The Voluntaryist

Whole Number 96 *"If one takes care of the means, the end will take care of itself."* **February 1999**

"Once An Owner—Always An Owner"

By Carl Watner

My article "Rightful Ownership and Wrongful Possession," in THE VOLUNTARYIST (Whole No. 56, June 1992), concerned situations where an innocent purchaser was discovered to have unknowingly "bought" stolen property. I discussed what options were available to the purchaser when confronted by the original owner, who demanded return of his stolen property. Should he voluntarily relinquish the property in question? Should he tell the original owner to "Go to hell!" ("I bought and paid for it. Here is my receipt!")? Or, should he seek out the person from whom he bought the property to ascertain whether the property was actually stolen? What if that person was a thief or cannot be found? Who should take the lumps and shoulder the cost of the crime? The voluntaryist sides with the original owner, basing this decision on a title transfer theory of property, which essentially says a thief, or a subsequent possessor, is unable to convey title to stolen property because the original owner did not consent to transfer of ownership. My article used the history of branding animals, especially range cattle, to demonstrate that the general rule on the American western frontier was that wrongful possession of branded animals did not confer ownership, and that an innocent purchaser's possession of branded animals did not trump the original owner's title. If the innocent purchaser could not trace his purchase back through a chain of voluntary title transfers to the original owner, then he was morally and legally obligated to return the stolen animal(s) without receiving any reimbursement from the original owner.

On June 24, 1997, I read an interesting article in THE WALL STREET JOURNAL (p. A20). Entitled, "Return of the Missing Klee," it was written by Constance Lowenthal, executive director of the International Foundation for Art Research. The "missing Klee," a watercolor painting known as "Little Regatta" by Paul Klee, was stolen from The Phillips Collection in Washington DC in 1963. The story of its theft (and its ultimate return in 1997) sparked the research and writing of this present article. The confrontation between innocent purchasers and original owners (whose property has been stolen) is an ancient conflict, discussed in the Roman laws of the Twelve Tables, and exemplified in strictures about horse-trading and cattle buying in old English law codes dating back to at least 700 A.D. More contemporary situations include the thievery of art work, gemstones, numismatic items, antique books and religious reliquaries; in short, anything of high value that is easily transportable and transferable. The purpose of this article is to present some historical examples of ownership disputes and to show how real-world legal systems, private institutions, and individuals sometimes embrace voluntaryist solutions to resolve these ancient problems.

I.

Art theft, whether by members of organized governments or individual thieves, has taken place for thousands of years. Nebuchadnezzar, the Babylonian king, and his army plundered Solomon's temple in Jerusalem in 586 B.C. The Romans repeated his conquest in 70 B.C. Genseric, the Vandal king (428-477 A.D.) captured Carthage at the beginning of his reign, and in 455 sacked Rome. Genseric even went so far as to declare efforts to hide one's property from his soldiers as prejudicial to his rights of plunder, and punishable as a crime. His "crime prevention program" gave people an incentive to protect themselves by hiding and burying their personal wealth and treasures. They or their dependents were subjected to all kinds of compulsion and torture to induce them to confess or betray their knowledge of secret hiding places. Often these secrets were lost forever, which explains how it was that bombs of the Second World War sometimes uncovered gold, silver, and booty that had been secreted for hundreds and hundreds of years.

World War I and World War II, even though fought by the armed forces of "civilized" governments, did not depart from the norms of history. Plundering took place on an organized scale hitherto unimaginable. Many national art patrimonies and private treasures were seized or disappeared, only to surface years later, often bringing with them title disputes between their pre-war owners and their good faith possessors. One such case involved a painting by Marc Chagall known as "Peasant With a Ladder." It was left behind in a Brussels apartment by its owners, Mr. and Mrs. Menzel, who were forced to flee in March 1941. (They eventually settled in the United States.) The painting was seized by the Nazis as "decadent Jewish art" and a receipt was left in the apartment stating that the painting had been taken into safekeeping. No compensation was ever paid. The whereabouts of the painting from 1941 until 1955 is unknown. In 1955, Galerie Art Moderne of Paris sold the Chagall painting to the New York art gallery, Perls. Later that same year, it was resold to a New York resident, Albert List, for $4000. Mrs. Menzel filed suit (267 NY 2d 804) in New York after she discovered the whereabouts of the painting in 1962, when she saw a reproduction of the picture in an art book. List refused to surrender the painting, claiming that he was a good faith purchaser for value, and that the statutes of limitation in both New York and Belgium precluded any legal action against his possession of the Chagall. Nevertheless a judge and jury ordered him to return the painting or pay Mrs. Menzel its then present value of $22,500. List chose to return the painting and was reimbursed its current value by Perls, because the art gallery had

continued on page 3

The Voluntaryist

Editor: Carl Watner

Subscription Information

Published bi-monthly by The Voluntaryists, P.O. Box 1275, Gramling, SC 29348. Yearly subscriptions (six issues) are $18 or .06 ounce or 1.866 grams of fine gold. For overseas postage, please add $5 or 1/3 of the regular subscription price. Single back issues are $4 each or 1/5 of the regular subscription price. Please check the number on your mailing label to see when you should renew.

