Anyone who wished to export Article 1 type objects had to apply for a license and declare the market value of each object as provided in Article 36. Any disputes as to value would be resolved by the Minister of Public Instruction. Objects of particular interest could be purchased by the Ministry within two months of the determination of the object's value.[121]

Article 61 renders null and void any transfer made without compliance with the procedural requirements of the 1939 law.[122] Fines are provided for and confiscation of the object under regulations pertaining to smuggled goods is permitted.[123] If the item has left Italy or cannot be traced, the transgressor is required to pay the stated value of the item.[124]

Because the 1939 law expressly excluded works by living artists or works less than 50 years old, the question arose as to whether

Article 130 of the 1913 regulations survived to govern such works or whether the 1939 law superseded the 1913 regulations thereby leaving such works unregulated. Article 73 of the 1939 law entitled 'Transitional Provisions' was found to control: '[T]he provisions of the regulations approved under Royal Decree No. 363(3) of January 30, 1913, shall remain in force, in so far as they are applicable until such time as the regulations to be issued in execution of this law take effect.'[125]

There was conflicting testimony as to the effect of this provision between those experts who felt that only the provisions of the 1913 regulations dealing with works within the scope of Article 1 of the 1939 law survived; a position that resulted in the free exportation of works of living artists or works less than 50 years old, and those who felt that such portions of the 1913 regulations that did not conflict with the 1939 law remained in force. This would mean that the informal fiscal provisions requiring only a permit would continue to apply to such works.[126]

Almost ten years after the export of the Matisse painting,[127] on March 28, 1979, the Assistant Minister of Culture issued a notification pursuant to Article 3 of the 1939 law declaring the painting to be 'of particular artistic and historical interest' to the Italian government and 'therefore subject to the 1939 regulations.'[128] Penal proceedings were instituted against Anna Frau DeAngeli (Vichey), Interpol was requested to recover the painting and the Chief of the Italian Delegation for Retrieving Works of Art was asked to present the request of the Italian government to the United States authorities to assist in returning the painting.[129] In view of the efforts of the Italian government and uncontradicted testimony of several art dealers that the painting could not be resold the Court of Appeals was hard pressed to reach its determination that in fact no cloud on title could be said to exist.[130]

The rationale of the decision lies in the court's citation of Professor Bator's article that declared 'the fundamental general rule' to be that 'illegal export does not itself render the importer (or one who took from him) in any way actionable in a U.S. court; the possession of an art object cannot be lawfully disturbed in the United States solely because it was illegally exported from another country.'[131] Although in this case the rule penalized the good faith purchaser, it is not hard to imagine the widespread effect on commercial transactions involving the sale of art had the lower court decision been allowed to stand.[132]

Nowhere did the applicable Italian laws declare such objects as the painting in question to be state property. None of the Italian regulations appeared to extend their reach to *bona fide* purchasers provided the painting was never returned to Italy.[133] The Court of Appeals disagreed with the trial court's instruction that if the painting was ever returned to Italy, the 'owner, even if he purchased the painting in good faith, could be required to pay customs duties

and/or fines.'[134] On the contrary, the Court of Appeals found nothing in the Italian law that imposed any such liability on the purchaser as opposed to the exporter. The court also determined that no government, including the U.S. government, would act on Italy's request for help in securing the return of the painting.[135]

It can certainly be argued that any geographic limitation on resale reduces the value of the item on the worldwide art market.[136] In looking at the effect of its decision, however, the Court of Appeals was clearly correct in determining that a decision to grant to the uncertain Italian laws the power to create a cloud on title would be to give the laws effect beyond normal understanding and the generally recognized territorial limitations on national legislation.[137]

*Jeanneret* reaffirms the position that the Customs laws of one country are not effective in the courts of another.[138] As decided in *Attorney General of New Zealand v. Ortiz*,[139] when a regulation amounts to a restriction on export, the government must actually seize the object before it leaves the jurisdiction to vest ownership in the government.[140]

## 6 Part V — Conclusion

Commercial transactions involving cultural property can be highly uncertain. In considering the conflict between the rights of the original owner and the *bona fide* purchaser, U.S. courts have tried to effect a balance by treating a thief in the chain of title as an absolute bar against subsequent purchasers and otherwise supporting the free transferability of property.

