

Advisory Commission
on the return of cultural property seized as a result of National Socialist
persecution,
especially Jewish property

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Recommendation of the Advisory Commission
in the case of
Heirs of A. B. ./ Bavarian State Painting Collections

Berlin— 1 July 2020. The Advisory Commission on the return of cultural property seized as a result of National Socialist persecution, especially Jewish property, chaired by Professor Hans-Jürgen Papier, decided on 23 June 23 2020 regarding the case of Heirs of A. B. ./ Bavarian State Painting Collections, to recommend the restitution of the painting “Lemon Slice” by Jacob Ochtervelt to the community of heirs of A. B., with the stipulation that, if the painting is sold within 10 years after being returned, the state of Bavaria is to receive 50% of the proceeds.

The Commission’s reasons for the recommendation are set out below.

1. The object of this case is the painting “Lemon Slice” by Jacob Ochtervelt (1634–1682). The work is an oil painting on panel, approximately 48.6 x 37.2 cm in size, dating from around 1667. The painting is also known by the titles “Oyster Breakfast”, “Interieur” or “Zitronenscheibchen”. It is in the possession of the Bavarian State Painting Collections.

a) The application was submitted by the community of heirs of A. B., represented by Dr. D. B. (great-grandson of A. B.). A. B. was the main shareholder of B. & Co. Bank, founded in 1889 in Berlin. He died on 31 January 1938. His family was subjected to severe injustice during the National Socialist era. His four children – C., D., E. and F. – were all persecuted directly by the Nazi regime. C. B. was murdered at the Sachsenhausen concentration camp in May 1942. D. B. was imprisoned by the Gestapo from October 1938 to March 1939. Himself, his sister E. and her husband Dr. G. H. were forced to emigrate. G. H. was interned at Sachsenhausen concentration camp during the 1938 November pogroms and was released in return for a payment of 15,000 Reichsmark to the Jewish community. A. B.’s daughter F. survived in what the National Socialists termed a “Mischehe” (mixed marriage), and was affected by the reprisals such marriages entailed.

b) The contested painting is associated with a loan granted to attorney Dr. T. U. in 1927. U. was working in Amsterdam at the time and took out a loan of 217,616 Reichsmark from B. & Co. Bank. As collateral for the loan he transferred ownership of his collection of 21 paintings – among them the “Lemon Slice” – to the lender. The value of the collection was agreed to be approximately 200,000 Reichsmark. The painting initially remained in U’s possession. After the death of A. B. in 1938, the bank was discriminated against as considered “non-Aryan” and liquidated under pressure of the National Socialist state. The paintings provided by U. as collateral were to be liquidated for that purpose and in preparation for emigration. The paintings were consequently moved from Amsterdam to the bank’s vault in Berlin. At the time, U. had only paid off part of the loan.

The collection was sold through the art trade and yielded proceeds of approximately 190,000 Reichsmark. The “Lemon Slice” was sold on 19 November 1938 to the art dealers Hans Bammann (Düsseldorf) and Johannes Hinrichsen (Berlin) for 35,000 Reichsmark. The entire proceeds were used to service U.’s loan. The applicants assume – as neither the loan contract nor the security agreement are available –

that in the meantime the loan had been taken over personally by A.B. and O.P, a limited partner of the bank. The proceeds from the paintings were initially used to settle P.'s claims. The remainder was offset with the claims of A. B.'s estate. U. repaid any remaining debt to the heirs of A. B. in full by 1950.

The "Lemon Slice" was later sold to the industrialist Fritz Thyssen. His daughter transferred ownership of the painting to the Bavarian State Painting Collections in 1987 along with other art works. The State Painting Collections exchanged it in 2008 for another painting owned by the gallery French & Company. French & Company consigned the painting to Sotheby's New York for the auction on 5 June 2008 under lot number 46, where it sold for 602,000 US dollars to the New York gallery Otto Naumann Ltd. As the provenance of the painting had been imprecise and Otto Naumann had also been informed by the heirs of A. B. about their claim, Naumann cancelled his purchase with consent of the previous owner. After the other transactions of the painting, including the original trade agreement, were also rescinded, it returned once again to the possession of the Bavarian State Painting Collections.

c) The parties agree that A. B. and his family were subjected to massive, even murderous persecution during the National Socialist era. They also agree essentially on the provenance of the contested painting.

However, the heirs of A. B. as applicants presume that A. B. had acquired absolute ownership of the painting. They maintain that the loan originally granted by B. & Co. Bank was transferred later to A. B. personally. Accordingly, A. B. would then have become the collateral recipient for the collection provided for that purpose. At the latest, when he, or rather his heirs, gained possession of the paintings at an unspecified date in 1938, ownership by way of collateral would have become absolute, and the heirs could have disposed of the property as they saw fit. The fact that U. ultimately paid off his debt in full, the heirs assert, does not affect the issue of ownership because U.'s right to retransfer of ownership became void when the paintings provided as collateral were liquidated. Under pressure from the National Socialist regime, however, the family had been forced to sell the painting. The price it yielded, the heirs assert, was below market value. Also, the heirs were not able to freely dispose of the proceeds.