Back issues of this publication are available on microfiche from John Zube, Box 52, Berrima, NSW 2577, Australia.

Potpourri from the Editor's Desk

No. 1 "An Ancient Chinese Lesson"

[China (1916)] was now divided between the Southern Republic and the war lords who were the rulers in the provinces. How were the people ever to be gathered together again under one flag?

Any other nation would have been destroyed by such civil wars. But the Chinese people are old and their country is vast. While wars were fought in one place and another between the different war lords, yet the good common people in villages and towns and cities went on living decently and working hard. They were civilized people and they had through the centuries learned that if people live decently and work hard and respect each other, then it is quite possible to live for a while without a government and even without police. Policemen, after all, are needed only to protect people from each other, and if there is mutual respect and good behavior people can manage themselves. The Chinese had long ago learned this lesson.

—Pearl Buck, THE MAN WHO CHANGED CHINA (1953), pp. 156-157.

No. 2 "The Myth of Political Action"

Political action does not solve problems, it only aggravates them. The enemy of progress is force, and politics is merely the game of deciding who is to use it on whom and to what extent and by what legislative means. This is a game which only the state can win.

"Good people" should not get into politics, they should get out of politics. Their involvement, even for a "good" cause, only makes matters worse. Their participation merely lends respectability to a process which, based on force, is inherently destructive. The solution to our problems does not lie in politics at all, but in counter-politics, and in the voluntary alternatives of a free society.

—R.W. Grant from The League of Non-Voters monograph, THE MYTH OF POLITICAL ACTION, circa 1974-1975.

No. 3 "Lysander Spooner on The Injustice of State Law"

Natural justice either is law, or it is not. If it be law, it is always law, and nothing inconsistent with it can ever be made law. If it be not law, then we have no law except what is prescribed by the reigning power of the state; and all idea of justice being any part of our system of law, ought to be abandoned; and government ought to acknowledge that its authority rests solely on its power to compel submission, and that there is not necessarily any moral obligation of obedience to its mandates.

If natural justice be law, natural injustice cannot be made law, either by "the supreme power of the state," or by any other power; and it is a fraud to call it by that name.

"The supreme powers of states," whether composed of majorities or minorities, have alike assumed to dignify their unjust commands with the name of law, simply for the purpose of cheating the ignorant into submission, by impressing them with the idea that obedience was a duty.

The received definition of law, viz., that it is "a rule of civil conduct prescribed by the supreme power of a state," had its origin in days of ignorance and despotism, when government was founded in force, without any acknowledgment of the natural rights of men.

The enactment and enforcement of unjust laws are the greatest crimes that are committed by man against man. The crimes of single individuals invade the rights of single individuals. Unjust laws invade the rights of large bodies of men, often of a majority of the whole community; and generally of that portion of community who, from ignorance and poverty, are least able to bear the wrong, and at the same time least capable of resistance.

—Lysander Spooner, THE UNCONSTITUTIONALITY OF SLAVERY: Part Second (1847), pp. 145-146.

No. 4 "Consistent Secessionism"

Anarchists would be sympathetic to the kind of 'confederacy' advocated by such men as John Calhoun and other early 19th century American political thinkers, only in that it proposes to strip central government of most of its authority, permitting member states to withdraw from the system if they see fit. However, from an anarchist point of view, Calhoun and his sympathizers were inconsistent, in that they were primarily concerned about maximizing the power of the several states within the Union. Had they been interested in the freedom of the individual unit members, they would also have recognized the legitimate right of the counties to withdraw from states, of towns to withdraw from counties, and of individuals to withdraw from towns.

—Harold Barclay, PEOPLE WITHOUT GOVERNMENT (1982), p. 15.

"Once An Owner—Always An Owner"

continued from page 1

warranted that the Chagall painting had a clear title.

