

RETURN
TO AN ADDRESS OF THE HONOURABLE THE HOUSE OF COMMONS
DATED 23 MARCH 2005
FOR THE

**REPORT OF THE SPOLIATION
ADVISORY PANEL IN RESPECT OF A
12TH CENTURY MANUSCRIPT
NOW IN THE POSSESSION OF
THE BRITISH LIBRARY**

The Right Honourable Sir David Hirst

*Ordered by the House of Commons
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SPOILIATION ADVISORY PANEL

REPORT CONCERNING A CLAIM IN RESPECT OF A 12TH CENTURY MANUSCRIPT NOW IN THE POSSESSION OF THE BRITISH LIBRARY

INTRODUCTION

The Claim

1. The claim is brought by the Metropolitan Chapter of the Cathedral City of Benevento in Southern Italy (“the claimants”). The claim is for the return of a manuscript which is now in the possession of the British Library (“the respondents”), catalogued under the title Egerton 3511. The claimants contend that they lost possession of the manuscript in or near Benevento on a date between September 1943 and April 1944.

2. Our Terms of Reference, which are annexed at Appendix 1, define the scope of our jurisdiction by providing that our task is to “consider claims from anyone ... who lost possession of a cultural object during the Nazi era (1933-1945), where such object is now in the possession of a UK national collection ...”. Although the claim has no direct Nazi connotation, we came to the conclusion at the outset, not without some hesitation, that it fell prima facie within our jurisdiction, having regard to the date of the alleged loss, and that it was therefore appropriate for us to consider it, focusing first on the jurisdiction issue.

3. The manuscript was acquired by the British Museum in 1947 and was transferred by the British Museum to the British Library on the latter’s foundation under the terms of the British Library Act 1972, which took effect on 1 July 1973. The British Library’s legal title to the missal is impregnable under the Limitation Acts, as the claimants acknowledge; however, if the claimants are able to establish a loss during the 1933-45 period, and consequently bring this claim within our jurisdiction, our Terms of Reference require us to give weight to the moral strength of the claim.

4. In the course of our enquiry we have received copious evidence and written submissions from both sides, and we have also held two oral hearings. The claimants have been represented by Mr J W Le M Scott, solicitor and partner in the firm of Withers LLP, and the respondents have been represented by the Treasury Solicitor’s Department.

The Manuscript (hereinafter called “the missal”)

5. The missal was written in the early part of the 12th Century at the Scriptorium of the Monastery of Santa Sophia at Benevento, which is an ancient

cathedral city some 60 kms north east of Naples. It was compiled for the nuns of the Benedictine nunnery of St Peter Intra Muros nearby. It is a very large volume comprising 290 folios and consisting of a missal and calendar written in what is known as Beneventan script. Some of the folios include musical notations of Beneventan chant. The missal is a work of considerable importance to scholars of palaeography and of early music linked to the Benedictine order, for which Benevento was an important centre.

6. Beneventan culture flourished in the 11th and 12th Centuries, and according to its most eminent scholar in his authoritative work, the missal is “a product of the culture’s greatest excellence and finish at its period of maturity” (A E Loew “the Beneventan Script” Oxford University Press 1914). It is thought that the missal was acquired by the Chapter following an earthquake in 1688 when the nunnery was severely damaged and the nuns moved to Naples. In the light of several scholarly records mentioned below, there is no doubt that it was still in the possession of the Chapter up to the outbreak of the First World War.

The British Museum’s Acquisition

7. In October 1946 a Captain D G Ash brought the missal to the British Museum and asked for an expert opinion on it from Mr AJ Collins, Deputy Keeper of Manuscripts. According to his own account in a letter to the British Museum dated 27 October 1946 he had purchased it from a second-hand bookseller in Naples in April 1944. It was put up for auction at Sotheby’s on 24 June 1947, and sold to Bernard Quaritch Ltd who had been instructed to bid on behalf of the British Museum, but only up to a limit of £400. After further negotiation, the British Museum bought the missal for £420, the price paid by Bernard Quaritch at the auction. The latter transaction was handled not by Mr Collins but by Mr Miller, the Head of Manuscripts; however, Mr Christopher Wright, the present Head of Manuscripts at the British Library, accepted in evidence that his two predecessors must have been in contact with each other at the time.

The Key Issue on Jurisdiction

8. In order to come within our jurisdiction under our Terms of Reference quoted above, it is incumbent on the claimants to make good at the outset their contention that they lost possession of the missal at a date within the period covered (1933-1945), which they pinpoint, as already noted, between September 1943 and April 1944. This contention is strongly disputed by the respondents. It is common ground between the two sides that our task, as also laid down by our Terms of Reference, is to evaluate on the balance of probabilities the validity of the claimants’ case, while recognising the difficulties of proof after the destruction of the Second World War and the duration of the period which has elapsed since.

The Rival Cases in Outline

9. The claimants' case as originally presented hinged mainly on an entry in an inventory bearing the date 1939 ("the 1939 inventory"). This inventory, they contended, firmly established the presence of the missal in the Chapter Library at the outbreak of the Second World War. Four years later, following heavy bombing by the Allies during their advance in Italy, the Library was severely damaged and the manuscripts evacuated to an adjoining papal seminary. The seminary was requisitioned in September 1943 following the capture of Benevento by the Allies, and used as a military hospital. It is at this juncture, amid the confusion which ensued, that the claimants contend that the missal must have been stolen, the dates pinpointed being between the upheavals in September 1943 and Captain Ash's purchase in Naples in April 1944, as described by him.

10. Following the British Library's initial response to the claimants' original presentation, the case based on the "1939 inventory" fell by the wayside in circumstances we shall examine in detail shortly. The claimants then proceeded to rely on other documentary material, in particular a reference to the missal in a booklet on the history of the Chapter Library written in 1940 by the then librarian Monsignor De Lucia, to show that the missal was still in the Chapter Library at that date. As the claimants themselves realistically accept, their case that the theft must have occurred between the relevant dates in 1943-44 is based entirely on inference derived from the circumstances prevailing after the bombing of Benevento, there being no direct evidence of any mishandling of the missal at this stage. An inventory taken in 1948 by an outside authority recorded the missal as apparently missing, but that does not seem to have registered with De Lucia. Indeed, it was not until 1976 that the claimants appreciated their loss. No other manuscripts are missing.

11. The respondents contend that the case based on De Lucia's 1940 booklet is flawed, and that there is no credible evidence that the missal was in the possession of the Chapter Library during the 1933-1945 period. The only firm dates that can be established for such location of the missal precede 1914. The claimants' suggested inference is, they argue, entirely speculative.

SUMMARY OF RELEVANT EVIDENCE

The History up to the Second World War

12. There are two detailed references to the missal published in the years immediately prior to the First World War:—

- (a) A G Loew (1914 *op. cit*) provides a detailed description of the missal which he had examined in or about 1909 in the Chapter Library where it was designated by its shelf-mark VI 29: the Roman numeral denoted the particular Armario, or cupboard, where it was kept in the Chapter

Library, together with a large number of other ancient manuscripts which Loew also describes and lists;

- (b) at approximately the same time, the missal was examined and described in detail by a Benedictine scholar, Dom Raphael Andoyer, who compiled a detailed descriptive list of the contents of the Chapter Library published in 1909.

13. The only references to the missal published between the two Wars are in two consecutive issues of the periodical *Paleographie Musicale* published in 1931 and 1937 by the Abbey of St Pierre at Solesmes in Belgium. However, these do not represent a contemporaneous examination, but are based on photographs then in the possession of the Abbey, taken in 1904.

