Editorial

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One of the more gratifying developments of recent years has been the evolution of national legislation catering specifically for issues of cultural property. An example of such legislation, the Canadian Cultural Property Export and Import Act, is examined by Stephen Katz in our leading article. Readers may find interesting scope for comparison with the United Kingdom legislation examined by Clare Maurice and Richard Turnor in our last issue. The Canadian statute imposes export controls not dissimilar to those applying within the United Kingdom, but reinforces them by unusually stringent penalties unassisted by any concomitant forfeiture of objects exported in breach. Having regard to the misfortunes which have afflicted attempts by foreign States to enforce such forfeiture in English courts,[1] this restraint may reflect no more than the triumph of discretion over valour.

To English eyes a more innovative feature of the Canadian Act lies in its prohibition (on pain of criminal penalty) on the import into Canada of cultural objects illegally exported from overseas. The view that international co-operation to limit the illegal movement of cultural goods should focus on the point of entry rather than the point of exit has much to commend it. Properly applied, it can spare States from whose territory objects are removed the frustration of proceedings like *Ortiz*. Such a policy underpins both UNESCO and UNIDROIT and is powerfully exemplified by the United States National Stolen Property Act, examined by Judith Church in her detailed and revealing survey of American case-law. But prohibition on entry has its problems, not least those of proof; for it is incumbent on the prosecution in a case of alleged unlawful importation to prove both that the objects in question were illegally exported from the relevant overseas State and that they were imported into the trial State during the currency of its import prohibition. It may be no coincidence that prosecutions both in Canada and in the United States have foundered on such point.

The challenges facing North American legislatures can appear almost frivolous when compared with those confronting the European Community. This issue of the Journal (in common with its

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predecessors) gives substantial coverage to the Community's efforts to devise acceptable uniform principles governing the movement and restitution of cultural property. Reaction in some quarters has been notably baleful. In a recent letter to *The Times*, the Chairman of Christie's and others stigmatised the latest initiatives (along with recent Community proposals to subject works of art to VAT) as a serious potential fetter on the market. In addition to our regular essay by Joanna Goyder we publish Manlio Frigo's critique of the proposed Council Directive on the Return of Unlawfully Exported Cultural Objects, the text of which document appeared in our last number. The author takes issue with the content of the list appended to the Directive and with its designation of certain categories of goods by reference to their economic value, but is generally inclined to favour the Directive.

Some of the least attractive antiquarian curiosities are to be found in the law itself. English law abounds with such anachronisms, many of them affecting cultural goods: the supposed rule that neither possessory nor proprietary rights can exist in human remains, and the archaic (if not anarchic) concept of treasure trove. A further case, aptly stigmatised as an 'ugly medieval relic', is that of market overt. This doctrine (the most contentious of the exceptions to the rule nemo dat quod non habet) confers property on a good faith purchaser, irrespective of the seller's lack of ownership, whenever goods are sold in an open, public and legally-constituted market between the hours of sunrise and sunset. Sale in market overt has become an obvious medium for the disposal of stolen art or antiques, and represents a blatant abuse. In a pungent character study, Brian Davenport QC and Anthony Ross conclude that case for humane destruction is amply made out.

General legal doctrine still exerts a decisive influence on questions of cultural property. As some of our case-notes illustrate, the results can be idiosyncratic. Paul Kohler, examining a New Zealand authority, reminds us that beyond treasure trove the common law principles dictating title to discovered antiquities are essentially indistinguishable from those dictating title to a buried Kentucky Fried Chicken box containing the proceeds of drug dealing. Richard Bragg shows that ordinary trading legislation or 'consumer protection' laws can produce resolutions to authenticity disputes which sit uneasily alongside the received view that the art world deals in opinions and not in facts. Jonathan Montgomery depicts an interesting conflict between the responsibilities of Church and State in the preservation of antiquarian objects.

If we have a lesson to learn from the content of our third issue, it is that cultural life (like life in general) can too readily become dominated by lawyers. When political, economic and philosophical transition intensifies, an acceleration of legal provision is only to be expected. But to lose sight of the spirit of cultural life amid the detail of its regulation would be a great misfortune. We will cordially welcome efforts by our readers to redress the balance.

Note

1 E.g. *Attorney General of New Zealand v Ortiz* [1984] AC 1; *King of Italy v Marquis Casion di Medici Tornaquinci* (1918) 34 TLR 623; cf *Kingdom of Spain v Christie Manson and Woods* [1986] 3 All ER 28; *Princess Paley Olga v Weiss* [1929] 1 KB 718.

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