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Case Japanese Netsuke Collection -Winkworth v. Christie's

William Winkworth - Christie's - Royaume-Uni/United Kingdom - Italie/Italy - Artwork/œuvre d'art - Post 1970 restitution claims/demandes de restitution post 1970 - Criminal offence/infraction pénale - Choice of law/droit applicable - Ownership/propriété - Judicial claim/action en justice - Judicial decision/décision judiciaire - Request denied/rejet de la demande

A collection of Netsuke is stolen in England, sold to a good faith collector in Italy and finally offered at auction in England. William Winkworth, the original owner, recognized the objects in the Christie's auction house catalogue and initiated legal action in London to have his ownership of the goods recognized. Despite the plaintiff's arguments, the judge in the case considered that Italian law was applicable and therefore recognized the Italian collector's title to the property as valid.

I. Chronology

Post 1970 restitution claims

- **1970s**: Japanese **artworks** (Netsuke) [1] are **stolen from** a collector, William Winkworth, in his house in **England**. The objects are imported to **Italy**, where they are sold to a **bona fide** collector, D'Annone. D'Annone entrusted the works to the auction house Christie, Manson & Woods Ltd. (Christie's) in London.
- **22 July 1977**: William Winkworth identifies the works stolen from him in the sale catalogue and initiated **legal action** in **England** against the auction house and the seller.
- **1980**: Judge Slade, hearing the case, **designates Italian law as applicable**. However, under Italian law, D'Annone had obtained title to the property against Winkworth. **The claimant will therefore not obtain the restitution** of his property.[2]

II. Dispute Resolution Process

Judicial claim - Judicial decision

- Winkworth initially sued the auction house as well as D'Annone.
- Against Christie's, Winkworth sought an injunction prohibiting the auction house from selling the remaining property and returning the money from the sale to the seller. However, as Justice Slade points out, 3 Winkworth withdrew his action against Christie's during the course of the proceedings and Christie's agreed to comply with his demands.
- Against D'Annone, Winkworth asked the Court for an injunction prohibiting him from receiving the price of the sale, a declaration certifying that he was the owner of the Japanese works of art, and finally the restitution of his goods or their monetary value.
- Presumably, Winkworth and D'Annone were unable to reach an arrangement regarding the ownership of the property and it was for this reason that Winkworth decided to take legal action. The judgment, however, makes no mention of any attempt at negotiation.

[1] Netsuke are miniature sculptures that were invented in 17th-century Japan. At first they had a strict utilitarian function, and then they became objects of great artistic merit and expression of extraordinary craftsmanship reflecting the important aspects of Japanese folklore and life.
[2] *Winkworth v. Christie, Manson & Woods Ltd. and another*, [1980] 1 All ER 1121.
[3] *Winkworth v. Christie, Manson & Woods Ltd. and another*, [1980] 1 All ER 1123, §j.

III. Legal Issues

Criminal offence - Ownership - Choice of law

- The present case was triggered by the theft of the Japanese art collection belonging to Winkworth, which is considered a criminal offence under both English law (Section 8(1) Theft Act 1968) and Italian law (Article 624 Italian Criminal Code).
- The issue before Slade J. is whether the sale in Italy gave D'Annone full ownership of the works opposable against Winkworth, their original owner.
- In order to rule on ownership, he must first resolve the question of the applicable law because depending on whether Italian or English law applies, the outcome of the dispute will not be the same. Indeed: (i) English law, faithful to the principle *nemo dot quad non habet* (no one can transfer more rights than they possess), considers that the sale of a stolen object cannot enable the purchaser to obtain ownership of it, since by hypothesis the seller does not himself have this right. Therefore, if English law is applicable in this case, the judge will have to consider that Winkworth remained the owner of the Japanese works; (ii) on the other hand, Articles 1153 and 1154 of the Italian Civil Code provide that the purchaser of an object immediately becomes its owner if he is in good faith and has appropriate title,4 even in the case of stolen property.
- Consequently, if Italian law were to be applicable in this case, as D'Annone claimed, D'Annone would have title to the works of art which he could oppose against Winkworth's own title.
- According to the conflict-of-laws rule traditionally used by the courts in relation to movable property, the law of the location of such property (*lex rei sitae*) must be applied to determine its actual status. Since the property is movable, the *situs* may vary and it will therefore be necessary to apply the law of the state in which the property was located at the time when the events leading to the acquisition of the property right to which it relates occurred. In this case, therefore, the law of the place of sale, i.e. Italian law, should apply.[5]
- However, Winkworth, while acknowledging this traditional conflict of laws rule, argueds that in this case an exception to the *lex rei sitae* should be made and English law applied because of the many connections the dispute had with England (the works were stolen in England and the owner did not consent to their export, then, after being exported to Italy, they were offered for sale in England and finally the case was brought before an English court).

