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Stolen Cultural Property: Implications of Vitium Reale in Private Law and Private International Law

by **C. Roodt and D. Carey-Miller**

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Stolen Cultural Property: Implications of *Vitium Reale* in Private Law and Private International Law

Christa Roodt and David Carey Miller*

Abstract

Legal systems tend to reflect a preference between *mobilia non habent sequelam* (moveables cannot be pursued) and *nemo plus iuris ad alium transferre potest quam ipse habet* (no one can transfer to another a greater right than he himself has) in corporeal moveable property title issues in general. Cultural objects merit special treatment, but comparatively few systems have specific rules or exceptions for cultural moveables. General commercial law rules are readily given extended application. A value judgment is involved in denoting an object as 'cultural'. When stolen art moves across jurisdictional lines, courts may use the property transaction as a basis for classification without checking whether theft attaches thereto. Choice of law method can elevate legal rules above fact and context on the basis of the broad *lex situs* rule (the law of the place in which property is situated) of private international law. The *lex situs* rule strengthens the commercial imperative as applied to transactions involving cultural objects. This article argues that result-selection is desirable. The applicable law must be selected on the basis of a policy choice in favour of the party who lost possession on account of the vice of theft, and time ought not to affect the deprived owner's rights. This article demonstrates how the acknowledgement of *vitium reale* (inherent taint or defect in a title to property) in conflicts method eases tensions between private law and criminal law in the art markets in New York and England.

Introduction

In later *ius commune* development,¹ *mobilia non habent sequelam* came to compete with that axiom of property law expressed in the maxim *nemo plus iuris transferre potest quam ipse habet*. The policy basis of the former is the perceived commercial imperative that, in principle, the *bona fide* purchaser of a moveable thing, in a normal market context, should get a good title regardless of provenance. The tension between the *nemo plus* principle and the policy position of *mobilia non habent sequelam* is reflected in the range of solutions of modern European law concerning whether and when the prior title of the owner is extinguished or his action for restitution is barred.²

Legal systems tend to reflect a preference between these two positions in corporeal moveable property title issues in general.³ Cultural objects merit special treatment, but

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¹ P Stein, 'Jus Commune and Its Demise' *Journal of Legal History* 25(2) (2004) 161ff.

² G Reichelt, 'International Protection of Cultural Property' [1985] *Uniform Law Review* 42, 105ff.

³ Study Group on a European Civil Code and the Research Group on EC Private Law (C von Bar et al eds.) *Principles, Definitions and Model Rules of European Private Law* (DCFR VIII-4:101ff).

comparatively few systems have specific rules or exceptions for cultural moveables⁴ and general commercial law rules are readily given extended application.⁵

A value judgment is involved in attributing the epithet ‘cultural’ to an object.⁶ An objective definition of the term *in abstracto* is difficult to provide, and national laws and international instruments follow diverse approaches. Original statutory more than 50 years old would qualify as a cultural object under Article 1(1) of Council Directive 93/7 EEC⁷ on the Return of Cultural Objects Unlawfully Removed from the Territory of Member States.⁸ The Directive enables EU Member States to request the return of cultural treasures, but the owner may also institute proceedings in respect of a stolen object.

When stolen art moves across jurisdictional lines, municipal legal systems’ rules about the validity of title transfer are in constant interplay with jurisdictional and choice of law rules.⁹ The diversity factor leads to the vigorous contestation of choice-of-law in any assertion or denial of ownership to art works. Who owns art depends on whose law applies, and the applicable law depends, in turn, on the choice of law rule. It is trite that theft encroaches on ownership and possessory rights in fungible objects. However, when property transactions are a basis for classification, the broad *lex situs* rule of private international law responds to commercial imperative, and oversimplifies the nature and extent of the problems affecting the choice of law argument.¹⁰

Whether the action is prescribed could also depend on the legal system indicated by the *lex situs* rule, if treated as a matter of title.¹¹

Strong commercial orientation in the law may leave the cause and consequence of trafficking, including the real vice of theft that attaches to a cultural object, unaccounted for.¹² Courts may use the property transaction as a basis for classification without checking the integrity of the transaction chain, or may consider only the legal rules that require to be classified and not how it relates to fact and context. An owner or a state deprived by cross-border sale can recover on the strength of *vitium reale*¹³ and the implications it has for choice of law method. The tensions between private law and criminal law and between conflicts justice and material justice are eased in the art markets of New York and conflicts method

⁴ E.g. Dutch CC Art 3.99(2); commentary in DCFR VIII-4:102 n 13.