14. A photograph of the Chapter Library, probably taken between the two wars, shows a large room with glass fronted shelves containing the manuscripts round the walls, and working tables in the centre of the room. The present Librarian, Monsignor Laureato Maio, testifies in a witness statement that as far as he is aware “the Library has never been open to the general public without restriction but only to those experts and scholars interested in this specialist material, mostly scholars”. He also states that he remembers (presumably as a boy) “visiting the Library before the Second World War when it was not possible simply to walk in; visits would have to be arranged with the Librarian”. However, the claimants acknowledge that there was no evidence of the rules of invigilation in the Library, nor whether visitors were watched over or left alone.

The Removal of the Chapter Library’s Contents in 1943

15. The city of Benevento, which adjoined an important railway junction, was heavily bombed by the Allies in September 1943 ahead of their advance northwards through Italy. Previously, in late August, as a precautionary measure, the contents of the Chapter Library had been carefully wrapped up in blankets under the supervision of De Lucia. On the night of 13/14 September the Chapter Library itself was hit and severely damaged, and the cathedral virtually destroyed. Widespread looting was reported elsewhere in the city. Mercifully, however, the manuscripts escaped damage and were removed to the Pontifical Seminary, known as Seminary “Pio XI”, which is situated about 1km outside the city. Not surprisingly, no inventory was taken at the time of the removal to the seminary, where the manuscripts were hidden in a loft. After the War the cathedral complex, including the Chapter Library, was restored and the manuscripts reinstated.

16. In the first week of October 1943 Benevento was captured from the Germans by the Allies, and it was shortly afterwards that the seminary was requisitioned, and used as a military hospital thereafter until the end of October 1944.

Captain Ash and the British Museum

17. The circumstances leading up to the British Museum's acquisition of the missal are fully documented. The initial approach came from Captain Ash himself in a hand-written letter dated 27 October 1946 headed "Captain D G Ash", and giving his address as "53 Dukes Avenue, London N10". The letter ran as follows:—

"When I was in Italy I bought an old book in Naples in April 1944. Knowing nothing about it except that it was very old, it being described by the second-hand bookseller as molto antico. Having had the leisure to examine it more carefully, I found that it is written by hand on vellum, some of the pages being illuminated, and it appears to me to be decidedly medieval. ... I should very much like to have an expert opinion on the book. I am interested in anything old and have a collection of swords and armour, but this book is completely beyond me. Could you possibly give me an appointment to come and see you about it. I should be most obliged if you could spare the time."

18. The Deputy Keeper of Manuscripts, Mr A J Collins, replied on 30 October offering an appointment, and as a result, a few days later, Captain Ash brought the missal to the British Museum and left it with Mr Collins for examination. By letter dated 13 November, Mr Collins gave his opinion that the missal was of the 12th rather than the 13th Century, but that he had no doubt that the missal was written in Benevento, and that one of the texts seemed to indicate that it was written for the Abbey of San Pietro in Benevento, which was an important House of Benedictine nuns which during the Middle Ages had the possession of a fine library, parts of which survive. The letter concluded with comments to which the claimants attach considerable significance:—

"While we have found no indication that the MS was removed from such a place in the late war (it cannot be traced in Loew's "The Beneventan Script"), the appearance of a book of this date and liturgical interest in a bookseller's shop in Naples in 1945 (sic) makes me suspect that it may have been so removed. As you are doubtless aware it is an offence to possess "looted" property; and if I were in your place I should consult your friend, Mr J G Mann, who I believe is connected with the organisation dealing with such matters. If the MS is not "loot" you have been fortunate enough to obtain a manuscript which, on account of its liturgical interest, an institution such as this would be happy to possess."

19. In the Sotheby's auction catalogue of 23 June 1947 (see paragraph 7 above) the missal was listed under the heading "the Property of Capt. D G Ash", as follows:—

"Missal of the Abbey of San Pietro, illuminated manuscript of the 12th Century, on vellum probably for the Benedictine Abbey of San Pietro (no longer in existence) in Southern Italy which possessed, in the Middle Ages, a fine library While the top of some leaves are stained, the MS is on the whole in excellent condition throughout, and an unusually good specimen of a missal of such early date."

20. Our enquiries have established that Captain Douglas George Eric Dacre Ash, Intelligence Corps, died in Brighton on 6 March 1994. We have recently been able to contact his daughter, who informed us that the missal arrived in a parcel probably through the post “wrapped in several yards of deep maroon or plum coloured satin-like fabric as well as card and paper” and that “as far as can be recalled, there was no letter inside, and that, after unwrapping the manuscript which was smelly and wet, it was carefully dried out”.

21. Although the claimants question the legality in Italy of Captain Ash’s actions, they make no criticism of Captain Ash personally, but on the contrary rely on his story to fix the date of reappearance of the missal in April 1944. He came of his own volition to the British Museum bearing the missal, and openly disclosed his name, rank and address in London in the handwritten letter quoted above. Thereafter he went openly to Sotheby’s, and again gave his name and rank, which were published in the sale catalogue. This is not typical of the behaviour of a thief or of a culpable handler of stolen goods. Had he wished to conceal his identity he would have had no difficulty in doing so: the next entry in the sale catalogue, for example, is simply referred to as “Property of a Gentleman”.

The Chapter Library’s eventual discovery of the loss of the Missal

22. In 1948 an inventory of the Chapter Library was undertaken by Professor Franco Bartoloni of Rome University; in this inventory the space opposite VI 29 is left blank. However, there is no sign of any response from De Lucia either at this time or throughout the remainder of his term of office until he retired in 1952. De Lucia was succeeded by Monsignor Angelo Ferrara, and shortly after he took office, as will be explained shortly, an inventory was taken under his auspices which listed the wrong volume against VI 29.

23. In 1972 a group of medieval manuscript experts in Rome commissioned a second edition of Loew’s standard work (*op. cit.*), and entrusted the task to Professor Virginia Brown who is Professor of Latin Palaeography at the Pontifical Institute of Medieval Studies in Toronto. She began her work in the autumn of 1972, by which time she was already aware that the missal was located in the British Museum under the reference Egerton 3511.

24. On 2 August 1973 Professor Brown wrote to Ferrara informing him that she was preparing a new edition of Loew’s work, and asking him for information concerning some of the manuscripts, including the missal, adding in a postscript that “the missal is now in London, British Museum, Egerton 3511”. She received no reply. On 9 July 1974 Professor Brown wrote again to Ferrara, enclosing photocopies of a number of pages from Loew’s work, containing lists of manuscripts including the missal, and asking him if all these were still in the Chapter Library, and if they had the same shelf marks. In her first witness statement she said that, in order to give Ferrara an absolutely free field, she did not refer on this occasion to the fact that

Benevento VI 29 was now Egerton 3511. Ferrara replied on 22 July 1974 that “the manuscripts listed by Loew are all conserved in the Chapter Library”.

25. In March 1976 Professor Brown visited Benevento. This is her account:–

“On 20 April 1976 I went to Benevento and met Mons. Ferrara for the first time. He was distantly pleasant and willing to allow me at most 15 minutes in the Chapter Library for my verification of Loew’s data. Immediately upon entering the Library, I checked the so-called MS 29 and discovered that it was a devotional book (not a missal) written in a much later, non-Beneventan script. . . . I turned to Mons. Ferrara and said “Monsignore, look at the script; this codex is not in Beneventan and so could not be the MS cited by Loew. Do you know where the Beneventan manuscript now is?” His reply was negative. I continued “Well I will tell you where it is; it’s now in London at the British Museum and the shelf mark is Egerton 3511. What did you do with the manuscript? Why did it leave the Chapter Library?” (I spoke to him in Italian and give here the English translation.) It is my very clear and very vivid recollection that Mons. Ferrara was quite flustered and surprised at this turn of events. He said he knew nothing about all this and disclaimed any responsibility.”

