

WORKING TRANSLATION

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

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Recommendation of the Advisory Commission in “Behrens v. City of Düsseldorf”

Berlin, 3 February 2015. The Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, chaired by Prof. Dr Limbach, has produced an opinion on the case of Behrens v. Düsseldorf.

The facts of the case are as follows:

The painting “Pariser Wochentag” (Weekday in Paris) was painted by Adolph von Menzel in 1869 and bought by Eduard Ludwig Behrens, owner of the bank L. Behrens & Söhne in Hamburg, by 1886. It was part of his collection of paintings, the subject of a catalogue printed in 1891 (*Die Sammlung Eduard L. Behrens zu Hamburg. Catalog von Prof. E. Heilbut* (The collection of Eduard L. Behrens in Hamburg. Catalogue by Prof. E. Heilbut)). After Behrens’ death in 1895, the collection, including the painting “Pariser Wochentag”, passed to his son Eduard Ludwig Behrens, Jr. After the death of Eduard Ludwig Behrens, Jr. in 1925, the painting and the rest of the collection passed to his son George Eduard Behrens (21 February 1881–5 June 1956). However, the parties do not agree whether George Eduard Behrens was the sole owner or only the administrator of the common property (*Gesamtgut*) of his deceased father until the death of his mother in 1951, in accordance with the joint will of Eduard Ludwig Behrens, Jr. and his wife, Franziska Behrens née Gorrissen, of 22 September 1922 (community of property of the widow Franziska Behrens and the children George Eduard Behrens and Elisabeth Emma Behrens).

In order to reduce the inheritance tax, in 1925, George E. Behrens, who headed the bank L. Behrens & Söhne as senior director in the fifth generation, agreed to loan a number of paintings from his grandfather’s collection to the Hamburg Kunsthalle for exhibitions for ten years. In early March 1935, he informed the Kunsthalle that, as the agreement had expired on 6 February, he planned to sell

some of the paintings in Germany or abroad. In response to the Kunsthalle's request, on 23 March he sent the Kunsthalle "a list of the paintings from the common property of Galerie Ed. Behrens ... which I plan to sell". Of the 33 paintings on this list, only Menzel's "Pariser Wochentag" was crossed out. Behrens wrote that if the Kunsthalle was interested in buying any of these paintings, it should contact Professor Hermann Uhde-Bernays in Starnberg, whom Behrens had charged with selling the paintings.

At about the same time or possibly earlier, the director of the Städtische Kunstsammlungen Düsseldorf (art collections of the city of Düsseldorf) was asked to buy "a major work by Menzel" for the city. On 24 July 1935, he informed the lord mayor that his "negotiations" in the matter had been successful and that he had "just" received word that "one of the most important paintings of the master", "Pariser Wochentag", "was in the possession of the Düsseldorf art dealer I commissioned to conduct the negotiations". Already on 31 July 1935, the director informed Galerie Paffrath that the lord mayor had approved the purchase of the painting for the asking price of 33,000 Reichsmarks; after the negotiations on the mode of payment were successfully concluded, the Städtische Kunstsammlungen bought the painting "Pariser Wochentag" and have displayed it ever since.

Although the owners of the bank L. Behrens & Söhne had been Protestant for several generations, according to the Nuremberg laws George E. Behrens and his sister Elisabeth Emma were considered "full Jews" (*Volljuden*) and their mother a "half-breed in the first degree" (*Mischling 1. Grades*). Following the pogrom in November 1938, Behrens was initially held in Hamburg's police prison before being deported to the Sachsenhausen concentration camp (until March 1939). He had already given up his duties at the bank L. Behrens & Söhne effective 31 May 1938; the bank was liquidated effective 31 December 1938. After paying the "taxes" levied on Jewish assets (*Judenvermögensabgabe*) and on persons leaving Germany (*Reichsfluchtsteuer*), Behrens emigrated via Belgium and France to Cuba in April 1939. His sister emigrated in 1941. After the war, both returned to Hamburg in 1950 and lived there until their deaths. Their mother survived the Nazi regime in Hamburg.

