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Case Pre-Columbian Archaeological Objects – United States v. McClain

United States/États-Unis – Mexico/Mexique – McClain – Archaeological object/objet archéologique – Post 1970 restitution claims/demandes de restitution post 1970 – Judicial decision/décision judiciaire – Enforcement of foreign law/applicabilité du droit public étranger – Criminal offence/infraction pénale – Illicit exportation/exportation illicite – Ownership/propriété – Unconditional restitution/restitution sans condition

This case affirmed the conviction of several dealers who conspired to sell archaeological objects removed from Mexico in violation of the National Stolen Property Act (NSPA). Under the NSPA, it is a crime to deal in property that has been "stolen, unlawfully converted or taken, knowing the same to be stolen". According to Mexican law, pre-Columbian archaeological objects were State property. The Court of Appeals for the Fifth Circuit established the "McClain doctrine", according to which foreign patrimony laws vesting ownership in the State of cultural property found within its boundaries are acknowledged by the United States.

I. Chronology

Post 1970 restitution claims

- **May 1973**: Joseph Rodriguez arrived in Texas with a collection of pre-Columbian archaeological objects from Mexico to sell. Alberto Mejangos, an undercover director of the Mexican Cultural Institute who suspected illicit dealings, met with Rodriguez to see his collection. Rodriguez left his collection with William and Ada Simpson in San Antonio (Texas), who were authorized to sell the items, and returned to Mexico.[1]
- **December 1973**: Joseph Rodriguez, Mike Bradshaw, William Maloof and the Simpsons met to plan the transfer of the artifacts to Europe in order to auction them off and return them to the United States (US).[2]
- **February 1974**: FBI Special Agent John McGauley began investigating the sale of pre-Columbian objects. He recruited Travis Benkendorfer to work with him as an informant. Benkendorfer contacted Mrs. Simpson with a cover story that he was interested in acquiring illegal cultural objects for resale in association with the *Mafia*. Mrs. Simpson responded that her husband and his appraiser/partner Patty McClain were awaiting a pre-Columbian artifact shipment to cross the Mexican border into California.[3]
- **4 March 1974**: Agent McGauley met with Benkendorfer, McClain, and the Simpsons in San Antonio, Texas, to discuss the artifacts. The next morning Agent McGauley met with the Simpsons and his "appraiser" and "interpreter".[4] During this meeting, Patty McClain and William Simpson confirmed that they were bringing more artifacts across the border as well as their interest in selling the ones they already had in California.[5]
- **6 March 1974**: William Simpson and Mike Bradshaw were arrested in California while attempting to purchase US $850,000 worth of antiquities. The same day, Patty McClain and Ada Simpson were arrested in San Antonio.

II. Dispute Resolution Process

Judicial decision

- The US District Court for the Western District of Texas convicted the defendants under the National Stolen Property Act (NSPA)[6] for conspiracy to transport and receive pre-Columbian

[1] *United States v. McClain*, 593 F.2d 658, 660 (5th Cir. 1979).
[2] *Ibid*., at 661.
[3] In a phone conversation the next day, Mr. Simpson told Benkendorfer that he was in possession of about 150 pieces and was awaiting another shipment. He described his process of retrieving the objects from archaeological digs and then obtaining forged or backdated permits and documents from the archaeological institute in Mexico. *Ibid*.
[4] In reality, they were Dr. Eduardo Montes Moctezuma of the Mexican Department of Archaeology and another undercover FBI agent. *Ibid*.
[5] *Ibid*., at 663.
[6] 18 U.S.C. § 2315 (2000).

artifacts from Mexico, despite having knowledge that the objects were stolen.[7] There was clear evidence presented in the record of their involvement in the conspiracy, thus the defendants could be prosecuted. This verdict was appealed.