THE EVOLUTION OF THE CLAIMANTS’ CASE

26. In the claimants’ original Statement of Case it was contended that “the last known Beneventan inventory in which the missal appears is one taken in 1939 probably by or under the supervision of the then librarian of the Chapter Library Mons. De Lucia, in which the entry for VI 29 also lists its contents. There is also probably a reference to it in 1940 in a booklet on the history of the Library by Mons. De Lucia.” Mr Scott also testified in his written statement as follows: “The inventory of manuscripts in the Chapter Library nearest in time to the Second World War was apparently done in 1939. This inventory, which I have seen in the Chapter Library in a file marked “Curia Arcivescovile Benevento, M MSS 1939, Indici dei MSS”, consists of a detailed description of the contents of each codex.” Mr Scott exhibited copies of the relevant pages as part of the supporting evidence.

27. On presentation of this evidence to the British Library, this exhibit was examined by Dr Scot McKendrick, the Curator of Classical, Byzantine and Biblical Manuscripts at the British Library. In his witness statement he said he had compared the pages exhibited by Mr Scott with Egerton 3511 and then proceeded:–

“First, the number of folios in the manuscript described in the typescript is under one-third of that of Egerton MS 3511 (the typescript description ends with the text on folio 94, the text of Egerton MS 3511 ends on folio 290). Second there is no coincidence between the folio references of the description and Egerton MS 3511. Although the sequence of texts is broadly similar – this fact merely confirms that both manuscripts are missals of similar origin – several texts that appear in Egerton MS 3511 are not listed in the description and several texts that are listed in the description do not appear

in Egerton MS 3511. On this evidence I would conclude that the typescript description related to a different missal.”

28. In his second witness statement dated 12 May 2003 Mr Scott accepted Dr McKendrick’s evidence that the extract exhibited was not what he thought it was, and said that investigations carried out at the Chapter Library had established that this was in fact a description of another manuscript known as Benevento 66. He proceeded:–

“The document was provided to me by the Chapter Library before I visited Benevento in June 2001; the explanation of the Library is that it was provided in haste, without a detailed correlation having been made of the listed contents with those of Benevento 29. I regret that I too missed the fact that the document does not correspond with a full description of the manuscript itself. It is now thought that the loose-leaf file in which these two pages were found was compiled after the War (the date on the label on the cover is not explained; the reason for it is unknown). It is also believed that the contents of this file represent an early attempt to list the Library’s manuscripts on their return to the Chapter complex from the Pontifical Seminary and that it predates the inventory carried out by Professor Bartoloni in 1948.”

29. This explanation was expanded and to some degree varied in further evidence submitted on behalf of the claimants, comprising a third witness statement from Mr Scott and Mons. Maio’s witness statement. Mons. Maio focused attention on the wording written on the label of the file quoted above and stated:–

“The file containing the typed indices is one that, on the face of it, does not originate in the Chapter Library but in the Curia. For this and other reasons that will become apparent, I now believe that this file was kept, and the contents created, by Mons. Ferrara. Mons. Ferrara was appointed Chapter Librarian in 1952, but he had other duties; in particular, he was the Vicar-General of the Curia. The stamped heading on the label affixed to the file would be explained by its having been brought by him from the Office of the Vicar-General.” (ie post 1952)

30. This final version, which is confirmed by Mr Scott, is not challenged by the British Library, and we accept it, though the 1939 date on the label remains a mystery.

31. We in no way hold this unfortunate sequence of events against Mr Scott, but they did give rise to concern as to the general standard of management demonstrated by the Chapter Library during the tenure of De Lucia and Ferrara.

32. As a result, the claimants’ case suffered a grave setback which led to De Lucia’s 1940 booklet moving from the wings to centre stage, and being the subject of minute examination by both sides. The interpretation of this booklet is important, since upon it depends whether or not there is any positive evidence of the missal being present in the Library on any date after 1909 or thereabouts.

DE LUCIA'S 1940 BOOKLET

33. De Lucia was a leading figure in Benevento from at least the mid-1920s until his retirement as Chapter Librarian in 1952. He was not a scholar of the Beneventan script.

34. His 1940 booklet is a slim work entitled “La Biblioteca Capitolare di Benevento”. It is in essence a history of the Library, and contains a list of some of its contents prefaced by the words “Indeed here is a list summarising liturgical codices as put together by the Benedictine Dom Raffaele Andoyer who came here in November 1909 to study the ancient liturgical codices”. In the ensuing list there is a reference to the “Great Missal of the XII and XIII Centuries” (“Messale Grande del XII e XIII sec”). The descriptions throughout mirror almost word for word those given by Andoyer.

35. Fifteen years earlier in 1925 De Lucia had written and published a guidebook to the city entitled “Passegiate Beneventane”. This is a substantial volume comprising 25 chapters covering the main sites and treasures in the ancient city, including one chapter, 5 pages long, devoted to the Chapter Library. This chapter contains a list also drawn from Andoyer and almost word for word identical to the subsequent 1940 pamphlet introduced by the words “Here is a summary listing as drawn up by the late Dom Raffaele Andoyer of the Benedictine Order who came to Benevento in November 1909”. A key reference identifies the “Missale Grande del XII o XIII sec” in words reproduced exactly in the 1940 pamphlet, save for the substitution in the latter of the word ‘e’ (and) for the word ‘o’ (or).

36. It is common ground between the two sides that these citations refer to the missal. Indeed this is confirmed by Professor Brown in a second witness statement. The same conclusion was reached by Dr Elizabeth Peirce, an expert in Beneventan script, who in 1964 wrote a doctoral thesis entitled “An Edition of Egerton 3511” which Mr Scott in his evidence describes as “the most sustained treatment of the missal”. Both scholars specifically cite De Lucia’s 1940 booklet.

37. Professor Brown states in her second witness statement:–

“In 1940 Mons. Salvatore De Lucia described briefly the liturgical manuscripts forming part of the Library at that time De Lucia’s account, as he himself states, ... is based on the earlier summary list of Dom Raphael Andoyer. ... It is clear that De Lucia knew Andoyer’s list ... and used it in his own survey of the Library. Hence, De Lucia was aware of the age and contents of the codices. He states without reservation that the older manuscripts are carefully conserved.”

38. Dr Peirce is more guarded; having stated that “the last printed reference to VI 29 was in 1940 in a booklet on the history of the Library by Mons. De Lucia”, she describes the precautions De Lucia took in 1943 to safeguard the manuscripts, and their transfer from the Library after the bombardment. She concludes:–

“The manuscripts were therefore safe from the bombs, but whether the codex VI 29, now Egerton 3511, had already left the Library by this time, or whether it was separated from the collection at a later date must remain a mystery.”

39. The claimants set great store by De Lucia. They portray him as a diligent custodian with great concern for the manuscripts in the Chapter Library as epitomised by his care in safeguarding them in 1943. They cite his 1925 guidebook as illustrating his deep knowledge and love for the city – not the work they say of an ignorant or ill-educated man. They also refer to his war-time diary, later published in English under the title “Benevento in the vortex of War, diary of a war victim”, which gives a graphic account of the city’s trials and tribulations. They suggest that the diary displays qualities of precision which indicate that if the missal was missing in 1943 he would have noticed its absence and recorded it. They particularly rely on his entry for 24 August 1943, where he describes the steps he took to safeguard the manuscripts which were already stored in a secure cabinet. “I, helped by others, covered the door of the cabinet with sandbags and strong planks and also covered the big reliquaries containing the collection of seals, some ancient books and various manuscripts, having first wrapped everything in woollen blankets etc”. This shows, the claimants suggest, that he must have been in close physical contact with the manuscripts at this juncture, and so in a good position to notice and record in his diary the absence of any one.

