The Kelsey Museum of Archaeology at the University of Michigan recently returned a 3200-year-old Egyptian artifact to the Ägyptisches Museum in Berlin after research revealed that the piece had been looted from the Berlin Museum during World War II.

The artifact, a glazed stone funerary stela made for a man named Ptahmose around 1250 B.C., came to the Kelsey Museum in 1981 as part of the collection of Samuel A. Goudsmit, an internationally known physicist and enthusiastic amateur Egyptologist.

Recent research by Dutch Egyptologist Nico Staring noted the similarity of the artifact to an object from the Berlin Ägyptisches Museum, assumed to have been lost in the bombing of the museum in World War II. Staring, with the assistance of Kelsey Museum curators Janet Richards and Terry Wilfong, ultimately proved that the Kelsey artifact was, in fact, the Berlin stela, apparently looted from the damaged museum. Samuel Goudsmit had served in Germany at the end of World War II as part of the Alsos Mission, an American team that was investigating German nuclear energy and weapons development, and acquired the artifact from a private collector in Germany in 1945.

Upon this discovery, the Kelsey Museum alerted the authorities in Berlin, who investigated further and confirmed that this was indeed their artifact. The Kelsey Museum curators were in immediate agreement that the artifact had to be returned to Germany. The University of Michigan supported the Kelsey Museum's desire to return the artifact and, after a formal process to de-accession the piece from the Kelsey, plans were made for its return. On April 26th, Kelsey Museum Collections Manager Se-
bastián Encina took the artifact to New York, and met Ägyptisches Museum director Dr. Frederike Seyfried there. Dr. Seyfried took it back to Berlin, where it will soon go on display again, some seventy years after it was last on view in Germany.

The Kelsey Museum deferred to the German authorities on how to publicize the repatriation. The German press release, acknowledging the University of Michigan for its return of the stela, received wide coverage across the world. Reaction on social media was mostly positive, although the Kelsey Museum did receive some criticism—a number of commenters asked why it was returning the stela to Germany, rather than Egypt, where it originated.

This is a legitimate question, and one that is often asked more generally of Egyptian artifacts in museums outside of Egypt. Certainly, the early history of such material is one of plunder and looting, and even artifacts acquired through apparently legal means in Egypt can raise concerns. The majority of Egyptian artifacts in the Kelsey Museum, nearly 50,000 items, came from controlled archaeological excavations run by the University of Michigan in the 1920s and 1930s and were given to the University of Michigan by the Egyptian government at the time as part of an agreed division of finds. The remainder are donations, such as the Goudsmit material, or early purchases of artifacts that left Egypt, as far as could be determined at the time they came to the museum, through entirely legal means.

The sale and purchase of antiquities was legal in Egypt (with varying restrictions) into the mid-20th century: at one point common types of artifacts were available for purchase from the “sale room” of the Cairo Museum, while institutions (including the University of Michigan) were encouraged to purchase artifacts directly from the Antiquities Service of the Egyptian government. It has been argued that the Egyptian governments of the 19th and earlier 20th centuries that sanctioned trade in antiquities and even the divisions of archaeological finds were themselves illegitimate colonial rulers of Egypt. But such questions are not easily resolvable and did not seem to be the most immediate issue to the Kelsey Museum when it discovered the provenance of the Goudsmit stela.

In the end, the Kelsey Museum returned the Goudsmit stela to the Berlin Ägyptisches Museum because it had been the owner of record of the artifact before it was illegally removed from the museum and sold to Goudsmit. The stela was already known in the scholarly literature as being in Berlin, and the earlier known history of the stela (acquired for Berlin from a British private collection in 1910) further confirmed that the stela was indeed the legal property of the Berlin Ägyptisches Museum.

The German authorities have offered to make a 3-D scan of the piece, from which the Kelsey Museum can create a replica for display in Ann Arbor. In this virtual form, the artifact will continue to instruct about Egyptian funerary art and practice, but will also serve as a reminder of the complex paths museum artifacts travel and the value and importance of due diligence with respect to provenance.