Another similar case (536 F. Supp. 829) concerning war booty involved the Kunstsammlungen zu Weimar (KZW), a museum formerly owned by the East German government, and Edward I. Elicofon, a New York resident, who bought two paintings for $450 from an American enlisted man returning from Germany in 1946. Twenty years later Elicofon discovered that the two paintings were original color portraits done by Albrecht Durer in 1499, worth about $6 million. Apparently the paintings had been "liberated" by an unknown American soldier from a German castle in 1945 or 1946, where the museum had placed them for safekeeping during the war. Elicofon displayed the art work in his apartment for two decades, until an art dealer acquaintance identified them from a catalog of lost German art. Elicofon then submitted the portraits to the Metropolitan Museum of Art for examination. The story of their discovery received worldwide attention, and soon thereafter suit was initiated. The federal court in New York held that the museum was the true owner of the paintings and therefore directed Elicofon to return the paintings. Even though Elicofon honestly never knew that the paintings had been stolen, New York law (the law of the locale where he had bought them) held that a thief cannot pass good title. If the court had held that German law applied (or if Elicofon had bought the paintings in Germany), he might have kept them. Although an innocent purchaser cannot acquire title from a thief in Germany, German law makes an exception when the purchaser obtains the property in good faith and continues to possess it in good faith for ten years. Although Elicofon attempted to maintain this position, his appeals were ultimately denied and the two paintings were returned to the Kunstsammlungen on June 1, 1982, and were immediately placed on display.

II.

Art theft is by no means limited to war time activity. The law books and legal journals are filled with stories of chicanery, deceit, double dealing, and downright stealing by private individuals. Another well- known case illustrates what the lawyers refer to as "conflict of laws" and demonstrates how the laws of various nations treat bona fide purchasers and original owners. In a 1980 British decision known as Winkworth v. Christie Manson and Woods Ltd. and Another (2 W.L.R. 937) valuable art objects were stolen from Winkworth in England. They were then taken to Italy, sold, and then transported back to England for re-sale by the well-known auction house, Christie's. Winkworth, upon discovering that Christie's was selling his property, sued to stop them and recover it. The British court held that since the sale of the stolen art had taken place in Italy, the auction should proceed. Italian law protected the bona fide purchaser's right to transfer the stolen property back to England and sell it there without restraint. Winkworth claimed that British law should govern, and that he was the true owner of the stolen property. Nevertheless, the British court stood by the 'lex situs' rule (the rule of the place where the transfer had taken place) to resolve the dispute in Christie's favor.

Sophisticated thieves and purchasers are knowledgeable enough to take advantage of the differences among the laws of various countries, which in turn facilitate the laundering of stolen art. Thieves know that purchasers who buy in certain countries do not have to carefully investigate the chain of prior ownership because the 'lex situs' rule protects them. In fact, "The very reason the goods may be where they are is that the present possessor believes the law of that jurisdiction to be favorable to him." (LaLive, p. 511) As in the Winkworth case, thieves will try to sell their stolen goods in countries, such as Italy or Switzerland, where bona fide purchasers are favored.

The civil law codes of most European countries were built around early Roman law, though some have departed from the protection of original owners which was embraced in the Roman Laws of the Twelve Tables (Law XI, Table II), which came into existence around 450 B.C. "Stolen property shall always be his to whom it formerly belonged; nor can the lawful owner ever be deprived of it by long possession [of another]; nor can it ever be acquired by another, no matter in what way this may take place." Roman law was based on the concept of "once an owner, always an owner," unless the owner voluntarily consented to transfer his property and its ownership to another. Two Latin proverbs epitomize the Roman view of property ownership: "Nemo dat quad non habet" (He who hath not, cannot give), and "Nemo plus iuri ad alium transferre potest quam ibse habet" (No one can transfer to another a right that he does not possess).

III.

After the fall of Rome and the passing of the Dark Ages, European legal systems fell under the influence of a mix of Germanic tribal and customary law. Unlike Roman law, medieval Germanic law treated physical control as evidence of possessory title ('gewere') and protected ownership and possession as one and the same right. It was presumed that if an owner voluntarily relinquished possession of his movables, but did not intend to transfer title to the party coming into possession (such as a borrower or bailee), then the owner or "transferor," was not entitled to recover from a third party. His recovery was limited to his immediate transferee [the borrower]. Hence, the maxims developed: 'wo do deinem glauben gelassen hast, musst du ihn suchen' (where you placed your trust, there you must seek it). "Under Roman law, B, a bailee or borrower of A's personal property who sold it without A's authorization was treated as a thief, and A could recover from the third party. Germanic law treated B as an embezzler and, most importantly, C, the third party purchaser, as a presumptively innocent third party acting in good faith.... [W]here A had entrusted his chattel to bailee B, he had a cause of action only against B, and never against C.... Under Germanic law, this was so regardless of whether C had acted in good or bad faith. Unlike Roman law, then, Germanic law distinguished between theft and embezzlement where the third party purchaser or pledgee of personal property was concerned." (Kozolchyk, pp. 1480-1481)