The *Hollinshead* approach, extends the traditional common law rule, *nemo dat quod non habet*[141] to characterize as 'stolen' objects declared owned by statute as long as those objects have been discovered and documented. *McClain* rejected any further extension to undiscovered objects without a painstaking examination of the foreign ownership laws measured by American constitutional standards. *McClain* specifically rejected the notion that a general knowledge of the foreign sovereign's intent was sufficient for imposing criminal liability.

Criminal prosecutions may have continued limited application in a narrow range of cases where: (1) there exists a clear declaration of ownership by the sovereign measured by American constitutional standards; (2) the particular items in question have been reduced to possession, documented *in situ* or there has been some manifestation by the sovereign of the intent to exercise dominion and control over the class of object; and (3) the defendant has acted with scienter — guilty knowledge that his taking of the object was in violation of another's rightful claim of ownership.[142] Such prosecutions should be limited to smugglers and not be extended to subsequent purchasers.

Civil suits for replevin have wider applicability. Here *Peru v. Johnson* provides the clearest statement of policy. The sovereign must show: (1) it has made a clear declaration of ownership measured by American constitutional standards; (2) in regard to the particular items, the sovereign must have manifested some effort at dominion or control beyond the legislative declaration; and (3) the current possessor's detention must be wrongful.[143] If a foreign sovereign meets these criteria the object should be returned as the sovereign has proven superior title and right to immediate possession.[144]

In the case where the plaintiff fails to convince the trier of fact of the merits of its claim, for example a sovereign fails to demonstrate the clarity of its laws and its efforts at enforcement, the defendant should retain ownership without examination into the good faith of the purchaser.[145] Where there is no clear declaration of ownership, that is, where the national legislation amounts to a restriction on the power of alienation or exportation the courts will not give effect to the foreign jurisdiction's laws to disturb the possession of the current owner.

There has yet to be a definitive determination as to whether equity will intervene if the common law rule creates undue hardship for the *bona fide* purchaser or whether the prevailing plaintiff should be required to compensate the defendant for the purchase price of the object. It is also unclear how the courts will interpret the Cultural Property Implementations Act provisions pertaining to documentation and repose.[146] While no U.S. court has yet done so, this is certainly an area where international conventions, such as the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, could be considered indicative of national consensus and used as persuasive authority by the court in reaching its decision.[147] Any purchaser would be well advised to seek not only the necessary export documents but assurance that there is an clear chain of title. Museums and private parties interested in acquiring works of cultural property are the cheapest cost avoiders of lawsuits to establish clear title. Those who ignore this duty of due diligence do so at their peril.[148]

There are two factors that will insure the U.S. courts continued involvement with cases determining the disposition of cultural property. The first is the depth and variety of the legitimate U.S. art market. Maintaining both the integrity and stability of this market is an important consideration in any cultural property dispute. The second is the openness of U.S. courts to suits by non-citizens and the existence of legal rules that work to protect the interests of either the original owner or a *bona fide* purchaser depending on the context. Nations whose laws strongly favor the security of transactions will not be seen as a hospitable forum by a dispossessed owner. In fashioning rules of law to govern private conduct U.S. courts should be aware of the need to maintain the particular points of stability identified above within the evolving doctrine.

## Notes

1 Walsh, *It's a Steal; The World's Cultural Heritage is Being Looted by Thieves Who Often Have Ties to Organized Crime and Even Get Help from the Art World*, Time Magazine, Nov. 25, 1991, U.S. Edition, at 86. Walsh quotes Dr. Constance Lowenthal, executive director of the International Foundation for Art Research for the $2 billion figure and Trace, a British magazine that tracks art crimes, for the $6 billion figure.

2 *Republic of Lebanon v. Sothebys*, 561 N.Y.S. 2d 566 (A.D. 1 Dept. 1990). The suit involves fourteen antique Roman silver pieces, known as the Sevso Treasure, from the fourth or fifth century A.D.. The Marquess of Northampton claims the right to sell the silver through Sothebys. The governments of Lebanon, Yugoslavia and Hungary are each seeking to establish title to the treasure. In May 1990 a preliminary injunction was granted barring defendants from transferring possession or ownership of the Sevso Treasure or transporting it outside of New York City. *See Tainted Treasure*, New York Times, Friday, June 26, 1992, at C19.