40. So far as the booklet itself is concerned, they submit that as Chapter Librarian it is most unlikely that he would have failed to conduct a personal check of the accuracy of the list, not least because he must have been aware that it would be read by professional colleagues, including staff at the National Library of Naples, who acknowledged the gift of two copies by a letter dated 12 August 1940. We should assume, they say, that in repeating himself in his later (1940) work he would have verified the accuracy of his earlier (1925) work. Otherwise he would have been guilty of dereliction of duty. This assumption is endorsed by Mons. Maio in his witness statement.

41. The respondents direct close attention to the comparison between the 1940 booklet and the 1925 guidebook, and submit that this speaks for itself. Neither provides any evidence whatsoever of original research, and both rely expressly upon Andoyer’s 1909 list. The repetition almost verbatim in the 1940 pamphlet of the phraseology used in the 1925 guidebook, including the crucial seven word phrase referring to the missal, strongly suggests that De Lucia simply reproduced his 1925 description in his 1940 work, rather than conducting a fresh appraisal of the Chapter Library’s contents. In oral evidence Mr Christopher Wright, the Head of Manuscripts at the British Library, explained that by “original research” he would mean study directly of the manuscripts themselves. He said that the original research in this case was undertaken by Andoyer before the First World War which De Lucia was quite open in fully acknowledging; there was nothing improper about this on De Lucia’s part. For these reasons he would treat De Lucia as a secondary source. He described it as “cut and paste”, and said there was no evidence that there was any

reference to the manuscripts at all in the compilation of the guidebook or of the subsequent booklet. When asked to give an example of what would be such evidence he cited, for example, an addition by De Lucia about one of the manuscripts which was not in Andoyer, or a mention of a manuscript having been moved, ie something which would indicate that De Lucia had actually physically examined the manuscripts.

42. In response, the claimants suggest it is natural that De Lucia would adopt the description given by an earlier authority of acknowledged eminence, and it by no means follows that he had not troubled to check. Indeed, in his final oral submission, Mr Scott went so far as to argue that “After all, in a sense it is De Lucia who is on trial here.” In approaching this problem, Mr Scott contended, the Panel should proceed from the angle that there is no evidence that he did not check.

43. It is convenient to examine these submissions in a chronological framework, concentrating on the dates 1925, 1940 and 1943.

44. In the 1925 guidebook De Lucia covered a wealth of material throughout Benevento, devoting only a short chapter to the Chapter Library. With Andoyer’s authoritative work readily to hand, he was able, sensibly, to reproduce it.

45. Come 1940, his booklet was devoted exclusively to the Chapter Library of which he was by then the custodian. No doubt he might have checked the contents personally, but there is no evidence that he did, and it would be wrong to approach the problem from the opposite end as Mr Scott invited us to do, or to adopt his assumption that De Lucia would have automatically checked. The booklet is in essence a history of the Library, and in no sense an inventory, and does not represent itself as such. Moreover, the repetitive introductory words to the critical passage “Indeed here is a list as put together by Andoyer” are very hard to reconcile with the notion that he was relying on his own fresh appraisal. De Lucia was not a Beneventan scholar, and we reject the idea (which seems implicit in Mr Scott’s final plea that De Lucia is on trial) that De Lucia was under any duty to conduct a quasi-inventory when compiling a little booklet of this kind. We can find no fault in his drawing again on Andoyer’s list, and accept Mr Wright’s evidence to that effect.

46. Professor Brown and Dr Peirce are, of course, important scholarly witnesses, but are in no better position than we are to interpret the significance of the booklet, let alone draw the corollary that the missal must have been present in the library on the date the booklet was written; indeed Dr Peirce carefully left the question open.

47. In 1943 Benevento was under threat of imminent attack, and De Lucia’s prime responsibility was to safeguard its precious manuscripts from the threat of destruction. The atmosphere must have been frantic, and even the most conscientious librarian could hardly be expected at this juncture to note the presence or absence of every single item, both before and after the move.

48. The claimants were understandably at pains to demonstrate De Lucia's qualities as a careful, knowledgeable observer, and we have done our utmost to treat him fairly, particularly because he is no longer able to defend himself. However, he was still in office as Chapter Librarian in 1948 when the inventory undertaken by Professor Bartoloni revealed the loss of the missal when the entry against VI 29 was left blank. Here was concrete evidence that the missal was missing, and such a discovery would normally have set the alarm bells ringing in a librarian's mind; yet, as Mr Scott accepted in his final oral submission, De Lucia seems so far as we can judge to have done nothing about it, either at the time, or during the ensuing four years of his tenure up to his retirement in 1952.

49. For all these reasons we are not persuaded that De Lucia's 1940 booklet avails the claimants' case. Consequently, the claimants' case hinges on the circumstantial evidence concerning events in the 1943-1944 period.

THE RIVAL CASES ON THE CIRCUMSTANCES OF THE LOSS

The Claimants' Submission

50.1 The claimants invite the Panel to take a broad realistic view, and hold that the probability is that the loss was occasioned by allied bombardment, and resulted in the removal of the manuscript from its country of origin and its acquisition by an allied national institution shortly afterwards. Looked at in this natural way, the most probable circumstances of this loss are indeed properly associated with the idea of spoliation.

50.2 The destruction and confusion at the time of the bombing, amidst scenes of looting and chaos, followed by the transfer of the manuscripts to a site occupied shortly thereafter as a military hospital, furnished an obvious opportunity for the theft of the missal. Then only six months later it came to light in Naples when it was acquired by Captain Ash. All this occurred at a time when Benevento and Naples were on the Allied side of the line, following the capture of Naples in the Autumn of 1943. These are facts from which, by the application of common sense, a theft of the manuscript during the period can and should be inferred, especially in the absence of any evidence to suggest an alienation between 1914 and 1943. This is more probable than any other theory put forward.

50.3 The respondents are wrong to concentrate on the absence of any documentary record after 1914. There is no evidence of anything that we know between 1914 and 1943 which would provide the occasion for an easy extraction of a large and heavy volume from a shelf probably behind glass. If it had been stolen during this period, it would be remarkable if it had not been noticed.

50.4 Accordingly there is evidence of sufficient weight to enable the Panel to find that the missal was stolen from the claimants' possession within the period of the

Panel's jurisdiction, and to draw exactly the same inference as the Deputy Keeper at the British Museum himself drew in 1946, ie that it was war loot.

The Respondents' Response

51.1 The respondents reiterate that, once the 1939 inventory has been abandoned, and De Lucia's 1940 booklet has been discarded, the claimants' case is pure speculation.

51.2 There is no authoritative or credible evidence that the missal was in the possession of the Chapter Library during the 1933-1945 period. The only firm dates that can be established in relation to the location of the missal based on actual evidence are:–

- 1904 when it was photographed at Benevento.
- 1909 when it was seen by Andoyer at Benevento.
- 1909 or slightly later when it was seen by Loew when he researched his "Beneventan Script" which was published in 1914.
- 1946 when it was brought by Captain Ash to the British Museum.

None of the intervening dates cited by the claimants can be shown to have any authoritative standing or probity.

