The Legal Aspects of Forgery
and the Protection of the Expert

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MR. EASBY: In a light moment, Viscount Buckmaster, a former Lord Chancellor of England, once observed: “Law and legal procedure have always been a mystery to the uninitiated, a snare to the unwary, and a red rag to the unhappy man possessed by reforming zeal.” Our task will be to abandon the lawyer’s legendary role of mystifying the uninitiated, and, instead, to try to clear away some of the incontestable fog that envelops the topic assigned to us. This topic is the legal aspects of forgery and the protection of the expert. Although the subject is a relatively narrow one, were we to speak with the tongues of men and of angels, it is doubtful whether we could come up with all the answers. If we do not add to the confusion, you—and we—will be that much farther ahead.

Mr. Colin and I will be speaking as individual lawyers, and not as representatives of, nor spokesmen for, our institutional clients.

I think we should open the discussion by hearing from Mr. Colin on the legal definition of art forgery and the Penal Law of the State of New York concerning it.

MR. COLIN: There is, unfortunately, no readily available legal definition of art forgery. The statutory law of New York is simple. Up to a short time ago, Section 959 of the Penal Law, headed Reproduction or Forgery of Archaeological Objects, covered the field accurately defined by the title—that is, only archaeological objects. Effective on September 1, 1967, as part of the new Penal Law, the new Section 170.45, headed Criminal Simulation, was added. It’s short, and the easiest thing to do is to quote it in toto. It provides, “A person is guilty of criminal simulation when: 1. With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess; or 2. With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.” The section goes on to state that criminal simulation is a class A misdemeanor (which is punishable by not more than a year in jail).

The nub of this statute is the phrase, “with intent to defraud.” Here, as in many other phases of the law, the problem is proving intent. It’s obvious that the court or attorney or jury can’t make a hole in the head of the person under investigation and read what appears on his mind. Intent must be proven by the circumstances surrounding the event. For instance, if a reputable art dealer, who repeatedly has sold honest goods, is found one day with a work that is ultimately determined to be a fake, ordinarily no conclusion would be drawn from this that he was offering the fake intentionally. If, on the other hand, a dealer were in existence who continually offered fakes, one would be led to presume that somewhere along the line he must have known that most or all of what he was offering was false, and accordingly a jury or a judge would be entitled to draw the conclusion that he was dealing “with intent to defraud.”

Of course there are other ways that intent might be proven. The dealer might have mentioned to a friend that he knew he had fakes, but this is unlikely: one doesn’t usually prove fraud out of the mouth of the person accused. So, under any statutory provision dealing with intentional fraud, you have to prove circum-
stances that lead to the inevitable conclusion, by judge or jury, that such an intent was present.

It might be helpful to the layman for us to mention here that there is a great difference between what a person's legal rights are and what he can prove. This is always true; it's true in the world of art and it's true in all other fields. A person may have a right, but if he can't prove the facts necessary to substantiate that right, he's out of court.

MR. EASBY: You have the same problem of proving intent in the civil remedy that's available to the victim of an art fraud. In common law it's called an action for deceit, and the plaintiff must show that the seller knew he had a fake.

MR. COLIN: That's true if the civil action is for deceit, but ordinarily the art fraud case need not be an action for deceit, and therefore intention need not be proven. It is the common law, even without the recent statute, that when a dealer sells a work that he describes as "Corot, 1867, Dancing Nymphs in a Forest," he is representing that the picture is by Corot, that it was painted in 1867, and that it is known in the literature as Dancing Nymphs in a Forest. So, if the painting turns out not to be what it was represented to be, all one need do is prove that fact—it was not as represented—and the dealer has thereby breached his warranty, intentionally or unintentionally.

MR. EASBY: The proof that an art object is not what it was represented as is based on the stylistic and scientific criteria discussed in the earlier seminars. It's the same sort of proof, incidentally, that you rely on in any legal action involving expert testimony: part fact, part opinion.

This brings us to the second half of our topic, the protection of the expert. Who or what is an expert? Some writers have preferred to use the word "authority" rather than "expert," but I think we'll agree that he might be a dealer, museum curator, critic, art historian, professor, conservator, researcher, metallurgist, chemist, x-ray man, or even a nuclear physicist. One thing all these people have in common among themselves and in common with other expert witnesses is some special knowledge based upon long study and experience. Another thing they have in common—and this is contrary to popular belief—is that they are not possessed of papal infallibility.