3 *Republic of Turkey v. The Metropolitan Museum of Art*, 762 F.Supp. 44 (S.D.N.Y. 1990). Turkey is suing the Metropolitan for the return of over 200 gold and silver objects that the Museum purchased during the 1960's which Turkey claims were illegally excavated and exported from its territory. A motion for summary judgment by the Museum was denied and discovery is proceeding.

4 Art works and antiquities form separate but overlapping classes of objects. For simplicity, both types of objects will be referred to by the broader term 'cultural property'. The terminology used in discussing cultural property reflects differing ideological points of view regarding such property. The use of the term 'property' has been questioned by those who feel that it is not sufficiently broad to encompass the range of items for which protection is sought, such as folklore: Prott, *General Report on the Protection of the Cultural Heritage* 13th International Congress of Comparative Law, 1990, at 15–16. 'Heritage' may provide an alternative term, which has the additional advantage of not carrying along with it either civil law or common law legacies of property rules. For a discussion of terminology, see John Henry Merryman, *Protection of Cultural "Heritage"?*, 38 Am. J. Comp. L. 513 (1990). Because all of the cases discussed in this article involved tangible objects the term property is appropriate.

5 In addition to the cases previously noted, Turkey has also instituted suit against William Koch seeking the return of ancient coins known as the Decadrachm Hoard. For a background of this case, see Acar & Kaylan, *The Hoard of the Century*, Connoisseur, July 1988.

6 *United States v. Hollinshead*, No. 10970 (S.D. Cal., March 14, 1973), *aff'd* 495 F.2d 1154 (9th Cir. 1974).

7 *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), *rehearing denied*, 551 F.2d 52 (5th Cir. 1977); 593 F.2d 658 (5th Cir. 1979), *cert. denied*, 444 U.S. 918 (1979).

8 *Peru v. Johnson*, 720 F.Supp. 810 (C.D. Cal. 1989); *aff'd by Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

9 *Jeanneret v. Vichey*, 541 F.Supp 80 (1982); *rev'd* 693 F.2d 259 (1982).

10 *United States v. Swetnam*, Indictment CR 88–914 RG (Nov. 1988).

11 18 U.S.C. §§ 2314, 2315 (1976).
At the time of the *McClain* decisions, Section 3 of the NSPA, as amended, provided in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud ... [s]hall be fined not more than $10,000 or imprisoned not more than ten years or both.

Section 4 provided in part:

> Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise ... of the value of $5,000 or more ... moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken ... [s]hall be fined not more than $10,000 or imprisoned not more than ten years or both.

The National Stolen Property Act was designed to help state governments manage problems such as interstate car theft. It is doubtful the statute was ever intended to reach art stolen pursuant to a foreign ownership law. See generally Fitzpatrick, *A Wayward Course: The Lawless Customs Policy Toward Cultural Properties*, 15 N.Y.U. J. Int'l L. & Pol. 857 (1983). For a discussion in favor of the use of the NSPA in cultural property cases, see Rosencrance, *Note, Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 Cornell Int'l L.J. 311 (1986). For an opposing position, see Upton, *Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts*, 10 N.Y.U. J. Int'l L. & Pol. 569 (1978).

12 *Hollinshead*, 495 F.2d at 1155.

13 Ibid.

14 Merryman & Elsen, Law, Ethics and Visual Arts, 115 (2d ed. 1987).

15 Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 345 (1982).

16 *Guatemala v. Hollinshead*, No. 6771 (Cal. Super. Ct. filed Dec. 29, 1972).

17 Bator, *supra* note 15 at 346.

18 Hughes, *United States v. Hollinshead: A New Leap in Extraterritorial Application of Criminal Laws*, 1 Hastings Int'l & Comp. L. Rev. 149 (1977).

19 *Hollinshead*, 495 F.2d at 1155.

20 Ibid.

21 Ibid.

22 Ibid.

23 3 Prott & O'Keefe, Law and the Cultural Heritage: Movement, 623 (1989).

24 495 F.2d at 1155.

25 Hughes, *supra* note 18 at 150, *quoting United States v. Hollinshead*, No. 10970 DC (S.D. Cal., March 14, 1973) at 116.

26 The NSPA itself does not provide a definition of stolen. The judge defined stolen to mean: 'acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership.' 495 F.2d at 1156.

27 National Motor Vehicle Theft Act, *as amended*, 18 U.S.C. § 2312. *See also, United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d. Cir. 1978) (all felonious takings... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny).