51.3 There is no guarantee that the staff of the Chapter Library actually saw the missal. Indeed it seems that there are three different manuscripts which were given the same shelf number. The first is Egerton 3511, now in the British Library; the second is the one that is mentioned in the withdrawn 1939 inventory; the third is the substitute manuscript found by Professor Brown in 1976.

51.4 Despite the general chaos and confusion in 1943 on which the claimants place so much reliance, the manuscripts survived the upheavals of war in good order, as the claimants' own evidence demonstrates. Despite the damage to the Chapter Library's fabric, the evacuation of the volumes in the most difficult of circumstances and their storage in the seminary (which was necessarily unsupervised during the period of its requisition as an Allied hospital), only one volume is claimed to have been lost during this turbulent time. Although this does not preclude the opportunistic theft of this single manuscript, it is clear that the Chapter Library itself was not the objective of significant looting, such as that which eye witnesses describe taking place elsewhere in the city.

51.5 There is no evidence to support a theory that the missal was confiscated by occupying forces, or that its sale, or sale at an undervalue, was coerced, or that it disappeared in an act of pillage by troops or civilians. The missal may have been lost

before the war, removed during the war before the evacuation of the Chapter Library, lost in transit when the Chapter Library was evacuated, left behind, taken by a well-meaning person involved in the evacuation for sale or exchange for provisions, or found by an individual who recognised its value but not its provenance and sold it to the Naples bookseller. There is no more evidence to support the proposition of theft than to support any of these other hypotheses. To assume theft may be convenient to the claimants, but it can be no more than an assumption. Even if there was reason to assume the missal's loss would be occasioned by theft, it would not be more than common opportunistic theft and not in the category of misappropriation that is properly associated with spoliation.

51.6 The common sense inference which the claimants invite the Panel to draw is no more than a presumption unsupported by solid evidence, and falls far short of establishing their case on the balance of probabilities.

The Panel's Conclusion

52. We have found these arguments finely balanced. However, after careful consideration, and bearing in mind our need, as laid down in paragraph 7(d) of our Terms of Reference, to make allowance for the difficulties of proof, we have come to the conclusion that the circumstantial evidence relied upon by the claimants is sufficiently robust to vindicate their submission, for the reasons they give, that the missal was spoliated between the time of the bombing in 1943 and its acquisition by Captain Ash in 1944. It follows that they have made good their case on the circumstances of their loss, and consequently that the case falls within our jurisdiction.

FURTHER RELEVANT EVIDENCE IN THE POST-WAR PERIOD

53. The first public announcement of the British Museum's acquisition came in 1952 with the publication of Vol XV of the *British Museum Quarterly*, where it was mentioned under the heading "Manuscripts acquired during the years 1941 to 1950" as a late 12th Century missal from the Abbey of San Pietro in Benevento, written in characteristic Beneventan script, and as one of the two liturgical manuscripts of outstanding importance acquired between 1941 and 1950.

54. In September-October 1961 there was an exchange of correspondence between Dom C Benoit-Castelli of the Abbey of St Pierre at Solesmes and Mr D B H Turner, the Assistant Keeper of the Department of Manuscripts in the British Museum, which established the identification of the missal as Benevento VI 29 to the satisfaction of Mr Turner, Dom Benoit-Castelli having furnished to him a microfilm of a number of folios in the manuscript.

55. Sixteen years later, on 6 December 1977, following a telephone conversation between them, Mr Turner wrote to Mrs M Barzetti of the Italian Institute of Culture

in London. Having described the acquisition of the missal by the British Museum, Mr Turner proceeded as follows:–

“I understand that the museum were not thoroughly satisfied about the provenance of the manuscript and therefore declined the acquisition. They were however prepared to accept it when it became the subject of public auction. Neither in 1946 nor 1947 were the Museum aware of the missal’s identity with the codex in the Beneventan Chapter Library. This only came to light in 1961 as the result of an enquiry to me from the late Dom G Benoit Castelli of Solesmes. If my memory serves me right, the distinguished scholar Dom Rene-Jean Hesbert, formally of Solesmes, told me subsequently in conversation that Dom Benoit Castelli’s enquiry resulted from an investigation which Pope John XXIII had had made into the state of the ecclesiastical libraries in Italy. This investigation was prompted by a serious theft from the Chapter Library of Milan in 1959, a theft which I was instrumental in uncovering in 1960. My further recollection is that Dom Hesbert told me that Benoit-Castelli had passed on to the Vatican, who had forwarded it to Benevento, the identification of the missal and that both the Vatican and Benevento were satisfied that the manuscript remain here. This tallies with your remarks over the telephone that you thought Benevento were merely checking their records and not attempting to recover the manuscript.”

THE MORAL ISSUES

The Panel’s Task

56. Under paragraph 7(c), (e), (g) and (h) of our Terms of Reference, we are obliged to:

- (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
- (e) give due weight to the moral strength of the claimants’ case;
- (g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object’s provenance;
- (h) take account of any relevant statutory provisions, including stipulations as to the institution’s powers and duties, including any restrictions on its powers of disposal.

The two international instruments

57. Our duty to give weight to moral considerations is founded on the terms of two important international instruments. The “Inter Allied Declaration against

Acts of Dispossession committed in Territories under Enemy Occupation or Control” was issued in London on 5 January 1943 and is annexed at Appendix 2. All the allies, including the United Kingdom, subscribed to this Declaration, which is in the following terms:–

“The Governments hereby issue a formal warning to all concerned, but in particular for persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against countries and people who have been so wantonly assaulted and despoiled. Accordingly, the Governments making this Declaration reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong to or have belonged to persons resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”

58. Although the Declaration was never embodied by Statute into English law, it gives most helpful guidance on the underlying principle. This was echoed in December 1998 in the Declaration of Principles issued by the Washington Conference on Holocaust-Era Assets, which is annexed at Appendix 3, and which stresses the need to achieve a just and fair solution.

The National Museum Directors’ Conference’s Statement of Principles

59. This theme was followed by the National Museum Directors Conference (NMDC), which is a UK-wide voluntary association of 25 national cultural institutions, receiving funding from central Government, and comprising 20 museums, the 3 national libraries (including the British Library) and The National Archives.

60. Under the heading “Spoliation of works of art during the Holocaust and World War II period” the NMDC issued a “Statement of Principles and Proposed Actions” dated 2002 and updated in June 2004.

61. The Statement of Principles provides as follows:

- “ i) NMDC recognises and deplores the wrongful taking of works of art that constituted one of the many horrors of the Holocaust and World War II.
- ii) NMDC members support the principle outlined in the M[useums] A[ssociation] Code of Practice for Governing Bodies dated 1994 which states that “Collections Management Policy should ensure, through the appropriate documentation, that the museum does not acquire or exhibit

any stolen or illegally exported works and that it acquires legal title to items accessioned to its collections”.

- iii) NMDC is committed to working with other institutions and organisations both within the UK and internationally to increase awareness and understanding of the facts surrounding the spoliation of works of art by the Nazis and others during the Holocaust and World War II period.
- iv) NMDC is committed to giving prompt and serious consideration to claims to title for specific works in their collections.
- v) In line with its members’ general policies for and commitment to increasing public access to information about their collections, NMDC advocates a practical approach to reviewing and making accessible information relating to the provenance of their collections, taking into account the nature and size of the collections concerned and the resources available.
- vi) NMDC advocates a process of reviewing, reporting and researching the issue of works of art wrongfully taken which respects the dignity of all parties and the complexity of the issue. Each claim represents a unique situation which must be reviewed thoroughly on a case by case basis taking into account both the interests of individuals and the statutory and legal responsibilities of the institutions.”