⁵ A Chechi, *The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?* PhD Thesis EUI (2012) 249.

⁶ UNIDROIT Secretariat, Explanatory Report to the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, (2001) 3 Uniform Law Review 476, 496.

⁷ Council Directive (EEC) 93/7 of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a member state OJ L 74/74, 27.3.93 (amended 1997 and 2001).

⁸ To qualify for return, the object must be classified among the national treasures under national legislation, and belong to the categories referred to in the Annex or form an integral part of public collections or inventories of ecclesiastical institutions.

⁹ A Kenyon and S MacKenzie, ‘Recovering Stolen Art – Australian, English and US Law on Limitations of Action’ (2001-2) 30 Western Australian Law Review 233, 235.

¹⁰ *Cammell v Sewell* [1860] 8 WR 639; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496; *City of Gotha and the Federal Republic of Germany v Sotheby’s and Cobert Finance SA* [1998] 1 WLR 114 (QB); *The Times* 3 July 1997 (CA).

¹¹ A particular domestic legal system may regulate this issue separately or hold a claim time-barred with reference to the law of the court if statutory limitations are considered a matter of procedure.

¹² Study LXX Doc 14 Unidroit 1989 §§ 25-29.

¹³ See section 2.5 below.

can realize this potential also in England.¹⁴

1. The Menace of Title Laundering

1.1 The Phenomenon

Title to stolen works of art is easily ‘laundered’ in an inter-jurisdictional transfer that favours acquisition by a *bona fide* purchaser¹⁵ and limits criminal repercussions. A number of continental European states extend protection soon after the sale.¹⁶ Title can be lost because the purchaser does not have to prove the validity of the afore-mentioned transfers, and the position of the purchaser remains unaffected by subsequent notification of a defect in the transfer chain. The *lex situs* rule and its connecting factor, the law of the place where the moveable object was physically located when title is alleged to have been created, modified or terminated,¹⁷ can purge an object of tainted title upon sale. Compliance with non-demanding good faith purchaser standards¹⁸ and short prescription further enables title to objects of dubious provenance to be laundered.¹⁹

1.2 *Winkworth v Christie Manson and Woods Ltd*²⁰

The *Winkworth* ruling illustrates the laundering of valuable Japanese miniature carvings or *netsuke*, at a time when these thefts increased sharply.²¹ The original owner’s title was extinguished by a post-theft sale to a purchaser who received good title in Italy. The purchaser later returned the objects to England to be auctioned off. When the owner filed proceedings against the seller and the auctioneer, the English court applied Italian domestic law. The court concluded that the acquirer in good faith prevailed over the original owner’s title, even if the moveable was stolen. Italian private law permits a good faith purchaser who bought from a thief or a seller who is not the owner to gain title immediately upon the conclusion of the transaction.²² The stolen collection was already in Italy when the Italian purchaser acquired it.

The *lex situs* rule was treated as an ideal rule of international law although the Japanese carvings were stolen in England, shipped abroad, resold and then returned to England. The court did not address the case for a distinction of the carvings based on the cultural property factor. The *lex situs* rule was automatically applied where the original owner had been

¹⁴ Chechi (n 5) 101.

¹⁵ LV Prott, ‘Problems of Private International Law for the Protection of the Cultural Heritage’ Vol V *Recueil des Cours* (The Hague 1989) 215, 264.

¹⁶ French Civil Code Arts 2268, 2269, 2279; Dutch Civil Code Art 2014.

¹⁷ E Crawford and J Carruthers, *International Private Law: A Scots Perspective* 3rd edn (W Green 2010) 523; J Carruthers, *The Transfer of Property in the Conflict of Laws* (OUP 2005) 79.

¹⁸ *Bumper Development Corporation Ltd. v Commissioner of Police of the Metropolis and Others* [1991] 1 WLR 1362 CA (1991).

¹⁹ IF Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (Transnational Publishers Inc 2004) xxiii.