Mr. Wilfong is Professor of Egyptology at the University of Michigan, and Curator for Graeco-Roman Egyptian Collections at the Kelsey Museum


By: Armen Vartian

This case involved an art advisor who participated in the sale of an artwork that was ultimately returned by the purchaser after the artist disavowed it. When the seller’s Germany-based agent refused to refund the entire purchase price, the purchaser sued the agent in U.S. District Court for the Southern District of New York but did not effectuate service, and also sued the German seller but dismissed voluntarily against him shortly thereafter. The only served defendant, an art advisor based in New York named Marisa Newman, moved to dismiss the action under FRCP 12(b)(6), and Judge Naomi Reice Buchwald granted the motion.

The court noted that Newman was described in the purchase and sale agreement as “an independent art advisor to facilitate the sale of the work”, and that according to plaintiff Newman had informed plaintiff’s art dealer that the work was for sale, and also had hired the law firm that drafted the purchase and sale agreement. The court pointed out, however, that Newman was not a signatory to the agreement and had no contractual relationship with plaintiff.

According to Plaintiff’s Complaint, the allegations of which must be deemed correct for purposes of a 12(b)(6) motion, the artwork in question, a log cabin façade draped with an American flag and entitled “Log Cabin”, was disavowed by its creator after Plaintiff had wired the full purchase price to the seller’s agent but before delivery took place, on the grounds that some rotted logs had been replaced. The parties’ agreement provided for this contingency by requiring the seller to buy back the work upon the purchaser’s request. Plaintiff duly requested the buy back, but received less than half of the purchase price from the agent.

Plaintiff’s Complaint alleged that Newman
was involved directly with the buyback provision, both recommending that the provision be placed in the agreement, and also providing a legal memorandum concluding that it was “hard to imagine” how the modifications made to the artwork would justify disavowal. According to Plaintiff, the advisor also made comments “suggesting that the artist would not disavow the work.”

Plaintiff asserted two causes of action against Newman: (1) breach of fiduciary duty; (2) unjust enrichment. The court disposed of the fiduciary duty claim quickly, characterizing New York law as requiring that the fiduciary “gain” some “superiority of influence” over the client. After citing cases holding that superior knowledge or expertise in the art field do not create a fiduciary relationship, the court pointed out that the Complaint did not even allege that Plaintiff had retained or paid Newman, only that the advisor somehow must have been compensated as part of the transaction. The court stated: “At most, Mueller alleges that Newman advised Mueller (which advice actually benefited Mueller) and that Mueller relied on that advice. But providing advice does not make one a fiduciary.” The court went on to say that even were there a fiduciary relationship, Newman didn’t breach any duty by advising Plaintiff that the artist was unlikely to disavow the work, because Plaintiff did not allege that Newman “advised [him] in bad faith, engaged in self-dealing, or had personal interests that conflicted with [his]”. Indeed, the court noted that “Newman’s advice affirmatively benefited Mueller by protecting him against the risk that the artist would disown her work”. Finally, the court stated that Plaintiff had not pleaded facts showing that Newman had proximately caused his injury: “Even assuming that Newman was paid by the Janssen Gallery, Mueller’s injury results from the Janssen Gallery’s conduct, not Newman’s.”

As for the unjust enrichment claim, the court cited authorities for the proposition that where a valid contract covers the subject matter of a dispute, there can be no claim for unjust enrichment against a nonsignatory to that contract. Rejecting Plaintiff’s argument that a German court might not enforce a U.S. court’s judgment against the German defendants, the court stated that even if a judgment was not enforceable, the contract between the parties surely was enforceable, and in fact Plaintiff’s lawsuit was based on that premise. The court further found that Plaintiff’s Complaint did not allege how much, and by whom, Newman was paid, and certainly did not allege that Plaintiff himself paid Newman, a prerequisite for an unjust enrichment claim in this situation. Finally, the court found no basis for a ruling denying Newman her fee in connection with the sale.

The court’s ruling seems colored by two facts: (1) the German agents had been sued but never served, and were the proper defendants to this breach of contract action; (2) Newman’s advice, if anything, benefited the Plaintiff by enabling him to rescind the transaction after the artist’s disavowal – the mere fact that Newman could be sued in New York did not make her responsible for Plaintiff’s damages.

Preserving Underwater Cultural Heritage through International Cooperation

By: Dave Conlin, David Gadsby and Carla Mattix

On June 27, 1748, the British naval frigate HMS Fowey (Fowey), under the command of Captain Francis William Drake, struck a coral reef and sank near present day Miami, eventually embedding within the sea bed of the modern-day boundaries of Biscayne National Park. The Fowey lay undisturbed until 1978 when sport diver Gerald Klein located the site while spearfishing. He subsequently removed artifacts from the wreck site, using a prop wash deflector to remove sediment from the site that damaged both the submerged environment and the cultural context of the Fowey.