- The US Court of Appeals for the Fifth Circuit reviewed the first instance ruling. The Court of Appeals decided that the District Court's jury instructions were erroneous because they falsely instructed the jury that "since 1897 Mexican law has declared pre-Columbian artifacts […] to be the property of the Republic of Mexico" except when a permit or license has been issued to export the artifacts. In fact, it was not until 1972 that Mexico enacted a law that declared all archaeological objects within Mexico to be the property of the Nation.[8]

III. Legal Issues

Criminal offence – Illicit exportation – Ownership – Enforcement of foreign laws

- The NSPA applies to objects or goods that are "stolen, unlawfully converted, or taken", and it criminalizes trafficking of stolen property. Specifically, "[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more […] which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken […] shall be fined under this title or imprisoned not more than ten years, or both".[9] This is contrasted with national "found-in-the-ground" laws that forbid export of artifacts discovered within the territory of a nation.[10]
- The defendants never disputed that the objects involved in this case were illegally exported from Mexico.[11] Thus the question was whether the Pre-Columbian archaeological objects were "stolen" under Mexican law and US law definitions. In effect, the NSPA criminalized stolen items, but never actually defined the word "stolen". A clarification in this respect was necessary because during the trial court proceedings the judge instructed that in order to find the defendants guilty, the jury had to "find beyond a reasonable doubt" that the artifacts were "stolen".[12]
- On appeal, the defendants challenged the court's application of the NSPA regarding the illegal exportation as an unwarranted federal enforcement of a foreign law. They argued that the pre-Columbian artifacts could not have been "stolen" because of the lack of evidence showing they were taken from private individuals without their consent and whether the Republic of Mexico actually had possession of them. They based this on previous case law on which US

[7] These objects were exported without a license or permit from Mexico into the US nor had they been registered with the Public Register of Archaeological and Historical Zones and Monuments of the Republic of Mexico. *United States v. McClain*, 545 F.2d 988, 992 (5th Cir. 1977).
[8] *Ibid*.
[9] 18 U.S.C. §§ 2314-2315 (2000).
[10] Adam Goldberg, "Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects," *UCLA Law Review* 53: 1031.
[11] *United States v. McClain*, 545 F.2d, at 993.
[12] *Ibid*.

courts have relied on in order to define "stolen" in the NSPA. According to the appellants, Mexico's ownership legislation of pre-Columbian objects is not enough for the objects to fall within the scope of the NSPA because this statute uses the term "stolen" to apply only to acts which wrongfully deprive ownership rights. They thus argued that the NSPA could not apply to "stolen" artifacts that violated patrimony laws.[13]

- The Court of Appeals discussed the differences between "theft" and "unlawful export" due to the discrepancies between the criminal definition and that under the NSPA. They analyzed different Mexican legislation and patrimony law and determined that the Mexican government did, in fact, make a declaration of national ownership.[14] The Court ended its analysis by looking at the Mexican Federal Law on Archaeological, Artistic and Historic Monuments and Zones of 1972, which stated that archaeological "monuments, movables and immovable, are the inalienable and imprescriptible property of the Nation" (Article 27). Therefore, Mexico would only have ownership of these types of objects after 1972.
- The Court of Appeals concluded by summarizing its decision to reconcile the broad definition of "stolen" in the NSPA with the more stringent criminal statutes.[15] If the definition was so narrow that it did not cover the illegally exported pre-Columbian objects that occurred after the 1972 patrimony law, the Mexican Government would not be protected by the NSPA, even though it vested itself with ownership.[16] However, if the object was deemed "stolen" solely because it was illegally exported, it would construe a too broad meaning of the word. "It should not be expanded at the government's will beyond the connotation depriving an owner of its rights in property conventionally called into mind".[17]
- The Court of Appeals thereby established the "McClain doctrine", according to which a cultural object may be considered "stolen" in the US provided that the country of origin can prove that: (1) the object was discovered within its territory; (2) a patrimony law that unequivocally vested ownership of such object in the State – even without physical possession – was in effect when the object was removed from that country; and (3) such foreign patrimony law is not so vague as to violate the due process requirements of the US Constitution.

IV. Adopted Solution

Unconditional restitution

- The Court of Appeals affirmed the conviction of conspiracy because the evidence presented in the District Court to the jury showed the appellants conspiracy to sell the collection.