MR. COLIN: The true expert is more modest than one would expect. He is satisfied if he knows everything there is to know about a very narrow field. I can give as an example Lloyd Goodrich, the former director of the Whitney Museum, who claims to be an authority only on four nineteenth-century American painters. I would take his opinion on a much wider field than that, but that's all he claims. The true expert doesn't pretend to be all-knowing.

MR. EASBY: Twenty-seven years ago, Huntington Cairns, who was then general counsel of the National Gallery of Art, and I got together on a document that we thought would protect the curatorial people in our respective museums. In that document, the undersigned (who is the person bringing in the work for an opinion) certifies that he is the owner, that he requests an examination and an informal oral opinion as to the probable date and attribution for his personal information only, and not for use in connection with any past or contemplated commercial transaction. In consideration of the giving of that opinion, the person requesting it agrees to indemnify the Museum, its Trustees, and the members of its staff, and save them harmless from any and all liability in the event of any claim based in any way upon the rendition of the opinion.

It was our feeling then—and it is my feeling now as a lawyer, and not as secretary of the Metropolitan Museum speaking for the Museum—that that is about as much protection as the expert on the Museum's staff can ever hope for.

The New York State Attorney General's office is currently drafting a bill designed to protect art experts from lawsuits for uttering disparaging opinions of the authenticity of certain kinds of works of art. As far as I can make out, the apparent urgency for passing such legislation to protect the expert stems, in part, from an article published in the December 1965 issue of The Record of the Association of the Bar of the City of New York. There a member of the bar opened his article by stating, "The United States has been inundated with fraudulent art. This is a direct consequence of the laissez-faire attitude of all branches of the art community." He goes on to say that he is limiting himself primarily to contemporary art. Mr. Colin, as vice-president of The Museum of Modern Art and also as vice-president of the Art Dealers Association, where your membership includes a number of people dealing in contemporary art, I'd like to have your comments on those two statements.

MR. COLIN: I would say that both of them are quite false and, in my opinion, irresponsible. Let's take them separately. "The United States has been inundated with fraudulent art." Bearing in mind that the writer of the article states that he is dealing mainly with contemporary art, I state as a fact that it is only a very, very small fraction of one per cent of all art dealings in the United States or in the world, in any one year, that in-
volves fake art. Hundreds of millions of dollars' worth of art is sold every year by honest dealers, and comprises honest works of art. When a fake is sold and discovered, it hits the newspapers. The sale of honest works is not newsworthy and doesn't hit the newspapers. This is analogous to the situation with respect to airplane travel: millions of miles of airplane travel occur without a comment from the papers, but every time there's an accident, there's a headline. This is what happens in the world of art. There is no inundation of fraudulent works. There are a few fakers and when they are discovered, they make the headlines and are given an importance that is entirely unwarranted in terms of percentage of the market.

Let's take the second statement, that this so-called inundation of fraudulent art is "a direct consequence of the laissez-faire attitude of all branches of the art community." What are all branches of the art community? Well, that certainly includes museums and dealers, primarily; collectors too, incidentally. I don't believe there's a laissez-faire attitude on the part of museums; I think museums are extremely careful in what they purchase. The fact that so many often make a mistake doesn't mean that there's a laissez-faire attitude. On the contrary, they're very shamefaced about it; they admit they are not perfect — but they are far from laissez-faire.

When it comes to dealers, bear in mind that a dealer not only sells art, but he buys it. And when a dealer lays his money on the line, you can be certain that he's just as careful as he can be that what he buys is what he thinks it is, and is something that he can therefore resell for what he thinks it is. Of course I'm talking about the responsible dealers. There are crooked dealers, as there are crooked lawyers and crooked doctors and crooked stockbrokers. But I choose to believe that most segments of any industry or profession are honest, and I think the fact is that most art dealers are honest. They're certainly careful, and there's no laissez-faire attitude that I'm aware of.

I would think that if there is any laissez-faire attitude in the art world, it may be among some collectors who try to outsmart the market and buy bargains. When they're doing that, they are engaging in laissez-faire practices, but knowingly. They're taking their chances on something that looks cheap: cheaper than it ought to be, and therefore they ought to be suspicious.