This presumption of good faith on the part of the third party purchaser was carried forth into nearly all

of the 19th century civil codes of Europe, especially those of Spain (Article 464), France (Article 2279), Switzerland, and Italy. "Spanish medieval law was one of the first to ascribe greater weight in some cases to the purchaser's good faith than to the historical owner's actual or presumed intent. This reliance upon the purchaser's good faith proved crucial in the development of the law of sales by non- owners, qualified owners, or persons with unknown ownership." (Kozolchyk, p. 1479) Although contemporary German law does not allow for the good faith acquisition of stolen or lost property, it permits the application of a statute of limitations. "The possessor must have detained the object and behaved like an owner in good faith for ten years with no interruption. The acquirer must have been in good faith when the object was handed over to him as well as during the whole ten year period. He does not acquire title if he was grossly negligent." (LaLive, p. 192)

In France, the protection of a bona fide purchaser exceeds the protection of former owners in the event of a theft. "The French Civil Code (Sections 2279 and 2280) holds that 'for moveable property, possession is equivalent to title.' Section 2279 provides that a person robbed of an article may take an action to recover only within three years of the theft. Furthermore, [if] the original owner [wishes to recover his property, he] must pay the possessor the price of the object if the possessor bought it at a public sale, or a fair, or an auction. Thus, bad title can be converted to a good title, if that title is not contested within a given time." The only exception is government property (such as of museums). "Public goods are 'imprescriptible, and title remains in the original owner in perpetuity." (Simpson, p. 86) The Italian Civil Code of 1942 is the most protective of the good faith purchaser. In Italy, as described in the Winkworth case, "the bona fide purchaser acquires good title regardless of whether the owner's loss of possession was voluntary or involuntary." (LaLive, p. 515) A buyer in good faith on Italian soil gains immediate title to property purchased, even if shortly thereafter it is discovered that the property he had just purchased had been stolen. There is no waiting period during which the victim may reclaim his stolen property. In Switzerland, the dispossessed owner has five years during which he may reclaim his stolen property. Otherwise, after this time period, the actual thief or the person who has acquired the stolen property becomes the new owner (Article 934, par. 2 of the Swiss Federal Civil Code).

IV.

Unlike the European civil codes, the English and American legal systems have given little recognition to adverse possession or statutes of limitation when applied to situations involving theft of movable property. The theory of adverse possession originally applied to land which was used and occupied by a non-owner. If the true owner failed to exert control over the property for a specified number of years (often twenty or more), then the actual user acquired title by petitioning a court to recognize his ownership (and occupation) of the property. The original owner was thus punished for his untimely delay in asserting his title, the possessor's expectations for continued usage was protected, and the courts were able to avoid evidentiary problems caused by stale claims. Statutes of limitation operate much like law suits to claim adverse possession. Such statutes are based on "the presumption that those who have good causes of action will not delay in asserting them" and that "a defendant should not be called upon to defend a claim when the lapse of time may have caused evidence to be lost, destroyed, or disappeared." In effect, a statute of limitation extinguishes an original owner's title by barring a suit for the recovery of stolen property, and consequently transfers the original owner's title to an adverse possessor.

The difference between adverse possession of real estate and personal property is that the original owner of land is always presumed to know where his property is. In the case of movables, an owner does not usually know the whereabouts of his stolen property. This fact has led to numerous controversies involving the question: when exactly does the statute of limitation begin to run - when the personal property has been stolen - or when it has been located in the hands of a thief or a good faith purchaser? In some U.S. jurisdictions the solution to this problem has led to what is known as "the demand and refusal rule." Thus, the time for a statute of limitation does not begin until the owner has located his property and demanded its return from the current possessor. The rationale for the rule is that an owner cannot demand return of his personal property until it has been located; therefore it is unfair to begin running the statute of limitation until he has actually found the property. Otherwise, the time during which he may initiate a suit to recover his property may expire before he has actually discovered its whereabouts.

V.