28 *Hollinshead*, 495 F.2d at 1156.

29 Ibid.

30 The disposition of the Stela was decided in *United States v. One Pre-Columbian Artifact, known as "Machaquila Stela II" of Mayan Origin, Clive Hollinshead, Claimant*, U.S.D.C. Central District of California, No. CV73–2349-FW (1975). The Government of Guatemala allowed the stela to be exhibited at the Los Angeles County Museum for one year where it was restored before being returned.

31 A related case involved Machaquila Stela V. This case, brought in Arkansas, resulted in a plea of guilty and a fine of $2,500. *See* Duboff, The Deskbook of Art Law 94 (1977).

32 As one commentator noted: 'The stolen character of the stela was established under the law of Guatemala. It cannot be doubted that the stolen character of the goods is an essential element of a violation of 18 U.S.C. § 2314. Solely with reference to the laws of the United States, the acts committed by Hollinshead and Fell within the territory of the United States were not of an unlawful character. Transporting Mayan artifacts in interstate commerce is not a crime in the United States. It is only through reference to Guatemalan criminal law that such an act can be characterized as criminal.' Hughes, *supra*, note 18 at 166. The result in *Hollinshead* appears to contravene a basic understanding in international law that one nation will not enforce the criminal laws of another; *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (The Courts of no country execute the penal laws of another ...; See also 2 J. Moore, A Digest of International Law 236 (1906).

33 United Nations Educational, Scientific and Cultural Organization Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property. Nov. 14, 1970, 27 U.S.T. 37, T.I.A.S. No. 8226, 823 U.N.T.S. 231 (1972). Article 7 provides in pertinent part:

> The States Parties to this Convention undertake: ... (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution.

34 118 Cong. Rec. 27,924–25 (1972).

35 Guatemala ratified the Convention on January 14, 1985. Bowman & Harris, Multilateral Treaties-Index and Current Status, 1984. (8th Cumulative Supp. 1992).

36 Since the *Hollinshead* case the Republic of Guatemala and the United States have signed an executive agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11077. The agreement states that the U.S. government will provide Guatemala with information concerning the location of cultural property claimed by the Republic and shall employ the legal means at its disposal to recover and return stolen property and facilitate the bringing of a private action for the return of the property. Ibid., art. II, §§ 1–4. See also, Kenety, *Who Owns the Past? The Need for Legal Reform and Reciprocity in the International Art Trade*, 23 Cornell Int'l L.J. 1, 24 (1990).
Guatemala has also requested import restrictions under the emergency provisions of the Cultural Property Implementation Act, 19 U.S.C. § 2603 (1988). In October 1989, Guatemala requested import restrictions for pre-Hispanic ceramic, shell, and bone artifacts from the Peten region. Import restrictions were imposed on April 15, 1991. 56 Fed. Reg. 15,181 (1991).

37 Before 1973, the NSPA had been applied twice to cases of foreign *situs* theft not involving archaeological theft or illicit movement of cultural property. *United States v. Rabin*, 316 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 815 (1963); *United States v. Greco*, 298 F.2d 247 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962); *cited in*, Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 Syr. J. Int'l L. & Com. 77, 84 n.24 (1978).

38 Upton, *supra* note 11, at 571.

39 Ibid. at 572.

40 The defendants told the undercover FBI agents that they knew the removal of the items from Mexico was illegal and that they had bribed Customs officers to bring the objects into the United States. Duboff, *supra* note 31 at 81.

41 *McClain*, 545 F.2d at 995.

42 545 F.2d at 1000.

43 *McClain*, 593 F.2d at 670. Foreign law is a matter of law to be decided by the judge. Fed. R. Civ. P. 44.1.

44 Diario Oficial de 11 de mayo de 1897. *See* XIV Annuario de Legislation y Jurisprudencie (1897); *construed in United States v. McClain*, 545 F.2d at 997.

45 545 F.2d at 997.

46 Article Six provides in pertinent part:

> Mexican antiquities, codices, idols, amulets and other objects or movable things that the Federal Executive deems interesting for the study of the civilization and history of the aboriginal and ancient settlers of America and especially of Mexico, cannot be exported without legal authorization.

47 Law on the Protection and Conservation of Monuments and Natural Beauty of January 31, 1930. 58 Diario Oficial 7, 31 de enero de 1930, *construed in* 545 F.2d at 998.