²⁰ See *supra* n 10.

²¹ Auction prices reached £125 000 in 1991 (*The Independent*, 4 August 1993).

²² While there is no presumption in Italian law that the possessor is owner, Articles 1153-1157 Italian Civil Code permit the good faith purchaser to acquire title immediately if (a) good faith existed when the thing is bought (b) the transaction is capable of transferring ownership (c) the documents evidencing the sale are capable of transferring title. DCFR VIII-3:101 n 101.

deprived through crime. The *lex situs* rule governed objects that were transported across state boundaries respectively on the basis of authorities dealing with the removal of a horse and a load of timber. The lack of the owner's knowledge and consent was considered insufficient to take the *netsuke* out of the general rule. No thought was spared the potential intermediary status of Italian law in the circumstance of the case before it.²³

Winkworth would have won if the court had applied English law, because the limitation period on his claim had not run.²⁴ No statutory limitation applies to recovery claims by a dispossessed owner if the acquisition was in bad faith; time only starts to run on the first good faith transfer of the stolen property. Later exercise of rights of ownership over the property of another (conversion) is presumed to relate to an earlier theft.²⁵

1.3 Responding to *Winkworth*

The declaration made by Slade J that the movement of the *netsuke* was irrelevant for the questions of transfer of title went too far.²⁶ Yet the wider implications of the *Winkworth* ruling for the art world did not alarm everyone.²⁷ A connecting factor that serves the convenience, certainty and consistency required by commerce seemed worthy of endorsement.²⁸ The *lex situs* rule protects the property title in the jurisdiction in which the object was acquired. Purchasers cannot be lightly subjected to a duty to make further enquiries into the provenance or conveyance history of an object.

The systemic effects of the *lex situs* rule tend to remain obscure and unquestioned because the rule is so well-established. Nonetheless, UNIDROIT and commentators realized that the mechanical recourse to the law of the last transaction by which acquisition of title is alleged, gives scope to title laundering²⁹ resulting in havens for art thieves and their transferees.³⁰ The *lex situs* at the time of the alleged transfer indicates only if the previous possessor authorized the transfer of the object, and not if the original owner granted or withheld authorization.³¹ A purchaser need only investigate one law before proceeding.³² The connection could be transitory.

The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereinafter UNIDROIT Convention)³³ is primarily concerned with the question of return to

²³ Carruthers (n 17) §§ 8.38-3.40.

²⁴ Title accrues to a purchaser in good faith six years after the purchase, barring recovery by the owner.

²⁵ S 4 of the Limitation Act 1980. Kenyon and MacKenzie (n 9) 241.

²⁶ At 514B.

²⁷ DW Rowe, 'Stolen Property in the Conflict of Laws' [1980] *Canterbury Law Review* 71.

²⁸ At 506B and at 513A-B.

²⁹ Reichelt (n 2) 91; N Palmer, 'Recovering Stolen Art' [1994] *Current Legal Problems* 215, 249; I Stamatoudi, *Cultural Property Law and Restitution* (Cheltenham 2011) 189 -190; Chechi (n 5) 102-103.

³⁰ S Symeonides, 'Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey' (2011) 59 *American Journal of Comparative Law* 303, 362; Prott (n 15) 269; M Lee, 'A Choice of Law Dilemma: The Conflict and Reconciliation of Laws Governing Cross-Border Transfers of Stolen Art' [2008-2009] *Cardozo Public Law Policy and Ethics Journal* 719, 722-3.

³¹ PA Lalive, *The Transfer of Chattels in the Conflict of Laws* (Clarendon Press 1955) 159.

³² D Fincham, 'How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property' (2008) 32 *Columbia Journal of Law and the Arts* 111, 117.