Although it has been claimed that under the common law "an owner may never be deprived of his property rights without his consent" there are numerous exceptions to this rule in English law. The most ancient breach in the common law was found in the law of "market overt." If stolen goods were sold during daylight in a public market or shop in the City of London the buyer acquired good title, even if the property had been previously stolen. Although this rule is hundreds of years old, it is still respected today. As reported in THE WALL STREET JOURNAL on August 26, 1993 (p. A9), several portraits by well-known 18th Century portrait painters had recently been sold for $217 in Bermondsey market in London. Neither the seller nor buyer were aware of their vintage, or the fact that they had been stolen from Lincoln's Inn (home of one of London's four legal societies). A picture specialist at Sotheby's eventually recognized them and discovered they had been stolen. Since they had been sold in 'market overt' the good faith purchaser may keep them unless he feels some moral obligation to return them.

English law has numerous other exceptions to the title transfer theory of property. In 1824, Parliament breached the theory by passing the so-called Factor's Act. Under this and subsequent legislation, any person who entrusted goods for resale to a factor or agent assumed the risk of the factor selling the entrusted property beyond the scope of his authority. What this meant was that anyone buying from a factor or agent in good faith, took good title as against the true owner (even if

the factor was not actually authorized to transact the sale). The development of the law of negotiability also represented another exception to the general theory of property ownership. A bank note, check, or other negotiable instrument, such as a stock certificate, is said to be negotiable inasmuch as it is transferable, or assignable in the course of business, simply by delivery or possession. Negotiable instruments are bearer documents, not records of title. Title to bank notes has always been held by the holder or possessor, regardless of whether the bank notes had been wrongfully acquired or not. This doctrine has been adhered to since the founding of the Bank of England in 1694. It probably helped English bank notes gain widespread acceptance, and was extended to bills of exchange in 1781. As Murray Rothbard discussed in MAN, ECONOMY, AND STATE (pp. 155-156), there probably would "be no room, in a free society ... for 'negotiable instruments'.... The law of negotiability is ... a clear infringement of property right" because the State recognizes the possessor as owner regardless of how he came into possession. A negotiable instrument which A stole from B, and then sold to C, cannot be recovered by B under English and American commercial law codes.

English commercial usage and court decisions also ultimately led to the development of the concepts of void and voidable title. The two polar extremes of property theory were: 1) if B buys good from A, he gets A's title and can transfer it to any subsequent purchaser; and 2) if B steals goods from A, he gets no title and cannot transfer title to any subsequent purchaser, no matter how clear the purchaser's good faith. Voidable title is an intermediate position between these two extremes: if B gets possession of A's good by fraud, he has no right to retain them against A, but the law recognizes C's title if he purchased from B (the thief) in good faith. "The ingenious distinction between 'no title' ... (therefore the true owner prevails over the good faith purchaser) and 'voidable title' ... (the true owner loses to the good faith purchaser) made it possible to throw the risk on the true owner in typical commercial situations while protecting him in the noncommercial one." (Gilmore, pp. 1057-1056) In the art world, this means that if the owner of a painting entrusts it to a professional art dealer for appraisal, the owner is taking the risk that the dealer might sell it, and that the owner would lose title to a good faith purchaser - even though the owner did not intend to sell it. The concept of void and voidable title "accommodates a purchaser's expectation of acquiring good title from established merchants." (Hoover, p. 445)

The bases for the various Factor's Acts and the concepts of void and voidable titles lie in judicial and legislative policy considerations of promoting trade, yet at the same time attempting to protect ownership. Two principles of law have striven for mastery. The first, the protection of property - no one can give better title than he himself possesses - vies against the second - the promotion and protection of commercial transactions. Historically, the second principle of law has prevailed over the first. For example, fraud occurs when a purchaser gives an owner a worthless check in exchange for property. The fraudulently obtained property may then be sold by the giver of the worthless check, and acquired by a third party - a bona fide purchaser. The courts and legislatures have justified their protection of the third party purchaser by determining that "the owner, in cases of fraud, is the cheapest cost avoider, since he is in the best position to prevent the fraudulent transfer." (Burke, p. 444) The owner who sold his property in exchange for a bad check could have phoned the bank on which the check was drawn to verify the funds or could have demanded cash or a certified check from the buyer. In contrast, a third party purchaser from the person who gave the bad check would have a much more difficult and costly time in discovering that the seller had obtained the goods fraudulently. An 1898 Illinois judge put it succinctly: "[W]here one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who by his imprudence enabled such a third person to commit the fraud." (Burke, p. 444, [176 Ill 60])

VI.