48 545 F.2d at 998.

49 Law for the Protection and Preservation of Archaeological and Historic Monuments, Typical Towns and Places of Scenic Beauty of January 19, 1934. 82 Diario Oficial 152, 19 de enero de 1934, *construed in* 545 F.2d at 998.

50 Article 3. 545 F.2d at 998.

51 There was some dispute as to the exact translation of the statute. The court decided it was immaterial whether the Law protected objects found *on* an immovable monument or *in* an immovable monument. 545 F.2d at 998–999 n.20.

52 Article 9 required the 'Register of Private Archaeological Property' to maintain a record of movable artifacts and Article 10 required transfers to be recorded. Ibid. at 999. It has been suggested that this type of registration requirement, found also in the laws of Peru, should be one of the prerequisites to a nation seeking enforcement of its laws in U.S. courts. See Moore, *Enforcing Foreign Ownership Claims in The Antiquities Market*, 97 Yale L.J. 466, 484 n.98 (1988).

53 303 Diario Oficial 8, 16 de diciembre de 1970, *construed in* 545 F.2d at 999.

54 545 F.2d at 999.

55 Ibid.

56 312 Diario Oficial 16, 6 de mayo de 1972, *construed in* 545 F.2d at 1000.

57 Article 27, Federal Law on Archaeological, Artistic and Historic Monuments and Zones of May 6, 1972, *construed in* 545 F.2d at 1000.

58 545 F.2d at 1000.
59 Ibid. note 26. In support of this the court cited Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 Law. Americas 68, 71 (1975) and Rogers and Cohen, *Art Pillage – International* in Duboff, Law and the Visual Arts 281, 287 (1974). The court relied on these authors to demonstrate the radical change represented by the 1972 Law.
60 Ibid. note 25. The court cited Nafziger *supra* note 59 at 71 and an additional essay, Rogers, *The Legal Response to the Illicit Movement of Cultural Property*, 5 Law & Pol'y Int'l Bus. 932, 945 (1973).
61 Transitory Article Fourth, 545 F.2d at 1000.
62 545 F.2d at 1003.
63 Ibid.
64 *United States v. McClain*, 593 F.2d 659 (5th Cir. 1979).
65 Article 27 of the Constitution declares that property discovered within the land and water of the national territory belongs originally to the nation. The nation has the power to transmit such property to private individuals as private property. Divergent testimony was received as to whether this provision covered man-made items buried in the land in addition to the natural deposits of minerals and ores found there. The defendant's witness testified that Article 27 was restricted to land, subsoil and materials naturally occurring therein. Man-made items were covered by the Civil Code of the Federal District. 593 F.2d at 668 nn.13–14.
66 Ibid. at 667.
67 Ibid. at 670.
68 The U.S. Constitution has been interpreted to require that both civil and criminal laws give adequate notice of their impact. For a discussion of the application of American constitutional standards in evaluating foreign laws, see Church, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 Colum. J. Transnat'l L. 180 (1992).
69 593 F.2d at 670.
70 Ibid. at 671.
71 545 F.2d at 992. The government's expert testified that some of the items originated in Guatemala, Honduras, Panama, and Costa Rica. Ibid. at 993.
72 *See* Fitzpatrick, *supra* note 11.
73 Memorandum of Amicus Curiae American Association of Dealers in Ancient, Primitive and Oriental Art in Support of Rule 41(e) Movants, at 6, *quoted in* Darraby, *Current Developments in International Trade in Cultural Property*, 297 PLI 659, 680–681 (1990).
74 Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., art. III, § 1, 22 U.S.T. 494.
75 *See* Kenety, *supra* note 36, at 23.
76 Treaty, *supra* note 74, art. I, § 1.
77 Darraby, *supra* note 73 at 681.
78 Ibid.
79 *Peru v. Johnson*, 720 F. Supp. 810, 812 (C.D. Cal., 1989). The decision discussed three distinct grounds on which Peru failed to sustain its burden of proof. These were: (1) failure to prove the origination of the objects in Peru and their subsequent exportation from that country; (2) failure to prove the date the objects were discovered or exported so as to determine which was the effective law to be applied; and (3) failure to persuade the

court that the Peruvian laws, either as written or as applied, amounted to declarations of national ownership of such objects. For a discussion of the decision, see Merryman, *Limits on State Recovery of Stolen Artifacts: Peru v. Johnson*, (1992) 1 I.J.C.P. 169.