It is undisputed that George E. Behrens was a victim of Nazi terror and was subject to racist persecution, was forced to emigrate and saw his assets plundered by the Nazis. The question is whether he was no longer able to dispose freely of his property or the common property of Eduard Behrens under his management at the time he sold the painting "Pariser Wochentag" and whether

he was forced by the political circumstances to act differently than he would have under other circumstances. So the dispute focuses on whether the sale of the painting constitutes a sale under duress as the result of Nazi persecution (*NS-verfolgungsbedingter Zwangsverkauf*), which would justify restitution to the community of heirs of George E. Behrens.

The community of heirs believes that the painting was sold under duress. They state that “Jewish private banks [were in] decline” already starting in spring 1933 and that “from 1933 on the bank [suffered] major losses in revenue and income”. In this context, they state that Behrens lost “a total of 11 seats on the board between 1933 and 1935” and “was forced” in July 1934 to sell “the family home at Harvestehuderweg 34”, for which he received “compensation by way of a settlement” in 1952. They state that, starting in autumn 1935, he tried “to establish a new economic base” by expanding the Amsterdam branch, N.V. Behrens, but was ultimately unsuccessful. This is why, they say, the painting “Pariser Wochentag” was sold under the pressure of persecution.

The heirs argue that Behrens sold the painting directly to the Düsseldorf municipal art collections, and that the Düsseldorf Galerie Paffrath, which the museum’s director commissioned to look for a high-quality Menzel work, only acted as an intermediary. The heirs also argue that the contract of sale was concluded on an unspecified date after 15 September 1935, the date the Nuremberg laws were passed.

They say the sale of the painting constitutes a loss of property as the result of persecution (*verfolgungsbedingter Vermögensverlust*), because the sale price was not appropriate and it was not clear whether Behrens ever received the money or was able to dispose of it freely. The heirs say that in April 1934, an expert such as Uhde-Bernays appraised “Pariser Wochentag” at 50,000 RM, and in 1940/41 two other Menzel paintings were sold for 48,000 and 70,000 RM. Their heirs say that there is no concrete evidence that Behrens ever received the money from the sale. Based on the facts presented, the community of heirs therefore demands the restitution of the painting “Pariser Wochentag”.

The city of Düsseldorf disputes that the painting was sold under duress and that the sale constitutes a loss of property. It states that the business of private Jewish banks was hardly affected in the early years of the Nazi regime. The city quotes the commemorative volume *175 Jahre L. Behrens & Söhne* (L. Behrens & Söhne 175 years on) published in 1955 as stating that “the economic upturn after 1933

initially [benefited] L. Behrens & Söhne as well". Until 1937, according to the city of Düsseldorf, the bank participated in consortia to issue bonds of the German Reich and the German Reichsbahn-Gesellschaft. The city argues that there is nothing to indicate that the sale of the property on Harvestehuderweg to the city of Hamburg in July 1934 occurred under duress as the result of Nazi persecution. In view of the bank's economic situation in spring and summer 1935, a forced sale of "Pariser Wochentag" can be ruled out, according to the city.

In the city's view, Behrens did not sell the painting "Pariser Wochentag" to the Düsseldorf municipal art collections; instead, it was sold by Uhde-Bernays on the instructions of Behrens to Galerie Paffrath in July 1935 for 30,000 RM. Galerie Paffrath then sold the painting in August or early September for 33,000 RM to the art collections of the city of Düsseldorf. The city says this is shown by the gallery's log of incoming paintings together with a sworn statement by the gallery's subsequent long-time manager, and is further confirmed by the agreement on the mode of payment when the city bought the painting: This agreement was not made with Behrens or Uhde-Bernays, but was between the city and Galerie Paffrath; according to this agreement, half of the sale price was rendered in the form of eight paintings from the city's collection. Under these circumstances, the payment process was not concluded until autumn 1937.

The city of Düsseldorf regards the sale price as appropriate, saying it was the highest price paid between 1928 and 1935 for "a Menzel work of this quality". According to the city, the price of 50,000 RM cited by Uhde-Bernays for "Pariser Wochentag" repeated an appraisal from ten years earlier in which three Menzel watercolours and/or gouaches were valued at 20–30,000 RM. The city of Düsseldorf sees no indication that the sale price was not paid to Behrens. The city is of the opinion that, had payment been denied, Behrens could have taken legal action against the buyer without difficulty at that time. The city also notes that Behrens sold another Menzel painting ("Beati possidentes") from the collection of Eduard L. Behrens to Galerie Paffrath no later than 1938.