³³ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, in force 1 July 1998; 34 *ILM* 1330.

the original owner, be it a nation, a private person or a legal person. The *vitium reale* approach finds measured support in the common law presumption of *nemo dat quod non habet* (no one gives what she has not) adopted in Article 3 of the UNIDROIT Convention. In a title contest involving moveable property, this rule gives preference to an original owner over a good faith purchaser. A claim for the return of an object cannot be countered by acquisition in good faith. While its preference for stringent standards of diligence and compensation to the purchaser in good faith do not necessarily detract from a *vitium reale* approach, the Convention does not contain a presumption of bad faith on the part of the possessor in the absence of an export certificate. Moreover, it does not prevent trade that is lawful under the *lex situs* by the calculated mischief of professional traffickers who specialize in the transnational removal of cultural objects. Organized criminals, thieves and handlers avoid jurisdictions that protect the title of the original owner, and launder title in jurisdictions where the *lex situs* rule can support their activities. This technical compliance with one law to skirt another enables works of art tainted by the vice of theft to circulate. If the transfer of title is manipulated in this way, the benefits under the Convention are extinguished.³⁴

The *Winkworth* outcome would not have been different if the UNIDROIT Convention had been incorporated into English law at the time of the decision.³⁵ If the case had arisen in Italy post 2000, the outcome may have been different though.³⁶ The claim would clearly be international³⁷ in character and the policy that underpins the Convention may have played a role.

1.4 Title Laundering Remains Undeterred by EU and Global Instruments

Council Directive 93/7/EEC aims at closer collaboration in the EU but it does not counter title laundering directly.³⁸ Article 5 of the directive establishes the competence of the courts requested to rule on the merits of a claim for return. It leaves the question of ownership to the choice of law rule of the competent court in the requested member state hearing the case. Article 12 of the directive provides that, after return, ownership of the cultural object is determined by the *lex originis* (*i.e.* the law of the nation of origin).

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illegal Import, Export, and Transfer of Ownership of Cultural Property (hereinafter UNESCO Convention)³⁹ is less responsive to a *vitium reale* approach than the UNIDROIT Convention. Article 7(b)(i) of the UNESCO Convention encourages states to consider restitution to public institutions and entertain actions for the recovery of certain registered and inventoried artistic objects. A stolen object is effectively re-bought after the crime when just compensation is paid to the good faith purchaser from the state of origin under Article 7 of the UNESCO Convention.

³⁴ Carruthers (n 17) § 5.29.

³⁵ Study LXX Doc 1 Unidroit 1986 16-17; Study LXX Doc 7 Unidroit 1988.

³⁶ Italy ratified on 11 October 1999 and acceded on 1 April 2000. <http://www.unidroit.org/english/implement/i-95.pdf>. Accessed 23 July 2013.

³⁷ Explanatory Report, UNIDROIT Convention, Study LXX Doc 51 2002 10.

³⁸ DCFR VIII-3:101 n 135; Italian Movement of Goods of Cultural Interest Act Articles 2, 4 accommodate restitution claims from an EU Member State when a cultural object was unlawfully moved there.

³⁹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, in force 24 April 1972, 823 UNTS 231

A uniform and integrated world law would overcome horizontal competition among states based on substantive and procedural diversity. This will help to prevent the uncritical application of ordinary business norms to transactions involving cultural objects.⁴⁰ There is no treaty rule to the effect that transferees of stolen movables cannot invoke good faith.⁴¹ Harmonization of substantive law remains elusive. A durable counter-approach must manage global diversity in title issues. Private international law method may miss the mark if the current location of the moveable purges a title from vices when the object transits through a favourable jurisdiction.

1.5 Conflicts Rules and Context

That an object was stolen or removed at some point in the transaction chain deserves consideration.⁴² Denial of the criminal context in which transnational trafficking takes place undermines the rule of law. Yet conflicts rules function in the abstract to designate the applicable municipal law, and without concern for criminal penalties. The effect of the *lex situs* rule and decisions based thereon are anything but neutral.⁴³ The *lex situs* rule defers to the relationship between the true owner and the purchaser in good faith,⁴⁴ while it disregards the relationship between owner and thief.⁴⁵ It assigns importance to the time of the transaction post theft, but overlooks how crime affects the very practical human interests.

Legal systems that recognize the right to recover of a claimant deprived by theft, may do so on the basis that crime voids the title transfer,⁴⁶ or that a ‘real vice’ attaches to the thing until it is restored.⁴⁷ Scottish private law does not specifically protect cultural objects but it demonstrates the protection of the deprived owner. Flawed title cannot be cleaned by any market transaction because the thief or transferor passes it on to all successive transferees in the transaction chain.⁴⁸ While the acquirer always has the option of consulting a commercial, international or state-run database,⁴⁹ there is a very narrow window for any demonstration of good faith.⁵⁰

Jurisdictions do not necessarily agree on when an object has been ‘stolen’. German law draws a distinction between theft and conversion, with only theft rendering acquisition in

⁴⁰ Chechi (n 5) 249.