80 The 'do something' requirement flows from provisions in the UNESCO Convention requiring signatories to establish national services and carry out national inventories of protected property. UNESCO Convention, *supra* note 33, art. 5. Even if the court was convinced that the sovereign had done all it could be expected to do to establish its ownership, a second question arises. Will the prosecution of American citizens or the return of particular items redress the injury suffered? In many instances officials of the foreign government are instrumental in aiding the illicit traffic in cultural property. See MacDonald, *Guarding Mexico's Treasures Patrimony Slipping Away*, Business Mexico, Sept. 1990. (The pieces appear to be leaking out of every state in Mexico with the help of everyone from campesinos to the artifacts' supposed custodians at the National Anthropology and History Institute.).

81 Darraby, *supra* note 73 at 684.

82 The expert witness, identified by plaintiff's counsel as Peru's foremost archeologist in pre-Columbian artifacts, admitted that Peruvian pre-Columbian culture spanned areas that are now within the borders of Bolivia and Ecuador as well as modern-day Peru. 720 F.Supp. at 812.

83 Ibid.

84 In a brief submitted after trial, the Peruvian government tried to establish that it had declared state ownership of all artifacts as early as 1822. The proof was rejected for failure to present any evidence of pre-1929 law in the government's pleadings. The supplements failed to provide reasonable notice to the defendant in accordance with Federal Rule of Civil Procedure 44.1. Ibid. at 812–813.

85 Ibid. at 813.

86 There was testimony that a card registry was created in 1969 and located in the National Museum of Anthropology and Archaeology since 1972. Whether this was intended to satisfy the statutory requirement was unclear.

87 *Johnson*, 720 F.Supp. at 813.

88 Apparently no attempt had ever been made to enforce this provision and its effect was uncertain to the Peruvian expert. Ibid. at 813.

89 Ibid. at 814.

90 The court did not identify the statute by number.

91 *Johnson*, 720 F.Supp. at 814.

92 The problem of antiquities not found at a site was discussed in the *McClain* case as well. Both the Decadrachm Hoard and the Sevso Treasure were discovered apart from any known site. For a discussion of the Decadrachm Hoard see, Acar & Kaylan, *supra* note 5 at 74. The history of the Sevso Treasure was discussed in Watson, *The Case of the Silver Treasure*, The New York Times, June 28, 1992, sec. 2 at 1. *See also*, Doyle, *Sale of Sevso Treasure Challenged*, The Independent, March 3, 1990, at 2.

93 *Johnson*, 720 F.Supp. at 814.

94 Ibid.

95 Ibid. at 814–815, *citing United States v. McClain*, 545 F.2d 988, 1002 (5th Cir. 1977); and *United States v. McClain*, 593 F.2d 658, 670 (5th Cir. 1979).

96 Johnson was entitled to keep the objects and the case was affirmed in *Government of Peru v. Wendt*, 933 F.2d 1013, *full op. in* No. 90–55521, 1991 U.S. App. LEXIS 10385 (9th Cir. 1991).

97 Darraby, *supra* note 73 at n.162.

98 Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607. This agreement contains the same limitations as the agreement with Guatemala discussed *supra* note 36.

99 The Cultural Property Implementation Act implements the UNESCO Convention in the United States. Section 2603 allows the United States to impose import restrictions unilaterally in cases of emergency. Emergency restrictions require that the requesting State Party demonstrate: (1) that the material to be protected is both a newly discovered type of material that is important to understanding the history of mankind and is in jeopardy from pillage, dismantling or fragmentation; (2) the material comes from any site recognized to be of high cultural significance that is in jeopardy from pillage, dismantling, dispersal or fragmentation that has reached or threatens to reach crisis proportions; or (3) the material is part of the remains of a particular culture or civilization, the record of which is in jeopardy from pillage, dismantling, dispersal or fragmentation that has reached or threatens to reach crisis proportions. 19 U.S.C. § 2603 (a)(1)–(3)(1988).

100 54 Fed. Reg. 26,462 (1989).

101 55 Fed. Reg. 19,029 (1990).

102 *Vichey*, 541 F.Supp. 80, 83 (1982).