Although there is some merit to the argument that the seller should exercise care and thus prevent a fraud by the person to whom he entrusted his art work, there is also merit to the other side of the case - how carefully did the bona fide purchaser inquire into the provenance of his purchase? There are various methods that a serious art purchaser can use in an attempt to insure that he does not buy stolen property. One of the most basic is to consult the list of all known past owners of an art work (and the sales through which the work was transferred). This list, referred to as the work's provenance, provides a complete record of the work's chain of title, and generally provides the bona fide purchaser with the information that allows him to determine that he is not buying stolen property. In jurisdictions where the bona fide purchaser is protected by favorable legislation, a prospective purchaser need make no inquiries at all. He simply assumes that the possessor of a piece of valuable art is the true owner and that the courts and police will back him up. In other places, the bona fide purchaser may question that basic assumption (that the seller has proper title). His incentives direct him to be more careful, especially if there is some potential for losing the proposed purchase to the true owner and being left with no way to recover his investment because the seller of the stolen property cannot be located and has absconded with the proceeds.

If a buyer is contemplating purchase of a work by a well-known artist, there is another investigative tool that he may consult to insure his status as a bona fide purchaser. He may refer to a 'catalogue raisonne'. This is a definitive listing (often prepared by a prominent art expert) of every known artwork by a particular artist. Such a catalog generally contains a physical description and illustration of the artwork, a history of the exhibition of the work, the work's provenance, current location at time of publication, and published references to the work. Scholars, researchers, and art merchants rely on the 'catalogue raisonne' when discussing an artist's work. If a work by the artist is stolen, the prudent theft victim should notify the publisher of the 'catalogue raisonne', so that the next edition can reflect that the work in question has been stolen. "A subsequent purchaser, then, would have constructive notice of the theft, which would deprive him of the status of a good

faith purchaser." (Collin, p. 29; Bibas, p. 2452)

The main problem with the 'catalogue raisonne' is that updates must await publication of a new edition of the catalog. Beginning in 1966, art researchers and academics proposed the creation of a domestic art title registry to be administered by the Smithsonian Institute. "The registry would have provided a repository for ownership records and statements of authenticity for contemporary works of art" located in the United States. Information was to be provided voluntarily by owners and dealers, and "was to be patterned after existing recordation systems designed to protect purchasers of real estate, securities, and pedigreed animals." (Hoover, p. 459) Although a bill was introduced in the House of Representatives, nothing ever came of the proposed legislation.

VII.

In the last ten years, the development of computerized databases has made the creation of both art loss registries and art title registries much more practical. Either type of registry could include high- quality digitized color images. The difference between a title registry and an art loss registry is that the latter only requires that theft victims report art thefts. A title registry would require the cooperation of large numbers of current owners, some of whom might be reluctant to list their property for fear of triggering income tax audits and/or estate tax evaluations, as well as contemporary artists who would need to notify the registry of ownership as soon as new creations were purchased. Of the two possibilities, the art loss registry has shown the most commercial viability.

In 1971, the Art Dealers Association of America began maintaining an extensive archive of stolen art. Between 1971 and 1977, it published 49 bulletins, reporting 3215 stolen works of art. (Hoover, p. 459) Another effort by a group of art historians, attorneys, scientists, and members of the general public began in 1969. Known as the International Foundation for Art Research (IFAR) its main purpose is to provide the interested public with information about stolen art and to answer questions regarding authenticity of works of art. In 1975, IFAR began maintaining records of the theft of art objects from domestic and foreign dealers, private collections, and museums. In the late 1980s, it began to computerize its paper records, and in February 1991 it joined with Sotheby's, Christie's, and certain British and American art insurers to establish the International Art and Antique Loss Register, Ltd. (now referred to as the Art Loss Register or ALR). This is a British for-profit corporation, which also includes Lloyd's of London, the British Antique Dealers Association, the British Institute for the Protection of Cultural Property, and a venture capital company. One industry wag has referred to it as "an informational lost and found service." Victims or their insurers may register stolen art with ALR for approximately $65 per item. Before ALR will register a work, its theft must have been reported to the police and it must be valued in excess of $2000. In 1993, almost 9000 art items were recorded. ALR also provides an Art Theft Service for buyers, who wish to determine if a work has been reported as stolen. ALR charges $50 to search its registry, although both registration and search services are provided free as a public service to law enforcement agencies. "From 1991-93, the ALR claim[ed] to have played a role in the recovery of over 400 works of art, 200 of which were recovered in one location." (Hawkins, p. 88)