Similar to the fate of many other historic shipwrecks, the Fowey was subjected to years of litigation over ownership and preservation issues. Following the conclusion of the court battles, it took many more years for the National Park Service (NPS) to put a management framework in place to ensure the protection and conservation of the Fowey site.

The Fowey case illustrates the challenges faced by NPS and other government agencies in the absence of an overarching legal regime to protect underwater cultural heritage in the United States. Although the United States has expressed support, it is not a signatory to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention). Preservation efforts must typically navigate a patchwork of common and statutory law including the law of salvage and finds, the Archeological Resources Protection Act, the Antiquities Act, the Abandoned Shipwreck Act, and the Sunken Military Craft Act.

Foreign owned shipwrecks in U.S. waters present yet additional challenges. The NPS is accomplishing the preservation of these important resources through the development of agreements with other countries. Without comprehensive legal protection for underwater cultural heritage in the U.S., this trend...
toward international cooperation serves an important and necessary role.

The Fight over Ownership - Klein v. Unidentified Wreck
Klein filed an in-rem action in U.S. District Court to confirm title in and possession of the Fowey, and, alternatively, for a salvage award.11 The U.S. intervened as a claimant based on the wreck’s location within U.S. territorial waters and lands owned and administered by the U.S. as part of the National Park system. Based on knowledge and research at that time, all the parties considered the wreck to be abandoned.12 To confirm title and possession, the court applied the common law of finds which generally holds that the determination of a finder’s right to abandoned property is unaffected by the ownership of the land where the property is found. The court noted two exceptions to the general proposition: (1) when the property is embedded in the soil, and (2) when the owner of the land has constructive possession of the property such that the property is not considered legally lost.13 Under these exceptions, the finder does not acquire title to abandoned property. Instead, the landowner is presumed to have possession and title.

The court determined that the U.S. met the requirements of both exceptions and found the Fowey to be the property of the U.S., permanently enjoining Klein from conducting salvage activities.14 The court also held that Klein was not entitled to any salvage award and stated its concern that the salvage “did more to create a marine peril than prevent one.”15 On appeal, the 11th Circuit affirmed, finding “no error, whatsoever in the conclusions or analysis of the district court.”16

Developing the Fowey Agreement
Throughout the litigation and after, NPS conducted archeological and documentary research to confirm the wreck as that of the Fowey and bolster protection. The site was listed in the National Register of Historic Places in 1984. In the late 1990s, the United Kingdom (U.K.) expressed its interest in the Fowey and clarified its belief that the Fowey remained a sovereign vessel of the U.K. Recognizing the legal and operational challenges of managing a foreign-owned vessel within U.S. territorial waters and a National Park, and the escalating threats due to looting and vandalism, NPS, working with the State Department, proposed an agreement with the U.K. to collaborate in the future preservation of the Fowey.

The Fowey agreement took over a decade to realize. Initially, it was modeled on a loan agreement that resulted from similar litigation over the Juno and La Galga, two Spanish shipwreck sites of the coast of As-

Using the positive experience of the Fowey agreement, in 2013 NPS also entered into a more comprehensive MOU with the Kingdom of Spain that addresses the protection of cultural heritage of interest to Spain throughout the U.S. National Park System. Modeled on a previously existing MOU between Spain and the National Oceanic and Atmospheric Administration, this document recognizes that many sites and objects of Hispanic heritage lie within the care of NPS. Some of these, such as certain submerged archeological sites, remain titled to Spain, while others -- terrestrial sites like the San Antonio Missions National Historical Park or the early Spanish colonial archeological sites on Cumberland Island National Seashore -- are instead regarded as part of the Spanish cultural patrimony in which the Spanish government takes a strong interest. While Spain’s original interest was solely the protection of submerged sites, both parties quickly realized the potential for a more ambitious and comprehensive agreement covering both terrestrial and underwater re-

“This memorandum will see UK and US organizations working closely together in the further exploration of the site and it sets an excellent framework for collaboration in future projects.”