[4] This expression may refer to any legal act, even unilateral, that is abstractly capable of producing the effect of transferring ownership [...]; it is therefore the legal act that would have obtained the said effect if it had been performed by the owner. *Dictionnaire comparé du droit du patrimoine culturel*, 2012, p. 290.
[5] *Winkworth v. Christie, Manson & Woods Ltd. and another*, [1980] 1 All ER 1121, §e and 1125 §c.

IV. Adopted Solution

Request denied

- The judge accepted D'Annone's good faith ("*The defendant [...] was unaware that [the goods*] *were stolen*")[6] but did not detail his motivation for such assessment. This is because the assessment of good faith is a matter for trial judges and is a matter of their sovereign appreciation (the case is being heard by the Court of Chancery, which is a higher court).
- The judge ruled that Italian law applied to the dispute.[7] He therefore accepted that D'Annone had acquired valid title to the property, which was enforceable against Winkworth, who could not therefore obtain the return of the stolen objects. However, he was careful to point out that he had ruled without knowing the content of the Italian law and did not rule out the possibility that it might refer to English law. His decision does not, therefore, deprive the parties of the possibility of invoking such renvoi.
- The judge agreed to enter the debate and admitted that an owner who has nothing to feel guilty about and who sees his property stolen deserves some protection. However, he takes into consideration the other interests involved and considers that the security of commercial transactions must prevail. Both the buyer and the original owner - when acting in good faith - must be able to rely on the title obtained.[8] The judge then indicates that commercial interests require that the law applicable to movable goods be determined by the *lex rei sitae* rule.[9] He also refused to make an exception to the traditional conflict of laws rule on the grounds that this would lead to the abolition of all legal certainty: "*Intolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional English situs, when applying the principle to any particular case, merely because the case happened to have a number of other English connecting factors*."[10]

V. Comment

- On the strict application of the *lex rei sitae* in cases of theft of cultural property :
- The judge's reasoning in the *Winkworth* case is similar to that of the judge in the *Elicofon* case.[11] That case involved two portraits of Dürer stolen in Germany and then resold in New York. In order to determine whether the buyer had a title that

[6] Winkworth v. Christie, Manson & Woods Ltd. and another, [1980] 1 All ER 1131, §c and 1135, §a-b.
[7] If Italian law is applied (taking into account the hypothetical renvoi mentioned by the judge), the goods stolen from Winkworth will not be returned to him, as D'Annone has acquired a valid title deed enforceable against the original owner.
[8] Winkworth v. Christie, Manson & Woods Ltd. and another, [1980] 1 All ER 1134, § h.
[9] Winkworth v. Christie, Manson & Woods Ltd. and another, [1980] 1 All ER 1135, § b-c.
[10] Winkworth v. Christie, Manson & Woods Ltd. and another, [1980] 1 All ER 1132, § f.
[11] Kunstsammlungen zu Weimar v. Elicofon, 678 F. 2d 1150 (2nd Cir. 1982). See Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Two Dürer Paintings - Kunstsammlungen zu Weimar v. Elicofon," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

could be used against the original owner, the law applicable to the dispute had to be determined. The *lex rei sitae* in this case was New York law. The judge wondered, however, whether the fact that the paintings had been stolen in Germany might not lead to an exception to this conflict rule and to the application of German law. As in the *Winkworth case,* he concluded in the negative in favour of the security of commercial transactions.