MR. EASBY: In that same article in the Bar Association Record, the writer says that "Museums have been just as lax as collectors and dealers, in obtaining documentation on authenticity of contemporary art — particularly when the acquisition comes from a patron or a potential patron. It is no secret among the better-informed members of the art community that unscrupulous owners of art of questionable authenticity who want to salvage their investment, but do not want to risk the embarrassment through public sale, resort to tax-deductible gifts to their favorite museums." The writer goes on to say that perhaps museums accept these because "they are afraid of what they may find and whom they may offend. In any event the museums in this country are becoming the custodians of a prodigious number of fakes." It was brought out earlier by the representatives of The Museum of Modern Art and the Whitney that this statement is without foundation as regards those two museums.

MR. COLIN: I would say it's entirely without foundation. I'm aware of the care with which works offered to The Museum of Modern Art are scrutinized, because for many years I've been a member of the acquisitions committee. This statement is just false.

MR. EASBY: And, although in this context it's limited to contemporary art, it certainly is false as applied to other than contemporary art in any responsible art museum.

The writer continues, "The museums have also facilitated the marketing of fakes by prohibiting members of their staff, often consisting of the leading art experts, from rendering opinions on authenticity to a prospective purchaser of art. This prohibition by museums is not motivated by a perverse willingness to countenance frauds, but rather for the practical purpose of insulating them and their staffs against costly lawsuits that can be extremely difficult to defend. Nevertheless, the silencing of the art expert permits those dealing loosely with art to become more brazen. Who is left to accuse them?"

MR. COLIN: I'd like to answer that question very simply: The answer is the Art Dealers Association of America, which has been accusing people right and left when they find that the accusations are warranted. There is a very active, competent, and responsible agency at work in the art world today to accuse when action is warranted.

MR. EASBY: The passage continues, "The silencing of the expert also leaves the collector in a quandary when he is about to make a purchase, particularly if the artist is not available." The writer then discusses briefly the practice in the major New York museums, referring to the fact that The Museum of Modern Art and the Guggenheim prohibit any member of their staffs from giving an opinion for the public on questions of authenticity; he refers quite correctly to the practice at the Metropolitan, where we will permit our staff members...
to give an oral opinion – not a written certification – and he refers to the same practice at the Whitney. He then concludes, “Perhaps the solution may rest in the passage of legislation to protect certain museum curators, art professors and the like from liability if they render opinions within the area of their competency in good faith.” I think the law is that now, without legislation. The final statement is, “Exculpation will break the silence of the expert.”

I submit that that statement is really based on a misunderstanding of the facts, and the present legislation now under study, which refers only to the fear of litigation, seems to be based largely upon it. Fear of litigation is certainly an important element in the reluctance of museums to have their staff participate in expertise. But there are more fundamental considerations.

One is the unreasonable demands made on the time of the staff. You can’t pick and choose, and say, “Well, we’ll give an opinion to so-and-so but we won’t give one to somebody else.” It’s a public institution, and if you have a policy like ours of giving informal opinions, you have to give them to everyone.

I have a second practical reason for questioning the value of these opinions: at best they’re cursory and can’t be based on extended research. In the earlier sessions we’ve heard of studies that have gone on for twenty-five or thirty years before conclusions were reached – and even then you can’t be sure that they’re the final conclusions. It’s unreasonable, I think, to expect a man – even an art expert – to look at something for five or ten minutes and come up with an absolute judgment. He may, in the clear cases, be able to pull down a book and show the person the answer to his question. On the other hand, it may be something that has to go to a laboratory to be tested.

There are other considerations, ethical ones. The European practice of supplementing a museum man’s income by paid expertise is frowned on in this country and, in fact, is regarded as unethical in the museum profession. Both the Association of Art Museum Directors and the International Institute for the Conservation and Preservation of Historic and Artistic Works have provisions specifically prohibiting written expertise for pay. Another ethical consideration is that the staff of a museum, being primarily academic people, do not wish to be put in the situation of assisting the making of a sale, or of running an investment counseling service for somebody who wishes to buy cheap and sell high. Nor should a museum be a Consumer’s Union, nor put a Good Housekeeping seal of approval on works of art: I think that demeans the works of art. It’s for these reasons that curators don’t want to come forward and counsel somebody, “You should purchase this.”