soluteau Island National Seashore.17 The Fowey agreement had to address the delineation of ownership in light of the Klein case, the treatment of human remains (none are currently known to be present), and appropriate permitting requirements, all in the setting of an international negotiation involving two sovereign entities and their respective government bureaucracies. In the midst of the agreement’s development, Congress passed the Sunken Military Craft Act in 2004. The Act protects U.S. and foreign government sunken warships and other military vessels, military aircraft and spacecraft, and associated artifacts, and encourages the use of bilateral and multilateral agreements with foreign countries to protect sunken military craft.18 Applicable to the Fowey, the statute provided the benefit of added authority, but also introduced new compliance considerations to the effort.19

In August 2013, the NPS Director and the Commodore of the Royal Navy signed a final Memorandum of Understanding (MOU) at a signing ceremony in Washing-

ton, D.C. “The United Kingdom is hugely grateful for the professional diligence and care shown by the National Park Service in the protection of the historic wreck of HMS Fowey,” the Commodore said at the ceremony. “This memorandum will see UK and US organizations working closely together in the further exploration of the site and it sets an excellent framework for collaboration in future projects.”20

Although the MOU is considered non-binding under international law, it asserts the parties’ commitment to cooperative stewardship. The MOU acknowledges the U.K. retains title to the wreck, and provides for NPS’s management of the site and the associated collection, in accordance with laws and guidance applicable to NPS, and the principles of the UNESCO Convention. It also allows for the exchange of information and personnel, joint research, and the respectful treatment of any discovered human remains. Perhaps most importantly, the MOU represents a critical step toward the systematic management of other British resources on NPS submerged lands and is expected to serve as a model for future agreements.

A Path to Other Agreements

sources. Thus, shipwrecks became an impetus for a larger, overarching agreement, with a broader scope and the ability to facilitate research at dozens of national parks.

The MOU with Spain provides for cooperation between the U.S. and Spain on a variety of projects, which have included preparation of a Spanish Colonial Missions National Register travel itinerary,21 and consultation with the Spanish government on plans for public interpretation of the Spanish Colonial site of Santa Elena in South Carolina. The Fowey and Spanish agreements provide a solid foundation for other agreements. NPS is currently in the early stages of preparing a similar MOU with the Republic of France to focus on the potential remains of the Ribault fleet lost in the waters off Cape Canaveral National Seashore.

Conclusion
Submerged archeological sites like the Fowey are fragile resources, examples of the historic objects that NPS is charged in its founding legislation with protecting for future generations.22 Due to complicated legal regimes, the preservation of such resources presents challenges. They can also provide important touchstones for international cooperation...
Ninth Circuit Revives Hears’ Claims to Pisarro Painting in Thyssen-Bornemisza Collection

By: Laura Tiemstra

On July 10, 2017, the Ninth Circuit reversed a district court’s grant of summary judgment that Defendant TBC (an agency of Spain) was the rightful owner under the Spanish law of acquisitive prescription of a painting forcibly taken from Plaintiffs’ ancestors by the Nazi government.

In 1939, the Nazi government forced Lilly Neubauer (“Lilly”) to “sell” the painting “Rue Saint-Honore, Apres-Midi, Effet de Pluie” by Camille Pissarro, 1897 (the

1 Dave Conlin and David Gadsby are archaeologists with the National Park Service. Carla Mattix is a lawyer with the U.S. Department of the Interior, Office of the Solicitor. The views expressed in this article are those of the authors and do not reflect the views of the Department of the Interior or the National Park Service.


3 Id.


12 Klein, 568 F. Supp. 1562.

13 Id. at 1566.

14 Id. at 1565.

15 Id. at 1566.

16 Id. at 1566.

17 Id. at 1568.

18 Klein, 758 F.2d 1511, 1515.

19 See Sea Hunt, Inc. v. Kingdom of Spain, 221 F.3d 634 (4th Cir. 2001).


21 Regulations implementing the permitting requirements of the Sunken Military Craft Act were not finalized until 2015 (32 C.F.R. pt. 767).


“Painting”). The forced sale was a condition of allowing Lilly to leave Germany and “payment” for the Painting was deposited in a bank account to which she was denied access. The Painting was subsequently used as “payment” for art forcibly purchased from another Jewish family, and was subsequently confiscated by the Gestapo from that family as well.

In 1954, Lilly received a judgment from the United States Court of Restitution Appeals confirming that her claim to the Painting had priority over that of the other Jewish family. Lilly then pursued a claim against the German government that ended in a cash settlement (the “1958 Settlement Agreement”), all parties believing that the Painting itself had been lost or destroyed during the war.