103 N.Y.U.C.C. § 2–312(1) (McKinney 1964). The statutory section in full provides:

> (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
>
> (a) the title conveyed shall be good, and its transfer rightful; and
>
> (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of the contracting has no knowledge.
>
> (2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.
>
> (3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

The Official Comment on this section states in part:

> (1) Subsection (1) makes provision for a buyer's basic needs in respect to a title which he in good faith expects to acquire by his purchase, namely, that he receive a good, clean title transferred to him also in a rightful manner so that he will not be exposed to a lawsuit in order to protect it.

104 As noted by one commentator, the narrow legal question in the case was 'whether the Italian government's threats to confiscate an illegally exported work of art or to fine its owner constitute a sufficiently substantial cloud on title to support a buyer's claim of breach of the warranty of title... The broader underlying issue is whether any exporting nation, by threatening actual or potential owners with fines or confiscation, can cloud the title of or impair the marketability of a work exported without the approval of

the exporting nation.': Pearlstein, *Jeanneret v. Vichey: Sales of Illegally Exported Art Under the Uniform Commercial Code*, 6 N.W. J. Int'l L. & B. 275, 278 (1984).

105 *Vichey*, 693 F.2d 259, 266–68 (1982).

106 Ultimately she was vested with the sole legal title to the painting. Ibid. at 260.

107 Ibid.

108 Ibid.

109 Mme. Jeanneret was informed at that time by Signora Bucarelli, Director of the National Gallery of Modern Art in Rome, and referred to in the case as the superintendent in charge of the export of paintings, that the painting had probably been exported in violation of Italian laws. Nass, *Jeanneret v. Vichey: Evaporating the Cloud*, 15 N.Y.U. J. Int'l L. & Pol. 999, 1003–1004 (1983).

110 693 F.2d 259, 261 (1982).

111 Ibid.

112 [hereinafter 1913 regulations]: Ibid.

113 Ibid.

114 Ibid.

115 Ibid.

116 Ibid. Both of the articles could be found to apply to paintings. Article 130 as the more specific, under American principles of statutory interpretation, would be found to govern the export of a painting by a modern master if less than 50 years old.

117 The Statute for the Protection of Items of Artistic or Historical Interest, Law No. 1089 of June 1, 1939 [hereinafter 1939 law].

118 693 F.2d at 262.

119 Ibid. Under this type of regulation, the government attempts to monitor the whereabouts of an object while allowing private possession. Such laws obviously reduce the marketability of noticed objects. There was no discussion in the case as to how often this procedure was actually followed.

120 Ibid. This represents an effort to limit the law qualitatively so as to avoid creating a blanket export prohibition.

121 Art. 39, Ibid.

122 Art. 61 provides: 'Any transfer, agreement, or other legal act carried out against the prohibitions set forth in this law or without complying with the terms and procedures specified therein is null and void': Ibid.

123 Art. 66, Ibid.

124 Art. 64. Any liability falls on the violator of the export regulations. The affidavit of Enrico Gilioli, Milanese lawyer, stated that, 'In no way does this law authorize the imposition of a fine or other form of sanction upon a subsequent bona fide purchaser of the art work who had no involvement with the unlawful exportation,': Joint Appendix at 257(a), *Jeanneret v. Vichey*, 693 F.2d 259 (2d Cir. 1982); quoted in, Nass, *supra* note 109 at 1010 n.82.

125 Art. 73, 693 F.2d at 262.

126 Ibid. at 263.

127 The date of export was determined to be between 1969 and 1971. *Jeanneret v. Vichey*, 541 F.Supp. 80, 85 (1982).

128 *Vichey*, 693 F.2d at 263.

129 693 F.2d at 264.

130 'We find it somewhat hard to reject the commonsensical view of the district judge that an art dealer who has bought a painting which, according to

the usages of her trade, she cannot sell through ordinary channels is under a heavy cloud indeed.' Ibid. at 268.

131 Ibid. at 267. The court also noted that the rule is followed in all other major art-importing countries, including England, France, Germany and Switzerland.

132 The decision is also consistent with U.S. policy as embodied in the Cultural Property Implementation Act. McKenna, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. Pa. J. Int'l Bus. L. 83, 99–100 (1991).

133 *Vichey*, 693 F.2d at 267.