- Consequently, the judge applied New York law and considered that Elicofon had not acquired title to the paintings against the original owner. The application of the lex rei sitae here leads to a solution opposite to that in *Winkworth*, but the reasoning of the judges is the same: to the question "can the strict application of the *lex rei sitae* be departed from in the presence of certain criteria, in particular the existence of a theft", they both answered in the negative. The strict application of the *lex rei sitae* conflict-of-laws rule to traditional movable property may be justified on grounds of simplicity - it is conceptually easier to apply the law of the state in whose territory the object is located - as well as on grounds of security of commercial transactions. However, in the case of theft of cultural objects, this rule, which applies absolutely and without regard to the situation to which its application leads,[12] may lead not only to weakening the position of the original owner, as in the present case, but above all to encouraging the black market, especially in countries whose legislation allows the good faith purchaser of a stolen movable object to obtain valid title to it.[13]
- According to the doctrine, this problem could be remedied in two ways: (i) by establishing uniform substantive rules; and (ii) by retaining the *lex rei sitae* as the rule of principle, while allowing for the application of an alternative connecting point where a number of other criteria are met, so that the law of the state which has the closest connection to the situation of the case would be applicable, thus making it possible to introduce a connecting point based on a 'substantial character'.[14]However, the decision under review, like the decision in *Elicofon*, seems to pose serious obstacles to this second solution.
- On the application of the theory of renvoi in personal property :
- Prior to the *Winkworth* decision, the English courts had never applied the doctrine of renvoi to movable property. This is a mechanism of private international law which consists in taking into consideration the fact that the law of the state designated by the conflict of laws rule itself refers to another law (the law of the forum or a third law) and thus applying that law. For the first time, the judge states that the application of renvoi in this matter would be "theoretically possible", which leads him to express reservations as to the outcome of the dispute. The reasoning is

[12] Reichelt Gerte, Etude LXX- doc. 1, demandée à Unidroit par l'UNESCO sur la protection des biens culturels, Rome, December 1986, p. 18.

[13] *For* example, see *Autocephalous Greek-Orthodox Church of Cyprus and Cyprus v. Goldberg & Feldman Fine Arts and Goldberg*, United States District Court, Indianapolis Division, No. IP 89-304-C, 3 August 1989, and the commentary by Burk Karen Theresa, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers*, *in* Loyola of Los Angeles International and Comparative Law Review (1990): 427.

[14] Reichelt Gerte, *Etude LXX*, op. cit. p. 19.

as follows: (i) the English conflict of law rule (the *lex rei sitae)* in relation to tangible property designates Italian law; (ii) does the Italian conflict of law rule refer to the law of the forum or does it designate a third law? In the first case, Winkworth will not be able to obtain restitution of his property, as D'Annone has acquired a valid title. In the second case, the question of the ownership of the works of art in question will be subject to the third law.

- However, a more recent decision has clarified matters. The *Berend*[15] case concerns Achaemenid bas-reliefs from the fifth century B.C. purchased by Mrs Berend in New York in 1947. The sculptures were then imported to France and put up for sale in London in 2005. Iran then requested their return. The *lex rei sitae* referred to France, but Iran argued that under the doctrine of renvoi, French law should not be applied but rather the French conflict of laws rule which refers to the law of the country of origin (Iran). The judge rejected this argument on the grounds that the renvoi rule is not applicable in the case of a mobile conflict[16] ("*English law has held for many years, in order partly to achieve consistency and certainty, that where movable property is concerned title should be determined by the* lex situs *of the property at the time when the disputed title is said to have been acquired. Millett J. saw no room for the doctrine of renvoi, in the share context, and I see no room either as a matter of policy for its introduction in the context of a tangible object such as that in contention here. [I hold that, as a matter of English law, there is no good reason to introduce the doctrine of renvoi and that title to the fragment should thus be determined in accordance with French domestic law*.")[17] The judge therefore applied French law and dismissed Iran's claim, ruling out any future application by the English courts of the concept of renvoi in determining ownership of movable property.[18]
- The renvoi mechanism might prove interesting - from the point of view of combating trafficking in cultural objects - if the majority of legislations adopted the *lex originis* as the conflict-of-laws rule, since this would make it possible to curb trafficking and to take account, where appropriate, of national laws protecting cultural objects. However, this hypothesis does not reflect the truth, and in these circumstances it is better to minimise the possible applications of the renvoi mechanism, since it may lead to the application of a rule that is too favourable to the bona fide purchaser and thus encourages trafficking in cultural objects.

[15] *Islamic Republic of Iran v. Berend* [2007] EWHC 132 (QB), Bus. L.R. D65. See Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Achaemenid Limestone Relief – Iran v. Berend" Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.
[16] French courts have adopted the same solution.
[17] *Islamic Republic of Iranv. Berend*, §d and D68, §f.
[18] Fincham Derek, *How Adopting the* Lex Originis *Rule Can Impede the Flow of Illicit Cultural Property, in* Columbia Journal of Law and the Arts, Vol. 32, 2008, pp. 143-144

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