The executive director and chief spokeswoman for IFAR is Constance Lowenthal, an art historian who has been interviewed, quoted, and published in the press many times during the last decade. (It was her article in the WALL STREET JOURNAL that originally caught my attention.) She has publicly promoted ALR and urged insurance companies to give discounts to owners who actively use the Art Loss Register, especially to those who file photographs and descriptions with her company (which in an event of a theft make checking the database much easier). She has also negotiated contracts with large insurance companies, whereby they obtain unlimited access to the theft database for amounts ranging from $4,000 to $40,000 per year. Auction houses, such as Christie's, Sotheby's and Phillips, routinely conduct automatic searches of all items they list for sale in their auction catalogs. The Art Loss Register also keeps track of "when, why, and by whom any inquiry is made. Tracking a stolen artwork even through people who refuse to handle it for sale is often a key to its recovery...." (Bibas, p. 2463)

Ms. Lowenthal has also helped IFAR to develop and market an Authentication Service, "which exists to help owners resolve controversies concerning authenticity of works of art." There is a charge of $1000 for this service, if IFAR researches the work and prepares a report. She is also instrumental in the publication of IFAR's STOLEN ART ALERT, which is a magazine that appears ten times each year, and is followed by an annual INDEX OF STOLEN ART. These reports are distributed to IFAR members, art dealers, private individuals, libraries, museums, and law enforcement agencies. IFAR is cognizant of the fact that thieves might use its records to locate future theft victims. Therefore participants in its registries can choose the level of confidentiality they desire, and IFAR excludes the names and addresses of owners from accessible public files and computer indices.

In an article in the September 1995 SMITHSONIAN Magazine, Ms. Lowenthal refers to part of her duties as "relief work to victims of art theft." She counsels such victims and advises "them of other actions, besides talking to the police, [that] they can take." She has firm rules for people who own lots of valuable art work. "Don't display a piece, even a hefty piece, in a window [with an open view to the street]. If you allow pictures of your home to be shown in magazines, avoid mention of your name and your home's location. If you lend works of art to a museum exhibition, lend anonymously. If one of your pieces is stolen, notify the police, your insurance company, IFAR, art dealers who specialize in the items, even pawnshops." If the victim considers it worthwhile, IFAR, for a fee, "can arrange to send out fliers with a photograph of the stolen item. Offering a reward is also a good strategy," she adds.

Lately, Ms. Lowenthal has taken on new duties with The Commission for Art Recovery. Sponsored by the World Jewish Congress in September 1997, its goal is to track down and recover art taken from Jewish collec-

tors during World War II. As reported in THE NEW YORK TIMES (November 29, 1997, p. A17), there are still "thousands of looted [World War II] works... spread among the world's museums, art dealers, and private collectors." The Commission will work with the Holocaust Art Restitution Project of the National Museum in Washington, D.C., which is attempting to create an archive and database for families who have lost works of art during the early 1940s and want to find them. Ms. Lowenthal and her co-workers will act as advocates for the original owners or their heirs in an attempt to return looted works of art to their proper owners. If there are no surviving owners or heirs, Ms. Lowenthal says, "the art will be sold and the proceeds will go to Jewish charities. The commission has no plans to compensate people who own the [stolen] art, even if the purchasers were unaware of the work's clouded past. In our legal system they have no entitlement, even if they made their purchase in good faith." She adds, that such purchasers might be able to be made happy without paying them. "One possibility would be to have a disputed work of art donated to a mutually agreed upon museum with credit to both parties [the good faith purchaser and the proper owner]. I will look for creative solutions."

VIII.

Indeed, the possibility for creative solutions is inherent in the fact that the international world of art is in a state of "anarchy". Buyers, sellers, and/or victims have no single international or governmental agency to which they may report a loss or from which they may seek restitution. Unlike the police in domestic jurisdictions, there are a variety of agencies operating in different countries charged with the responsibility of searching for and discovering stolen international art. "The basic functions of law enforcement are complicated by the fragmentation of police services across national borders"; there is no single international police agency; and each sovereign country operates under different laws and law codes. (Collin, p. 36) Under the circumstances, there is no art "authority" to impose a single monopolistic solution to the problems created by "the eternal triangle" of property owner, innocent possessor, and thief.