134 Ibid. at 268.

135 Ibid. at 267. Some nations may provide for the return of items based on their illegal exportation from the country of origin. *See* Prott & O'Keefe, *supra* note 23 at 272.

136 'Some buyer, somewhere, some time, for some reason, will desire the painting only on the condition that he or she will be able to use it, if necessary, as a universally marketable asset. If a seller cannot guarantee title the world over the painting's market value will diminish as those potential buyers affected by government sanctions cease to bid against those unaffected buyers who continue to value the painting highly.' Pearlstein, *supra* note 105, at 290.

137 Mme. Vichey has instituted suit against Mme. Jeanneret for damages allegedly caused by malicious prosecution based upon civil and criminal complaints filed by Jeanneret in Switzerland and Italy; as well as damages allegedly caused by Jeanneret's abuse of process in a former state court action and in the federal action discussed above. The case is pending. *Vichey v. Jeanneret*, N.Y.L.J., Oct. 4, 1988, at 21 (N.Y. Sup. Ct.); *reported in* Lerner & Bresler, Art Law: The Guide for Collectors, Investors, Dealers, and Artists, 307 (1989).

138 The Court of Appeals found support for its decision in Article 66 of the 1939 law that allows confiscation of an illegally exported item but requires that the confiscation be carried out in accordance with the Customs laws and regulations pertaining to smuggled goods, which can only be done in Italy. 693 F.2d at 267. *See also*, Nass, *supra* note 109, at 1019.

139 [1982] 1 Q.B. 349, *rev'd* [1982] 3 W.L.R. 570 (C.A.), *appeal dismissed* [1984] AC 1 (H.L.).

140 In *Ortiz*, the Government of New Zealand sued for the return of carved Maori panels that had been illegally exported. The government did not claim ownership of the panels which remained with the Maoris.

141 'He who hath not cannot give'. Often rendered as 'you can't get good title from a thief'.

142 In a recent case the United States was reported to be considering the use of the NSPA against the family of Joe T. Meador, an American serviceman who allegedly removed items from the Quedlinburg church during World War II. *I.R.S. Rules on Estate of Stolen Treasures*, New York Times, Jan. 10, 1992, at C12.

143 These are the elements for an action for the recovery of a chattel in New York State. *See* 23 N.Y. Jur.2d Conversion, and Action for Recovery of Chattel §§ 105–07 (1982). Wrongful detention does not mean bad faith but only that the current possessor has refused a demand by the original owner to return the items in dispute.

144 This rule can sometimes work unfairness to a bona fide purchaser who has held a work for many years. For a recent example of the application of the

common law rule, see *Guggenheim v. Lubell*, N.Y.L.J. Feb. 15, 1989, at 22, *rev'd*, 133 A.D.2d 143, 550 N.Y.S. 2d 618 (A.D. 1990); *aff'd* 77 N.Y.2d 311, 567 N.Y.S. 2d 623, 569 N.E.2d 426 (1991). In *Lubell*, the Guggenheim Museum sued a bona fide purchaser who had purchased a Chagall gouache in the 1960's. Because the gouache had been stolen from the Museum collection, the court held that the mere lapse of time, no matter how long, was insufficient to affect the relative possessory rights of the parties. 153 A.D.2d 143, 149–50 (1990). In comparison, most civil law jurisdictions allow some form of ownership acquired by prescription after the requisite number of years. For a discussion of *Lubell*, see Gerstenblith, *Guggenheim v. Lubell* (1992) 1 I.J.C.P. 359.

145 Under general American practice a plaintiff bears the burden of proving all the elements of the cause of action. If the plaintiff fails to sustain its burden of proof it loses.

146 The Cultural Property Implementation Act provides in section 2607 that only articles of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution are prohibited from transport into the United States. Section 2611 provides a seies of exemptions for articles otherwise falling within the Act, if the articles have been held and exhibited, reported, or cataloged for various lengths of time providing the purchase was in good faith without notice of violation of the other terms of the Act. 19 U.S.C. 2607, 2611 (1988). No case has yet been brought under the CPIA.

147 UNIDROIT 1990 Study LXX-doc.18, appendix III; reprinted in, Prott, *The Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* (1992) 41 I.C.L.Q. 160, 168–170.

148 For a discussion of the requirements of due diligence see Pinkerton, *Due Diligence in Fine Art Transactions*, 22 Case W. Res. J. Int'l L. 1 (1990).