The Statement of Principles also states that “for the purposes of interpreting this document, wrongful taking shall mean any act of theft or other deprivation, the legality of which is open to reasonable challenge, and which was committed during the Holocaust and World War II period”.

62. In 2000, under the auspices of the NMDC, the British Library published a “List of works with incomplete provenance during the period 1933 to 1945”, which includes the missal. Having described the acquisition of the missal by the British Museum, the entry significantly states that “the manuscript was not identified directly by research, but may have been looted during the Nazi period”.

THE CHAPTER LIBRARY’S POSITION

The Claimants’ Submission

63. In support of their moral case, the claimants in their written submissions submit that, in evaluating their position under paragraph 7(e), the Panel should cross-refer to paragraph 7(c). Here, they say, the relevant circumstances are that the missal was stolen, and that it was the object of looting or plunder from the wreckage

of Benevento, such that its subsequent acquisition by Captain Ash in Naples in 1944 was itself tainted as both locally unlawful and immoral, and was also a transaction warned against by the London Declaration of 5 January 1943. They stress, in reliance on the opinion of an Italian advocate which the respondents have not contradicted, that the removal of the missal from Italy was unlawful under Italian law. This is the central pillar of their case which they submit vindicates their moral claim for the missal's return to the collection in Benevento where it had been treasured as part of their cultural history for several hundred years. They go on to submit that there is nothing in the claimants' conduct subsequently to tarnish the integrity of their claim, and that they were in no sense blameworthy.

The Respondents' Response

64.1 The respondents for their part focus in their written submission on the subsequent action or inaction of the claimants, which they submit fatally undermines their moral claim. There is, they say, nothing in the evidence to absolve the claimants of any blame. There appears to have been no inventory of the contents of the Chapter Library at any time between 1909 and 1948, even when, as we know, the Chapter Library was evacuated to the Seminary in 1943, or when the books in the Seminary were subsequently returned to it. That is how the loss of the missal was able to pass unnoticed for as long as it did, and why it is impossible now to pin down even to a short span of years when that loss occurred. For the custodian of a treasure to keep records so indifferently as to be unaware over a considerable period as to whether he or she remains in possession of it could be considered a want of due care.

64.2 If 1948 is taken as the year the claimants knew that the missal was missing, it appears no steps were taken to trace it or to seek to recover it. In 1952, a report of the museum's acquisition of the missal was published in the *British Museum Quarterly*. This was the first occasion on which the British Museum had published its acquisitions since 1940 and shows that no attempt was made to disguise or downplay the acquisition. If the claimants had been concerned as to the whereabouts of the missal and had actively pursued it during the period 1948 to 1952 or subsequently, the international scholarly community would have been able to inform them of its location.

64.3 The museum was contacted in September 1961 by Dom Benoit-Castelli, and it is clear that the presence of the missal in the museum was confirmed and no further action was taken. The communication was referred to in the Library's letter from Mr Turner to Mrs Barzetti at the Italian Institute of Culture in 1977, which is quoted in full in paragraph 55 above. In particular, Mr Turner records that both were satisfied that the manuscript remain at the museum in London and goes on to suggest to Mrs Barzetti that this "tallies with your remarks over the telephone that you thought Benevento was merely checking their records and not attempting to recover the manuscript."

64.4 The next activity in relation to the missal came in August 1973, when Professor Brown wrote to Ferrara at the Chapter Library, and informed him of the manuscript in the British Library known as Egerton 3511. For whatever reason, Professor Brown's letter did not elicit a reply. She then wrote again in 1974 and was told by Ferrara that the manuscripts cited by Loew were all in the Chapter Library. Professor Brown then visited the Chapter Library in Benevento in 1976. She describes the surprise of Ferrara upon being told that the missal was not the manuscript held in the Chapter Library as VI 29. Ferrara may have been surprised at the news, but the information was not novel. By this stage, the claimants had known for at least 15 years of the whereabouts of the missal. It was a further two years before the Archbishop submitted a claim to the British Library for its return.

The Claimants' Rejoinder

65.1 In reply, the claimants argued that it is unreal to suggest that someone should have compiled a detailed inventory in the chaos following the bombing, or at any time prior to the 1948 inventory. Thereafter, they ask, what steps could have been taken between 1948 and 1952, seeing that the British Museum themselves had not revealed their acquisition until the publication of their *Quarterly* in the latter year.

65.2 Post 1952 they acknowledge that there may be some case for criticising Ferrara, but only for his having apparently been unaware of the loss, as opposed to his not having tried to find the manuscript (which he did not know to be missing). Whatever criticism might fairly be made, the fact remains that unless the claimants had acted very quickly, not just by making an enquiry, but actually by issuing legal proceedings immediately after the publication of the *Quarterly*, the British Museum would within a matter of months thereafter have been in the position to give (and arguably been obliged to give) exactly the same reply as the British Library did in 1978, that is to say that the limitation period of six years from June 1947 to June 1953 had expired, and it was therefore legally unable to return it.

65.3 So far as the Benoit-Castelli and Turner correspondence is concerned, the claimants invite the Panel to reject Mr Turner's hesitant recollection of a conversation held some 16 years earlier as a reliable piece of evidence.

The Panel's Conclusion

66.1 We have concluded that, so far as the period up to the 1948 inventory is concerned, the claimants were not remiss in failing to conduct an inventory in the light of the chaos following the bombing. Thereafter, during the remainder of De Lucia's tenure (see paragraph 31 above), and throughout Ferrara's tenure, we think that the claimants should have appreciated the significance of the 1948 inventory, and indeed the claimants do not seek to defend Ferrara in this respect.

66.2 So far as the Benoit-Castelli and Turner correspondence is concerned, we are unable to accept that Mr Turner's tentative recollection of a conversation so many

years earlier justifies a finding that the claimants had positive information of the missal's whereabouts in 1961, or at any time up to Professor Brown's visit. Furthermore, we accept the claimants' argument that, even if they had identified the whereabouts of the missal at any time after 1953 and sought its return, the British Museum would without doubt have declined the request in reliance on their legal title, and on the statutory prohibition on the disposal of objects in their collection (British Museum Act 1963, Section 5).

66.3 All in all, we consider that the weight attached by the British Library to the claimants' stewardship between 1948 and 1976 is disproportionate, and falls far short of undermining the central pillar of the claimants' case as described above, which we uphold.

THE BRITISH LIBRARY'S POSITION

The Claimants' Submission

67.1 The main focus of the claimants' criticism concentrates on the British Museum's conduct in 1946/47 in connection with the acquisition of the missal.

67.2 The British Museum was told by Captain Ash in 1946 before its acquisition that he had acquired the missal from a secondhand bookseller. This is a manuscript of which the British Museum wrote at that point that, on account of its liturgical interest, the British Museum would be happy to possess. It was later described in the Quarterly as an unusual purchase, and one of the two chief acquisitions of the British Museum during the years 1941 to 1950 in the sphere of liturgical manuscripts of outstanding importance.

67.3 The British Museum's Deputy Keeper, despite his supposedly limited experience, knew that it was in Beneventan script. He had no doubt that it was written in Benevento, and inclined to a dating of the 12th Century; he suspected that it had been removed from a church or house of religion in the war, was concerned that it was looted property and indicated that, if it was not loot, the British Museum would be happy to possess it. In other words, the British Museum was suspicious that there was something amiss with the manuscript's provenance.