In fact, the Painting had survived; it was sold multiple times both during and after the war, and was purchased by Baron Heinz Heinrich Thyssen-Bornemisza in 1976. The Baron maintained possession until 1993, when the Painting was among a collection of artwork he sold to Spain through Defendant TBC for $350 million. (TBC, or “Thyssen-Bornemisza Collection”, is an agency or instrumentality of the Kingdom of Spain, created for the purpose of maintaining, conserving, promoting, and exhibiting the art collection purchased from the Baron.)

In 2000, Lilly’s grandson, Claude Cassirer, learned that the Painting was on display in a museum in Spain. In May 2001, the Cassirer family filed a petition in Spain for return of the Painting, which was denied. In 2005, the Cassirers filed an action in the U.S. District Court for the Central District of California seeking return of the Painting.

The district court granted summary judgment to TBC, finding that under Article 1955 of the Spanish Civil Code, TBC had acquired prescriptive title to the Painting. The Cassirers appealed, arguing that (1) California law, not Spanish law, should be applied; and (2) granting TBC prescriptive title would violate Spain’s Historical Heritage Law (“SHHL”) and the European Convention on Human Rights.

The Ninth Circuit panel agreed with the district court that Spanish substantive law applied because the Second Restatement of the Conflict of Laws governs choice of law issues when jurisdiction is conferred under the Foreign Sovereign Immunities Act, and the Second Restatement states that acquisitive prescription cases should be governed by the law of the state in which the chattel was located at the time of the alleged transfer of title.

The Cassirers then argued that even under Spanish law, Article 1955 should not be applied here because the Painting was designated part of Spain’s historical heritage when it was purchased in 1993, and the SHHL explicitly prohibits application of Article 1955 to Spain’s heritage property. The panel disagreed, finding that the SHHL’s definition of heritage property presumes the items belong to state or ecclesiastical institutions and therefore the prohibition of Article 1955 was meant to prevent Spain from losing title when a private person possesses and maintains a piece of Spain’s historical heritage, not to prevent Spain itself from acquiring title.

However, the Ninth Circuit did find the district court had erred in its interpretation of Articles 1955 and 1956. While Article 1955 vests title to property after six years of possession, Article 1956 states the six year period does not commence as against encubridores (accessories) to theft of the property at issue until the passing of all applicable criminal and civil limitation periods. The panel split with the district court in finding there was a triable issue of fact as to whether TBC was an encubridor to the theft, a crime subject to a 20-year aggregate (criminal and civil) limitations period. The district court had applied the definition of encubridor set forth in the current Spanish Penal Code for charging persons with that crime, which required some affirmative act to cover up the crime. The panel, by contrast, applied the definition as it was when Article 1956 was enacted in the 19th century, thereby finding that for purposes of tolling the title prescription period, an encubridor could include someone who, with knowledge that goods had been stolen from the rightful owner, received those goods for personal benefit. If TBC were found to be an encubridor, it could not acquire title to the Painting by prescription until 2019, i.e., 26 years after the purchase from Baron Thyssen-Bornemisza.

TBC asserted other grounds for affirming the grant of summary judgment, each of which was rejected by the panel. TBC argued that the Baron had lawful title under Swiss law which passed to TBC in the 1993 sale, but the panel held that there was a similar triable issue of fact as to the Baron’s good faith possession of the Painting. The Swiss Civil Code presumes good faith, but that presumption may be rebutted, and a Swiss law expert testified that the finding of good or bad faith in individual cases is considered an issue of fact.

Also, the panel rejected TBC’s argument that the Cassirers claim for physical possession of the Painting was foreclosed by the 1958 Settlement Agreement with Germany. The panel cited a recent case by the Bundesgerichtshof (Germany’s Supreme Court), finding that, absent an unambiguous act renouncing the right, a right to physical restitution was not waived through a financial settlement under Germany’s restitution law if the property had been considered lost at the time.

While the Cassirers have not yet recovered the Painting, almost eighty years after it was forcibly taken, the Ninth Circuit has instilled new hope in their pursuit by establishing that TBC must prove as an issue of fact that it (and/or Baron Thyssen-Bornemisza) lacked actual knowledge that the Painting was stolen.