⁴¹ Convention Providing All Uniform Law on the Acquisition in Good Faith of Corporeal Movables, 1975 (1) Uniform Law Review 66 (never entered into force).

⁴² WW Kowalski ‘Restitution of Works of Art Pursuant to Private and Public International Law’ 288 *Recueil des Cours* (2001) (The Hague 2002) 218-222.

⁴³ See generally Prott (n 15) 268.

⁴⁴ As in *Winkworth* (n 10) 513 C-F.

⁴⁵ G Carducci, ‘The Growing Complexity of International Art Law: Conflict of Laws, Uniform Law, Mandatory Rules, UNSC Resolutions and EU Regulations’ in B Hoffman (ed) *Art and Cultural Heritage: Law, Policy and Practice* (CUP 2006) 68, 77; Carruthers (n 17) § 8.18.

⁴⁶ Article 1 of Decree-Law No. 27633 of 1937 and Article 31 of Law No. 13 of 1985 render transactions in Portuguese territory concerning cultural objects originating in a foreign country null and void when effected in breach of legislation regulating alienation or exportation.

⁴⁷ D Carey Miller, ‘Title to Art: Developments in the USA’ (1995) 1 *Scottish Law and Practice Quarterly* 115, 121.

⁴⁸ DCFR VIII-3.101 n 103, n 130.

⁴⁹ See e.g. Art Loss Register; INTERPOL; London Stolen Arts Database.

⁵⁰ *I.e.* where 20 years’ negative prescription is pleaded.

good faith impossible.⁵¹ The *vitium reale* concept achieves an expanded definition of theft that includes any unlawful removal of cultural objects. It goes some way toward preserving the rule of law.⁵² Moreover, recognizing the implications of the indelible real vice of theft prevents safe havens for stolen or trafficked objects from flourishing.

1.6 Choice of Law Method Can Deter Title Laundering

Content-selecting conflicts rules are preferable when substantive rules diverge sharply and an important international policy demands consideration. Recognizing wrongful acts that lead to the displacement undermines everyone's ownership of unique and special objects.⁵³ An impressive list⁵⁴ of attractive specific conflicts rules for the art trade exists,⁵⁵ but short time limitations and difficulty with the identification of the applicable law remain.⁵⁶ In practice, national court rulings display inconsistencies. Recovery is not automatic.⁵⁷ The alternatives that exist for cultural objects in transit⁵⁸ do not identify 'intermediate' or 'final' destinations of trafficking networks either. There is no ascertainable court to determine whether an object is in transit and the *forum* tends to apply its own law⁵⁹ without checking for what theft may signal.

The easy transfer of stolen and looted art can also be countered by, among other things, exceptions;⁶⁰ formulated exceptions;⁶¹ or assessment of the diligence of the possessor during the acquisition. The defence of neglect or omission to assert a right ('laches') encourages owners to be diligent in searching for stolen objects and database listings,⁶² but they have the advantage of the heavy evidentiary burden imposed on the good faith purchaser.⁶³

European choice of law method gives effect to the substantive interests of the law when that law encroaches on fundamental public policy considerations. That the policy limits of the applicable law argument can assist, was recognized in *Winkworth*.⁶⁴ Counsel argued that broad considerations of policy have prompted US courts to protect the dispossessed owner

⁵¹ *Kunstsammlungen zu Weimar v Elicofon*, 536 F Supp 829 at 833ff (EDNY 1981); K Siehr, 'International Art Trade and the Law' 243 VI *Recueil des Cours* (The Hague 1993) 9, 60.

⁵² Chechi (n 5) 289.

⁵³ Carducci (n 45) 76.