67.4 Nine months later, notwithstanding these suspicions, the British Museum acquired the manuscript from Quaritch, who had purchased it at the Sotheby's auction. As Mr Turner said in his letter to Mrs Barzetti of 6 December 1977, the British Museum at first refused the manuscript on account of its unclear provenance, but were prepared to accept it when it became the subject of public auction. Mr Turner does not say why the British Museum was prepared to acquire it when all that had changed was the method of sale.

67.5 Despite its suspicions the British Museum appears to have made no attempt at all to investigate the provenance of the missal, either before or after its

acquisition. From the information recorded by the Deputy Keeper in 1946 as then available to him, from the internal evidence, and from Loew's book, it was a simple matter to work out that this particular manuscript came from either Benevento or Monte Cassino. However, the British Museum approached neither, and appears not to have been concerned to do so. Nor, it seems, did it approach any of the known scholars who might have known its provenance.

67.6 The British Museum's trust in Sotheby's to have checked the missal's provenance was misplaced. Even if the standards commonly observed by museums at the time were looser than today's, that is not sufficient to exonerate the British Museum when they actually suspected their acquisition to be war loot, and made no effort to establish its provenance themselves.

67.7 Furthermore, the claimants suggest that the water stains on the missal, which Sotheby's reported, indicated that the manuscript had recently been exposed to water (as we now know from the recent evidence of Captain Ash's daughter that it had been) casting further suspicion on its provenance.

67.8 The claimants recognise that their attack is directed at the British Museum and not at the British Library as such, but they submit that the British Library cannot be in any better position than its predecessor, and that the Panel should regard it as having assumed its responsibilities as its successor in title under the terms of the British Library Act 1972. This last submission was not contested by the respondents, who recognise that the British Library and the British Museum are, for the purposes of the Panel, essentially one and the same.

The Respondents' Response

68.1 In reply, the respondents adduced the evidence of Dr Wright, the present Head of Manuscripts, and of Dr Michelle Brown, the Curator of Illuminated Manuscripts at the British Library. Dr Wright testified in oral evidence that, thinking himself in Mr Miller's position, he would have been very much influenced by the fact that there was a public sale at auction, and that the missal was not being sold anonymously. Dr Brown testified in a written statement that in 1946 Mr Collins had recognised that textual evidence indicated a connection with the long defunct nunnery of San Pietro at Benevento; however, in the absence of any detailed codicological knowledge of the other manuscripts at the Chapter Library, he had no reason to connect this manuscript with that Library: no overt internal evidence of provenance derived from the labelling, inscription or ownership stamp survives on the missal to link it with that Library, or to any other library prior to 1947.

68.2 In their submission the respondents contended that the Panel's analysis must begin with the letter of 27 October 1946 from Captain Ash to the British Museum, as the first contact between the Museum and the missal. The letter simply describes the manuscript and seeks an appointment to obtain an expert opinion from the Museum about the book. This type of approach was not at all unusual.

68.3 An appointment was subsequently arranged, the missal was examined, and an opinion letter dated 13 November 1946 was sent to Captain Ash from Mr Collins, the Deputy Keeper of Manuscripts. The response from Mr Collins has been selectively paraphrased at times but the true picture of his view can only be gleaned from a reading of the letter as a whole.

68.4 In evidence before the Panel, Dr Wright testified that Mr Collins “got everything right”. In his opinion it was difficult to see what more he could have done: he checked the missal and was unable to find any indicators as to the provenance more recent than the 17th Century, and he checked the authoritative work of the time, Loew, which had only a brief and ambiguous reference (“Saec. Xii Missale et Kalendarium”), which did not identify the missal, and could have applied to several manuscripts. It would not have been standard practice, in the context of giving an opinion, to approach the Chapter Library; but even if, following some indication that the Library had an interest, Mr Collins had made contact, it is likely on balance that he would have been reassured that the missal was there intact, as happened to Professor Brown in the 1970s.

68.5 The next involvement of the Museum was the auction at Sotheby’s. The entry in the Sotheby’s catalogue must, as with all the evidence in this matter, be considered in context and without any application of information gained through hindsight. The catalogue entry describes the missal in similar terms to those advised by Mr Collins at the Museum. It is described as the property of Captain Ash, with no indication of how long it had been in his possession. The missal was described as being “for the Benedictine Abbey of San Pietro (no longer in existence)” and there was no indication of provenance more recent than the Middle Ages. There was nothing in the catalogue to suggest any concerns as to a link with the War. It would be unfair to suggest that either Quaritch or the Museum itself should not have trusted that Sotheby’s would have sold the missal in anything other than good faith, having satisfied itself that the missal had not been looted.

68.6 The duty of the British Museum not to dispose of its collection dates back to its foundation by Act of Parliament in 1753. By the time the British Museum discovered the provenance of the missal in 1961 (indeed from the moment the Museum acquired good title to the missal), the Museum was legally bound to retain it and there were no objections from Benevento to its doing so.

68.7 In summary the respondents submitted that, having regard to the actions of the British Museum in 1946 and 1947, the lack of identifying marks on the missal, the undisputed legal title resting with the Library, and the inactivity on the part of the claimants, the Panel must question what more the British Museum or the British Library could have done to satisfy their moral obligations in relation to the missal.

The Panel’s Conclusion

69.1 We do not find the British Library’s defence of the British Museum’s conduct convincing. It is manifest from his letter that Mr Collins suspected that the missal

might have been looted, and advised Captain Ash accordingly. When the missal came on the market 9 months later the potential purchase was handled not by Mr Collins, but by Mr Miller, Head of Manuscripts at the British Museum; however, as already noted, Dr Wright, the current Head of Manuscripts, accepted in evidence that they must have communicated with each other.

69.2 We do not think that the terms of the Sotheby's catalogue, and in particular the identification of Captain Ash as the vendor, were sufficient justifiably to allay the previously harboured suspicion as to the missal's provenance, judged by the standard of a reasonable Head of Department in a national collection. Doubtless the standards of the time were less rigorous than today's, but the possibility that the missal had been looted was so manifest that its provenance should have been further investigated. Despite the absence of identifying marks, Mr Collins had correctly pinpointed the missal's origin in Benevento, and the appropriate course would have been to direct enquiries to Benevento, or to other well-known repositories of such manuscripts such as Monte Cassino to investigate the missal's ownership prior to acquisition. This Mr Collins and Mr Miller did not do at the time, nor did their successors in 1961 even when the claimants were positively identified as the missal's original owners.

THE PUBLIC INTEREST

70. The respondents submit that the Panel should take into account the good stewardship of the missal by the British Museum and the British Library since acquisition, which, they submit, is relevant to the question of where the public interest lies. They rely on the evidence of Dr Michelle Brown describing the meticulous care that has been taken of the missal and the conservation efforts which have been employed to ensure its preservation, which they say should be a fundamental element in the determination of the moral claim. Allied to this is, they say, the accessibility of the missal in the British Museum and now the British Library to scholars and researchers. They say the British Library ensures free access to research and scholarship, and in recent decades has welcomed a number of scholars and experts in medieval subjects to study the missal. The Library is a nationally and internationally renowned centre for research and study. The Panel should, in the respondents' view be reminded of the difficulties faced in accessing the missal in the Chapter Library in the 1970s, as described by Professor Brown. They assert that the current accessibility of manuscript in Benevento is unknown, and it is in the public interest that the missal remains freely available in the British Library.

71. While the high quality of the British Library's conservation and the accessibility of their collection is not in doubt, the Panel does not think this is by any means a decisive factor especially in the light of the NMDC's Statement of Principles. Indeed, if it were decisive, the same consideration would almost certainly defeat any claim for restitution against any of the national collections within our remit, and thus frustrate the Panel's primary role as laid down in our terms of reference. Moreover, no evidence has been advanced by the respondents to show

that the claimants' present regime of conservation and accessibility at the Chapter library is defective.