The Bavarian State Painting Collections as the respondent to the application essentially asserts that A. B. and the community of heirs of A. B. had at no point in time acquired absolute ownership of the painting, and that for this reason alone a restitution, meaning transfer of full ownership, was out of the question. They further state that a purchase price that was possibly too low – which they expressly deny – would have been solely to the detriment of the borrower U.

d) As the parties could not reach consensus on restitution, they agreed to present the case to the Advisory Commission. In letters by the community of heirs of A.B. dated 10 May 2019 and by the Bavarian State Painting Collections dated 18 January 2019 and 23 August 2019, both parties set out their positions. During a hearing on 9 March 2020, the opposing arguments were discussed again in more detail. The Advisory Commission then submitted their proposal to the parties, suggesting that the Commission recommended restitution but with the stipulation that a consensus be reached about the utilization of the painting. This consensus was not subsequently reached.

2. The Advisory Commission now recommends that the contested painting be returned. However, since this is not supported by a legal assessment (a) but exclusively by moral and ethical considerations (b), the Commission adds a restrictive proviso to the effect that, if the painting is sold within 10 years after transfer of ownership, the state of Bavaria is to receive 50% of the proceeds (c).

In detail:

a) A. B. or his heirs never acquired absolute ownership of the contested painting, but merely ownership by way of collateral. It must be presumed that A. B. personally took over the loan to U. together with the limited partner O. P. after 1929. The heirs of A. B. made statements to that effect even in the restitution application of 21 December 1948 (to the Zentralmeldeamt Bad Nauheim, Az. Ia 5547). These statements are supported by the fact that the loan was no longer listed in the bank's audit reports after 1929. Also, the borrower U. continued to adhere to the loan contract after the sale of the collection and the liquidation of the bank and repaid his loan in full. Based on the restitution application of 1950, it must also be presumed that only A. B., but not O.P., was the secured party.

Nevertheless, the security transaction never resulted in the heirs of A. B. acquiring absolute ownership of the painting. A transfer of ownership for security purposes is accompanied by a contractual collateral loan agreement. In case of a loan, this agreement specifies that ownership applies only for as long as the lender's claim (secured party) against the borrower (collateral provider) exists. The transferred objects in such cases generally remain in the possession of the collateral provider. However, the collateral loan agreement does not become void automatically when possession is transferred to the secured party for the purpose of liquidation. The objects provided as collateral are removed from the estate of the collateral provider in legal terms but remain part of the provider's estate in economic terms.

In the case at hand, therefore, the transfer of ownership of the paintings did not result in absolute ownership for the heirs of A. B. The paintings were moved from Amsterdam to Berlin after the death of A. B. when the bank had to be liquidated. This did not affect the collateral loan agreement. The items provided as security could still only be sold for the purpose of offsetting the proceeds against the loan. Neither the heirs of A. B. nor U. presumed that ownership was transferred in place of fulfillment. U. himself continued to observe his obligations under the loan contract.

The sale yielded proceeds of approximately 190,000 Reichsmark, of which 35,000 were for the "Lemon Slice". Even though this was about 10,000 Reichsmark less than the estimated value of the paintings at the time of the security transaction, the purchase price for the "Lemon Slice" can still be considered appropriate. Regarding the price, the respondent explained that in 1941 another painting by Ochtervelt (of similar size and subject) from a Jewish estate was sold for only 3,800 Reichsmark, probably because the sale – unlike that of the "Lemon Slice" – had been labeled a "Jew auction". The fact that the proceeds for the "Lemon Slice" were nine times higher suggests that the price was adequate.

Once the transaction was offset against U.'s remaining loan amount, U. still had to pay about 6,666 Reichsmark per annum on the loan until 1945, as evidenced by a notification of A. B.'s executor of 25 September 1941 to the Finanzamt Moabit-West. T. would have been relieved of the remaining debt only in the event of his death, as specified in an agreement (see letter by Dr. K. L. K. to the Oberfinanzpräsident Berlin-Brandenburg of 26 May 1942), which also points to the fact that possession of the paintings was not transferred in place of fulfillment. There is consequently no evidence whatsoever of a mutual agreement to annul the collateral loan agreement and an associated transfer of full ownership of the collection to the heirs of A. B.

At this point it is not relevant that the heirs of A. B. undoubtedly suffered substantial financial damage as a result of the forced liquidation of the bank. It is out of the question that the heirs of A. B. were able to freely dispose of the proceeds from the sale of the security at the end of November 1938, not only because this was opposed by the collateral loan agreement but also because they were persecuted and deprived of their rights by the National Socialist regime. Since the paintings were also sold to prepare the family's escape, reference must be made here to the "Vertraulicher Erlass Nr. 64" (confidential decree) of 14 May 1938; this was followed on 3 December 1938 by the "Verordnung über den Einsatz des jüdischen Vermögens" (Ordinance on the Use of Jewish Assets), of which particularly § 14

was relevant. Notwithstanding the details, it can therefore be safely presumed that the heirs of A. B. suffered significant losses due to the liquidation of the bank.