Now it’s true, we all know, that members of museum staffs do give advice to collectors who are well known to the museum and whose collections are ultimately going to come to the museum. But that’s quite different from advising any stranger who, for all you know, may be a runner for some dealer, asking for an opinion so he may then go out and say, “The Metropolitan says it’s thus and so,” and puffs the price. (It’s amazing how even the simplest comment by a museum can be used. A friend told me of having seen, in a little curio shop in the country, a painting marked with a card saying, “Authenticated by The Metropolitan Museum of Art as an oil painting.” He told the shopowner he would like to see that authentication, and it turned out to be one of our form letters, thanking the man for a photograph and saying we wouldn’t be interested in acquiring his painting.) That situation is especially delicate in art centers such as New York.

So far, in considering the reluctance of museums to become involved in issuing certificates of authentication, we’ve referred to the practical reasons and the ethical considerations. Coming back now to the statute under study, which is addressed to the fear of litigation, it addresses itself only to one type of litigation. That is an action based on disparagement of title or disparagement of quality. If the statute were passed, I think it would create a false sense of security in a museum man if he thought he was being protected against all possible litigation. One of the most important types of litigation that an expert can get himself involved in, of course, is inducing a breach of contract. If something is up for purchase and he tells the prospective purchaser, “Lay off that, it’s not right,” the dealer can come back and claim he’s lost a sale, so the expert must defend himself against that type of action. Another action may be based on the negligent rendering of an opinion; if somebody sets himself up as an expert, qualified to give opinions in a particular area of his competence (and the statute would set museums up to do this), he may well find himself being sued for negligence if, in an opinion based on a cursory examination, he recommends a fake or a pastiche as a rare and desirable original, and the person receiving that opinion goes out and sinks a lot of money in it. The reverse twist would be the case of a man who comes in with, say, a genuine El Greco and is told that it is unfortunately not by the master. He goes out and sells it for a hundred dollars, and later discovers
that the purchaser has put it up at auction and it's brought a hundred thousand. I think he would have an action for negligence there.

Then, there's another possible action that is not as remote as it sounds. There's a pretty thin line between condemning an object and condemning the dealer who has the object. I can well imagine a curator, tired after four hours of inspecting things of relatively minor importance, being shown something from the Joe Smith Gallery and exclaiming, "Oh my heavens, is this another of Joe Smith's fakes?" Any defamatory statement about a man in his trade, profession, or calling is actionable per se—and that means you don't have to prove any special damages, you merely have to prove that somebody has made the defamatory statement that this is an unreliable dealer. So there are at least four actions not covered by this statute.

Another weakness is that the bill, as now drawn, defines a work of fine art as "a painting, sculpture, drawing or work of graphic art." It completely leaves out of consideration, as was pointed out by Mr. Hoving at one of the hearings, furniture, glassware, metalwork, ceramics, porcelain, carpets and tapestries, and even the archaeological objects covered by the penal statute that Mr. Colin discussed earlier. It should be possible to draw a statute that would cover all types of works of art. The Customs laws, after all, have been administered for a long time without any statutory definition of art or antiquity, other than that the object in question be a hundred years old.

If you could put through a statute that covers all works of art and all types of action, this would be an ideal world. I think museums would welcome having the additional protection. On the other hand, my personal opinion is—and this is not simply pride of authorship—that what Cairns and I worked out twenty-seven years ago gives almost the same thing without the necessity for legislation.

MR. COLIN: I agree entirely, and I think, in addition, that if a true expert, at the request of an interested party, gives an opinion in an area in which he is reasonably expert, he is safe without any law, or without any release, or without anything else. He is safe, that is, from liability, but nobody can stop someone from suing him. Anyone can sue anyone for anything at any time, and you can't prevent suits either by laws or by pieces of paper. If people get angry enough, they'll sue you.

MR. EASBY: The Metropolitan's practice of giving oral opinions is directed to the genuine collector and seeker after truth, who really wants to know about his work of art and not primarily what he can sell it for. I hope the time will come when we can give more of these, but I think that's all the public reasonably has a right to ask for. The purchase of a work of art is, after all, primarily the collector's responsibility. Ted Rousseau gave some pretty sound advice to true collectors: "Don't go into it unless you're willing to give it a tremendous amount of time, to train your eye, to look and look and look." All the expert advice and all the legal protection in the world cannot guarantee that a buyer of a work of art—be it a novice collector or a great museum—will never get stuck with a fake.