THE PANEL'S FINAL CONCLUSION

72. For the above reasons we have concluded that the claimants have on balance made good their moral claim. We now proceed to consider the appropriate remedy, in order to achieve a just and fair solution in accordance with the Washington Principles.

REMEDIES

73. As already noted, the claimants seek the return of the missal and make no claim for compensation or for an ex gratia payment. Subject to the possible exception under Section 27 of the Charities Act 1993, restitution is debarred by Statute (Section 3(5) of the British Library Act 1972, and Section 5 of the British Museum Act 1963). Consequently, the claimants invite the Panel to recommend to the Government the introduction of appropriate legislation to enable the missal to be returned.

74. The British Library submit that such primary legislation affecting the entire United Kingdom on the basis of this case would not be appropriate, since the impact of legislative change is far-reaching, and would involve a great deal of consultation and soul-searching.

75. In considering this submission, we are mindful of the views of the Select Committee on Culture, Media and Sport advanced in their 7th Report of 2000, paragraph 193 as follows:—

“We consider that the case for special treatment of alleged wrongful taking during the period 1933 to 1945 has been convincingly established. It is appropriate that the Spoliation Advisory Panel has been created to ascertain the facts of individual cases and to recommend an outcome for claims which are upheld. While there are merits to a solution which secures continuing public access to an object in a museum, that interest must be seen as subordinate to the interests and wishes of a rightful owner. Where a claim has been upheld and restitution is seen as appropriate by all parties, it is essential that legislative barriers to such restitution be removed.”

Hitherto, this question has not arisen in the Panel's deliberations, as the Secretary of State informed the Select Committee when giving evidence on 11 November 2003.

76. Under paragraph 9 of the Panel's Terms of Reference, we are empowered to “direct the attention of the Secretary of State to the need for legislation to alter the powers and duties of any institution”. The recognition by the Select Committee that

objects falling within the Panel's Terms of Reference constitute a special category in full accord with the Inter Allied Declaration of 1943 and the principles laid down by the Washington Conference.

77. Guided by these two important international instruments, we have come to the conclusion that it would be right to accede to the invitation of the Select Committee, and to recommend to the Secretary of State that legislation should be introduced to amend the British Museum Act 1963, the British Library Act 1972, and the Museums and Galleries Act 1992 so as to permit restitution of objects in this particular category.

78. If this recommendation were accepted in principle, we would be pleased to have the opportunity to consider in more detail the formulation of such legislation, bearing strictly in mind the need to restrict it to the 1933 to 1945 period, which is also the limit of our Terms of Reference. Alternatively, consideration should be given to legislation solely relating to the missal itself, for which there is a precedent in the Australian Constitution (Public Record Office Copy) Act 1990. Although enacted in very different circumstances, this statute shows that there is a precedent for the legislative release of a single object from the collection of a single institution.

79. Such legislation would pave the way for the restitution of the missal to Benevento, which we consider would be the just and fair solution in the present case.

80. Meantime, we recommend that the missal should be returned to Benevento as soon as possible on loan, and that the parties should forthwith engage in constructive discussions on the terms and conditions of such a loan.

23 March 2005

The Rt Hon Sir David Hirst – Chairman
Sir Donnell Deeny
Professor Richard J Evans
Sir Terry Heiser
Professor Peter Jones
Martin Levy
Peter Oppenheimer
Professor Norman Palmer
Ms Anna Southall
Dr Liba Taub
Baroness Warnock

Appendix 1: Terms of Reference
Appendix 2: Inter-Allied Declaration
Appendix 3: Washington Declaration

APPENDIX 1

SPOLIATION ADVISORY PANEL CONSTITUTION AND TERMS OF REFERENCE

Members of the Panel

1. The members of the Spoliation Advisory Panel (“the Panel”) will be appointed by the Secretary of State on such terms and conditions as he thinks fit. The Secretary of State shall appoint one member as Chairman of the Panel.

Resources for the Panel

2. The Secretary of State will make available such resources as he considers necessary to enable the Panel to carry out its functions, including administrative support provided by a Secretariat (“the Secretariat”).

Functions of the Panel

3. The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object (“the object”) during the Nazi era (1933-1945), where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit (“the institution”). The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.

4. In any case where the Panel considers it appropriate, it may also advise the Secretary of State

- (a) on what action should be taken in relation to general issues raised by the claim, and/or
 - (b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.
5. (a) In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 7(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;
- (b) The Panel’s proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant’s case (paragraph

7(e)) and whether any moral obligation rests on the institution (paragraph 7(g));

- (c) Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State;
- (d) If the claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is expected to accept the implementation in full and final settlement of his claim.

Performance of the Panel's functions

6. In performing the functions set out in paragraphs 3 and 4, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.

7. For this purpose the Panel shall:–

- (a) make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel consider appropriate to assess each claim as comprehensively as possible;
- (b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;
- (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
- (d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;
- (e) give due weight to the moral strength of the claimant's case;
- (f) evaluate, on the balance of probability, the validity of the institution's title to the object;
- (g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;

- (h) take account of any relevant statutory provisions, including stipulations as to the institution's powers and duties, including any restrictions on its power of disposal;
- (i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;
- (j) where applicable, assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;
- (k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and
- (l) formulate and submit to the Secretary of State any advice pursuant to paragraph 4 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

Scope of Advice

8. If the Panel upholds the claim in principle, it may recommend either:
- (a) the return of the object to the claimant, or
 - (b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or
 - (c) an ex gratia payment to the claimant, and
 - (d) in the case of (b) or (c) above, the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and
 - (e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.
9. When advising the Secretary of State under paragraph 4(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may, under paragraph 4(a), direct the attention of the Secretary of State to the need for legislation to alter the powers and duties of any institution.

APPENDIX 2

INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL (WITH COVERING STATEMENT BY HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND EXPLANATORY MEMORANDUM ISSUED BY THE PARTIES TO THE DECLARATION)

London, January 5, 1943

His Majesty's Government in the United Kingdom have to-day joined with sixteen other Governments of the United Nations, and with the French National Committee, in making a formal Declaration of their determination to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration and it has extended to every sort of property - from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same - to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors.

It has always been foreseen that when the tide of battle began to turn against the Axis the campaign of plunder would be even further extended and accelerated, and that every effort would be made to stow away the stolen property in neutral countries and to persuade neutral citizens to act as fences or cloaks on behalf of the thieves.

There is evidence that this is now happening, under the pressure of events in Russia and North Africa, and that the ruthless and complete methods of plunder begun in Central Europe are now being extended on a vast and ever-increasing scale in the occupied territories of Western Europe.

His Majesty's Government agree with the Allied Governments and the French National Committee that it is important to leave no doubt whatsoever of their resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasised their determination to exact retribution from war criminals for their outrages against persons in the occupied territories. Accordingly they have made the following joint Declaration, and issued the appended explanatory memorandum on its meaning, scope and application:-

DECLARATION

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Governments making this Declaration and the French National Committee solemnly record this solidarity in this matter.

London
January 5, 1943

APPENDIX 3

WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS

PRINCIPLES WITH RESPECT TO NAZI-CONFISCATED ART

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

- I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
- II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Conference on Archives.
- III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
- IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be made for unavoidable gaps or ambiguities in the provenance in the light of the passage of time and the circumstances of the Holocaust era.
- V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
- VI. Efforts should be made to establish a central registry of such information.
- VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
- VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

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