The "missing Klee," mentioned at the beginning of this article, was caught up in such a struggle when its rightful owner, The Phillips Collection, challenged its possession by a good faith purchaser. Edward Puhl, who had bought the stolen painting from an art dealer in Washington D.C., ultimately "made a gift to the museum of 'his interest' [in the painting]" and allowed the museum to regain custody. This example, as well as others documented during the research for this article, demonstrates that statist laws and the courts do not always act as the final forum for establishing the validity of ownership or, for that matter, even act as a deterrent to the loss of important works of art. "An unofficial moral imperative in the art community, however, often functions in the place of effective [legal] sanctions to settle questions which otherwise might be caught in a morass of conflicting jurisdictions and interpretations." (Burnham, pp. 27-28.)

To the voluntaryist, this moral imperative may take many forms, but it always excludes use of the courts, and the police. A victimized owner might publicize his loss; use private resources to track the thief down and remonstrate with him; and might even organize a public boycott to ostracize the thief or bona fide purchaser. If the stolen property is sufficiently important, the owner may have obtained title insurance (so he can recover from his insurance company), if available, or, if he knows the possessor of his property, even go so far as to "buy" it back in order to voluntarily regain possession. Voluntaryists embrace the "moral imperative" because it relies on persuasion and voluntary means to regain one's property. The voluntaryist must not join the rank of the aggressors for what appears to be a just cause - even if it means not recovering his rightful property. As Bob LeFevre suggested, the voluntaryist must accept full responsibility for both the good fortune and the bad luck that befalls him in life. If the voluntaryist wants to keep his profits, he must be willing to accept his losses, when and if they occur. Or, as we have repeated many times, "Freedom is self-control, no more, no less."

Short Bibliography

Steven Bibas, "The Case Against Statutes of Limitations for Stolen Art," 103 THE YALE LAW JOURNAL (1994), pp. 2437-2469

Karen Burke, "International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?" 13 LOYOLA L.A. INTERNATIONAL AND COMPARATIVE LAW REVIEW (1990), pp. 477 -466.

Bonnie Burnham, ART THEFT (International Foundation for Art Research, Inc., 1978).

Robin Collin, "The Law and Stolen Art, Artifacts, and Antiquities," 36 HOWARD LAW JOURNAL (1993), pp. 17-42.

Grant Gilmore, "The Commercial Doctrine of Good Faith Purchase," 63 THE YALE LAW JOURNAL (1954), pp. 1057-1122.

Ashton Hawkins, Richard Rothman, David Goldstein, "A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art," 64 FORDHAM LAW REVIEW (1995), pp. 19-96.

Deborah Hoover, "Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants," 51 THE GEORGE WASHINGTON LAW REVIEW (1983), pp. 443-464.

Boris Kozolchyk, "Transfer of Personal Property By A Nonowner: Its Future In Light of Its Past," 61 TULANE LAW REVIEW (June 1987), pp. 1453-1514.

Pierre LaLive, INTERNATIONAL SALES OF WORKS OF ART (Geneva Workshop, April 11-13, 1985, International Chamber of Commerce).

Elizabeth Simpson, THE SPOILS OF WAR (New York: Harry N. Abrams, Inc., 1997).

The State-House

By Ernest Howard Crosby

Up to the State-House wend their way
Some scores of thieves elect;
For one great recompense they pray:
"May we grow rich from day to day,
Although the State be wrecked."

Up to the State-House climbs with stealth
Another pilgrim band,
The thieves who have acquired their wealth,
And, careless of their country's health,
Now bleed their native land.

And soon the yearly sale is made
Of privilege and law;
The poor thieves by the rich are paid
Across the counter, and a trade
More brisk you never saw.

And we, whose rights are bought and sold,
With reason curse and swear;
Such acts are frightful to behold,
Nor has the truth been ever told
Of half the evil there.

At last the worthless set adjourn;
We sigh with deep relief.
Then from the statute-book we learn
The record of each theft in turn,
The bills of every thief.

Now at a shameful scene pray look;
For we who cursed and swore,
Before this base-born statute-book,
Whose poisoned source we ne'er mistook,
Both worship and adore.

"For law is law," we loud assert,
And think ourselves astute;
Yet quite forgetful, to our hurt,
That fraud is fraud and dirt is dirt,
And like must be their fruit.

We laugh at heathen who revere
The gods they make of stone,
And yet we never ask, I fear,
As we bow down from year to year,
How we have made our own.

We all deny the right of kings
To speak for their Creator;
May we not wonder, then, whence springs
The right divine to order things
Of any legislator?

(From PLAIN TALK IN PSALM & PARABLE, 1899)

The Voluntaryist

P.O. Box 1275 • Gramling, South Carolina 29348

FIRST CLASS-TIME VALUE

Please renew your subscription if the number on your address label is within one digit of this issue's number.