This loss of assets, however, cannot be the object of a restitution proceeding. Dr. H. and spouse, acting on behalf of the heirs of A. B., also conceded this point during the compensation proceedings. In a letter of 3 October 1950, they withdrew the pending restitution claims (Case No. RÜ 214/50 and RÜ 215/50) including the “Lemon Slice” against the Wiedergutmachungsamt (Office of Restitution) before the District Court of Düsseldorf. The withdrawal was explained as follows: “Bammann had bought the two paintings during a time when they were Jewish property provided as collateral. Since then, the original owner, who is not Jewish, has repaid his debt. Although this Aryan owner may have suffered financial damage due to the fact that the paintings had to be sold as Jewish property, the paintings can no longer be considered Jewish property, since the debt was paid in full. Therefore, the conditions for our application no longer apply, and we hereby formally withdraw the application. We assume that the proceedings are hereby concluded.” Even though the applicant contextualized this withdrawal differently, particularly with regards to the anti-restitution practices that were predominant at the time, the legal assessment of the facts is clear: the applicants could not lose ownership of the contested painting because they never had absolute ownership. From a legal standpoint, restitution of the painting is therefore impossible.

b) Nevertheless, the Advisory Commission in its search for a “just and fair solution” in line with the Washington Principles is not limited to the legal assessment. Rather, it is specifically called upon to consider ethical and moral aspects in order to reach a recommendation that addresses the particulars of each individual case.

In the case at hand, these moral and ethical considerations give rise to a qualification of the legal assessment. During the hearing before the Commission, the applicants memorably described the great symbolic significance attributed to the painting by the family. The family suffered enormously from persecution. Their own art collection was lost due to persecution and war. The forced liquidation of the bank, during which existing loan collateral was also liquidated, did not release any funds which the family could freely dispose of. The painting is a focal point for family memories of these terrible sufferings. Its auction on 19 November 1938 – ten days after the pogroms throughout the Reich – occurred during a time when the persecution of the Jewish population shifted fully towards a policy of existential annihilation. This new radicalization of National Socialist repression left deep scars on the applicants’ family history. As mentioned above, all four children of A. B. were persecuted by the National Socialist regime. Even today, the family resides almost entirely abroad as a result of that persecution.

To the applicants, the restitution of the “Lemon Slice” is associated with the hope of making their peace with this tragic past – if at all possible. As such, the financial loss, which is the focus of the legal assessment, recedes behind the non-material damage, which is the applicants’ essential concern. This non-material damage, however, is inextricably linked to the contested painting. For this reason – and no other – the Commission recommends the return of the painting, to make a contribution toward the recognition and amendment of historical injustice. The Commission also takes into account that the applicants’ interests are not opposed by equally valid concerns of the respondent. The respondent received the painting as part of a larger purchase. The acquisition of the “Lemon Slice” was thus not based on a deliberate curatorial decision; the painting is not part of the collection rationale and had not previously been exhibited.

c) The Commission nevertheless emphasizes that the respondent was not obligated to return the painting for legal reasons. The contested painting remains in the respondent’s property. In general, the respondent is committed to clarifying contested provenances of items in their collection and to return

the works on mutually agreeable terms whenever possible. In the case at hand, the respondent has thus also endeavored not to benefit from the unclear provenance. It is important to the Commission, therefore, to not pass moral-political judgment on the Bavarian State Painting Collections because of their prior negative stance.

In this particular case, only a comprehensive weighing of all relevant concerns ultimately prompted the recommendation to return the painting. Since the applicant Dr. D. B. thus far has not provided powers of attorney from the remaining heirs of A. B., the recommendation is for restitution to all heirs of A. B. (see § 2039 BGB, German Civil Code). The recommendation is primarily a gesture of reconciliation. To ensure that this remains recognizable, the Commission felt it was important that the parties come to a mutual agreement. When this failed, the Commission now recommends restitution with stipulations.

The function of the Advisory Commission is to mediate in the event of disputes between those currently in possession of cultural goods and the former owners or their heirs, if requested to do so by both parties. The Commission can make an ethically based recommendation to resolve the conflict. Contributors to the above recommendation as members of the Commission in an honorary capacity were the former president of the Federal Constitutional Court, Professor Hans-Jürgen Papier (chair of the Commission); art historian Professor Wolf Tegethoff (deputy chair of the Commission); former member of the Bundestag, Marieluise Beck; the former president of the Federal Administrative Court, Marion Eckertz-Höfer; historian Professor Raphael Gross; the former president of the Association of German Cities, Dr. Eva Lohse; the former director of the Museum für Kunst und Gewerbe, Hamburg, Dr. Sabine Schulze; the former director of the American Academy Dr. Gary Smith, the former president of the German Bundestag Professor Rita Süßmuth, and legal philosopher Professor Dietmar von der Pfordten.

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