⁵⁴ Study LXX Doc 1 Unidroit 1986 20, 35-36 proposes, for lost or stolen goods, the intention of the parties and the law most closely connected; H Hanisch, 'Internationalprivatrechtliche Fragen im Kunsthandel', in A Dieckmann et al, *Festschrift für Wolfram Müller-Freienfels* (1986) 193, 215 proposes the *lex furti*; E Jayme, 'Die Nationalität des Kunstwerkes als Rechtsfrage' in G Reichelt (ed) *Internationaler Kulturgüterschutz* (Wien 1992) 7 and the Institute of International Law propose the *lex originis* prior to the first illegal exportation (see the Basel Resolution of 1991 and Wiesbaden Resolution of 1975); S Symeonides, 'A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property' (2005) 38 *Vanderbilt Journal of Transnational Law* 1177, 1183-86 proposes the *lex originis* subject to clear exceptions.

⁵⁵ For an early effort to identify such discrete rules, see Reichelt (n 2) 91. Carruthers (n 17) § 5.42 n 111 argues against such proliferation.

⁵⁶ Siehr (n 51) 75.

⁵⁷ M Frigo, 'Ethical Rules and Codes of Honor Related to Museum Activities: A Complementary Support to the Private International Law Approach Concerning the Circulation of Cultural Property' [2009] *IJCP* 49, 60-1.

⁵⁸ *E.g.* the law of the place of destination; *Autocephalous Greek Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts, Inc.*, 717 F Supp 1374 (SD Ind 1989) 1394-5.

⁵⁹ Carruthers (n 17) § 1.28.

⁶⁰ *Winkworth* (n 10) at 501. Carruthers (n 17) § 1.27, 1.46, 3.35.

⁶¹ Counsel for Mr Winkworth formulated an exception (at 510F) which the court declined (at 511C).

⁶² *E.g. Solomon R Guggenheim Foundation v Lubell* 77 NY 2d 311 (1991).

⁶³ Kenyon and MacKenzie (n 9) 246-249.

⁶⁴ *Winkworth* (n 10) at 510D.

whose property had been removed to another state without his consent.⁶⁵ Slade J was willing to take the escape route if any Italian provision were against what the English court could countenance.⁶⁶ The argument failed⁶⁷ because the court refused to accept that the owner's involuntary loss constituted grounds for an exception to the *lex situs* rule.⁶⁸ The duration and conditions of a prescriptive or limitation period may operate as aspects of public policy when the public policy interests of the forum are threatened, justifying *non*-application of the choice of law rule concerned. Time does not need to affect rights to stolen cultural objects. The dogma of the European conflicts system does not permit a multilateral reference rule to assume a public policy function, but the limits of the applicable law, like classification and connection, inform the methodology.

Civil proceedings in New York are guided by the interest of a particular state in maintaining the integrity of the marketplace.⁶⁹ Time has been ruled insufficient to affect the respective possessory rights of the parties.⁷⁰ Due process requirements mean that the state in which the object ends up after having been removed voluntarily, must recognize the ownership position prior to the move, but due account is also taken of the provenance and conveyance history of an object.⁷¹ The art policies of the forum mediate the application of the *lex situs* rule⁷² and preclude it unless the foreign law safeguards the position of the person who can claim clear title.⁷³ Theft signals the need to uncover the most significant relationship between the law and the cause of action. The state must be prevented from being used as a marketplace for stolen or looted art. Purchasers must look after themselves. If they have been honest, they at least had an opportunity to investigate provenance.

*City of Gotha*⁷⁴ dealt with the English public policy status of the limitations provisions that apply to conversions by theft. The claim was for restitution of the tiny work of art⁷⁵ looted during the Soviet occupation of Germany. The tiny painting was located in Russia between 1946 and mid-1980s and, briefly, in West-Berlin since 1987 before being put on auction in London in 1992. The court found against the Panamanian company that consigned the work to Sotheby's, ruling that a thief who has fraudulently concealed the whereabouts of an artwork cannot have the benefit of a shorter limitation period. Moses J readily admitted that the conflicts method used was premised on reaching the desired result.⁷⁶ He recognized that the application of *Winkworth* would be precluded when the *lex situs* rule was contrary to English public policy embodied in the English Limitation Act of 1980. A policy approach notices the vice of theft without fixing on 'when' and 'where'. As such, the location of the painting did not prevent the court from noting that the claim was not time-barred under German law,⁷⁷ and that views expressed by commentators on the German Civil Code that

⁶⁵ At 511G.