[13] *Ibid*., 994. Patty Gerstenblith, *Art, Cultural Heritage, and the Law* (Durham: Carolina Academic Press, 2012): 684.
[14] The Court held that "a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered 'stolen' within the meaning of the [NSPA]". 545 F.2d at 1000-01.
[15] 545 F.2d at 1001.
[16] This would violate the NSPA's objective to protect owners. *Ibid*.
[17] *Ibid*., at 1002.

V. Comment

- There are some difficulties in applying the "McClain doctrine", especially when it comes to the NSPA and the issue of provenance. The problem is that it can be extremely difficult to prove whether the object was discovered within a nation's borders and when it was discovered.
- There are many critics and supporters of the "McClain doctrine", especially when it comes to State sovereignty.[18] Those in opposition of the doctrine believe that the US must respect foreign nations' ownership laws, but the "McClain doctrine" does no such thing because the NSPA overruled Mexico's ownership laws. Those in support of the doctrine recognize that every nation defines "ownership" rights in different ways and other countries should respect that.[19]
- This doctrine is noteworthy because the NSPA could be used to translate a crime against the Mexican Government into one against the US Government. Therefore the "McClain doctrine" represented the first precedent against the private international law rule that one State does not enforce the public laws of another State.[20] Since the appellants were arrested in the US, despite owning cultural property stolen from Mexico, the US Government pressed charges and the appellants were tried in the US.
- The problems brought up from the conflicting NSPA and domestic laws were addressed by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Article 7(b) of the 1970 UNESCO Convention affirms that the parties' obligations only extend to cultural objects that were "stolen from a museum or a religious or secular public monument or similar institution". This puts possession into an actual individual or institution that could claim the object was stolen.[21] This helps solve the problem of proving when and where the object was stolen. Since the object would be stolen from an individual entity, there would be no guess-work in determining the circumstances surrounding the theft on which the "McClain doctrine" relies. The 1970 UNESCO Convention, however, does not cover objects that are not inventoried, including archaeological objects. This problem is now addressed by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects. In effect, the provisions on illegal exportation of this treaty cover non-inventoried cultural objects. Moreover, regarding the issue of the recognition and enforcement of foreign public laws, the UNIDROIT Convention is based on the premise that the law of the country of origin is the controlling law. Basically,

[18] A later case furthers this doctrine: *United States v. Frederick Schultz*, 333 F.3d 393 (2nd Cir. (N.Y.) June 25, 2003) (No. 02-1357). See Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Egyptian Archaeological Objects – United States v. Frederick Schultz," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

[19] The McClain court stated "[t]his Court, of course, recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction; possession is but a frequent incident, not the *sine qua non* of ownership, in the common law or the civil law". 545 F.2d at 992.

[20] John Henry Merryman and Albert E. Elsen, *Law, Ethics and the Visual Arts* (London: Kluwer Law International, 1998): 180.

[21] Merryman and Elsen, *Law, Ethics and the Visual Arts*, 181.

the Convention does not formulate an independent supranational policy of international art trade, but dictates the enforcement of the export prohibitions of the country of origin regardless of what the law of the State of location provides.

VI. Sources

a. Bibliography

- Gerstenblith, Patty. *Art, Cultural Heritage, and the Law*. 3rd edition. Durham, North Carolina: Carolina Academic Press, 2012.
- Goldberg, Adam. "Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects ." *UCLA Law Review* 53.
- Merryman, John Henry, and Albert E. Elsen. *Law, Ethics and the Visual Arts*. London: Kluwer Law International, 1998.

b. Documents

- Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, "Case Egyptian Archaeological Objects – United States v. Frederick Schultz," Platform ArThemis (http://unige.ch/art-adr), Art-Law Centre, University of Geneva.

c. Court decisions

- *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).
- *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).
- *United States v. Frederick Schultz*, 333 F.3d 393 (2nd Cir. (N.Y.) June 25, 2003) (No. 02-1357).

d. Legislation

- National Stolen Property Act, 18 U.S.C. § 2315.
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 17 November 1970, 823 UNTS 231.
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 34 ILM 1322 (1995).