⁶⁶ At 514C-D.

⁶⁷ At 511 H.

⁶⁸ At 512D.

⁶⁹ Chechi (n 5) 103-4; Symeonides (n 30) 362; Lee (n 30) 719, 748, 754.

⁷⁰ *Guggenheim v Lubell*, 77 NY2d 311, 318, 320 (1991) (burden of proving clean title rested on the purchaser; dispossessed owner has no duty to search diligently for missing art under the demand and refusal rule).

⁷¹ Lee (n 30) 719, 730-1.

⁷² § 6(2) *Restatement (Second) of Conflict of Laws Vol 1*.

⁷³ S Symeonides, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons' [2008] *Tulane Law Review* 1741, 1746 n 25; Lee (n 30) 729.

⁷⁴ *City of Gotha and the Federal Republic of Germany v Sotheby's and Cobert Finance SA* [1998] 1 WLR 114 (QB); *The Times* 3 July 1997 (CA).

⁷⁵ *The Holy Family with Saints John and Elizabeth with Angels* (1603) by Wtewael.

⁷⁶ § I.2(2).

⁷⁷ § II.3 on Article 221 BGB and commentators' views.

thieves, robbers and embezzlers could not count the period of possession by predecessors to their own advantage as part of the period of limitation. That the German limitation period runs irrespective of whether the claimant knows of the claim or the identity of the possessor, was acknowledged *obiter*. If the completion of the foreign limitation period rewarded thieves and transferees in bad faith, a conflict with English public policy arises. That the limitation period in German law was longer than the period in English law did not justify subordinating the rights of the dispossessed owner to a possessor in bad faith. Since the exception for foreign limitation periods was not applied narrowly,⁷⁸ there was scope to find that section 4 of the Limitation Act 1980 reflects English public policy against criminal gain.

Gotha resonates with the progressive ruling in *Iran v Barakat Galleries Ltd.*⁷⁹ English courts seem increasingly willing to equate the sum of rights of a foreign state in undiscovered objects to ownership in English law and to relax the strict public policy objections to a claim based on state ownership legislation.

The Court of Appeals in *Mirvish v Mott*⁸⁰ recently ruled that the true owner has a right to claim a sculpture affected by conversion. Yulla, the widow of sculptor Jacques Lipschitz, had gifted it to her long-time companion, who had sold his interest in the work to Mirvish. Meanwhile, Yulla's son had sold it abroad. Mirvish alleged conversion, which ultimately prevented the relevant period being counted to the defendant's advantage. The court preferred not to draw any distinction between theft and conversion, and regarded as irrelevant the expiry of statutory limitations to legal title.⁸¹

Conclusion

The cause of involuntary loss has a role to play in disputes concerning cultural objects. If theft is the cause, stricter principles ought to apply to protect the owner's rights, and limited time periods ought not to render an object immune from recovery. Strict compliance with the law designated by the *lex situs* principle to evade another law, has systemic effects in the art trade that routinely support the circulation of tainted works of art. This leaves them vulnerable to diverse national legal approaches. It also challenges the foundations of choice of law theory and practice.

The aspiration to prevent easy marketplaces for art thieves, smugglers and their transferees is critical to any decision on the merits. It helps choice of law method brace itself against the impact of dogmatic orthodoxy on the illicit trade in art, so as to preserve the integrity of transactions for all owners. Several alternative reference rules, modifications, exceptions and formulated exceptions have been proposed for title and limitations conflicts. This article has argued that result-selection is desirable and that a policy choice made in favour of the deprived party is required. Once this functional choice is made, the method follows. New York law qualifies the application of the *lex situs* rule when the dispossession of the original owner was involuntary and unlawful. English conflicts method demonstrates dis-applying foreign law that conflicts manifestly with fundamental principles of justice. A single-method strategy is bound to fail to constrain an over-inclusive *lex situs* rule that amplifies the illicit trade of cultural objects. It can only undermine the support which deprived parties require.

⁷⁸ Kenyon and MacKenzie (n 9) 242-3.

⁷⁹ [2009] 1 QB 22 (CA).

⁸⁰ *Mirvish v Mott*, 18 NY3d 510 (3 January 2012).

⁸¹ (n 80) 520.