For these reasons, the city of Düsseldorf opposes restitution of the painting "Pariser Wochentag" to the community of heirs of George E. Behrens.

After the parties were unable to achieve a consensus, they agreed to refer the case to the Advisory Commission and end their dispute in accordance with the Commission's recommendation.

After careful examination of the documents and evidence presented by the parties, the Commission has come to the conclusion that the 1935 sale of the Menzel painting “Pariser Wochentag” from the common property of Eduard L. Behrens did not constitute a loss of property as the result of Nazi persecution; it therefore cannot recommend returning the painting to the community of heirs of George E. Behrens.

The Commission acknowledges that, following the Reich Citizenship Act (*Reichsbürgergesetz*) of 15 September 1935, George E. Behrens belonged to the group of Jews and “non-Aryans” collectively persecuted on racist grounds; that he was imprisoned at a concentration camp from November 1938 until March 1939; that he was forced to liquidate his bank; and that he was forced into exile at the cost of major loss of property. However, the Commission believes that the situation for the bank and the Behrens family was different at the time the Menzel painting was sold.

There is no doubt that following the spring of 1933, there were massive anti-Semitic campaigns in Germany as well as anti-Jewish riots and a new legal situation after the “Aryan clause” was introduced, banning Jews from the civil service. However, the historical research agrees that Jewish private banks were not directly affected in the initial years of the “Third Reich”. Until the end of Hjalmar Schacht’s tenure as Reich Minister for Economic Affairs (*Reichswirtschaftsminister*) in 1937, the ministry wanted Jewish private banks to continue to function smoothly and successfully fended off anti-Semitic activities in this area for several years. As the global economic crisis ebbed, Jewish private banks even experienced an economic upturn, which was also documented for the bank L. Behrens & Söhne.

There is no concrete evidence that the bank L. Behrens & Söhne suffered “major losses in revenue and income” in the initial years of the Nazi regime; the community of heirs asserts such losses occurred already starting in 1933. The community of heirs states that by 1935, George E. Behrens had already lost all eleven seats on the board that he held at the end of the Weimar Republic in 1933. It also argues that the fact that compensation was granted in 1952 for the sale of the family home on Harvestehuderweg in July 1934 confirms that the sale was the result of Nazi persecution.

Neither argument is valid. Contrary to what the heirs assert, the large majority of seats on the board, namely seven, remained intact until 1935. The loss of two seats in 1932–33 and again in 1933–35 was more likely for general economic reasons than anti-Semitism. The loss of board seats therefore

cannot serve as evidence of economic duress caused by persecution prior to the Nuremberg laws. This interpretation is corroborated by the fact that the bank belonged to the consortia to issue bonds of the German Reich and the German Reichsbahn-Gesellschaft until 1937.

With regard to the property on Harvestehuderweg, the 1922 testament establishing the common property of Eduard L. Behrens stated in Section 11: "If my wife [who was guaranteed the right of residence during her lifetime] wishes to sell or after the death of my wife, the property shall be sold." Thus the administrators of the common property were instructed to sell the property, which was apparently regarded as an encumbrance on the common property, as soon as the testator's widow no longer lived there. In July 1934, the city of Hamburg paid 200,000 RM for the property. In view of the sales price alone, there is no indication that the city even attempted to apply pressure or force a sale at a reduced price on anti-Semitic grounds. However, it is correct that George E. Behrens, who had applied for restitution, in February 1952 was awarded total compensation of 30,000 Deutschmarks from the city of Hamburg for this property and another property on Harvestehuderweg. The reasons for the settlement by the regional court and the relatively low compensation amount (in 1950, Behrens and his sister were awarded 130,000 DM for the bank's office in Hermannstrasse, sold in 1940 for 400,000 RM) are not known.

In this context, the community of heirs noted that, in June 1959, an administrative officer wrote in a proposal for addressing a restitution claim lodged by one of George E. Behrens' heirs concerning the 1934 sale (mentioned in the text "only to provide a full picture") that the sale was made "for reasons of persecution, because boycott actions against the testator's bank made it questionable whether the property could be maintained". It is unclear, however, which facts or documents the author based this statement on. There is no information on "boycott actions" against the bank L. Behrens & Söhne up to summer 1934. Nor would such "boycott actions" correspond to the political and economic situation of Jewish private banks in the early phase of the Nazi regime as uncovered by the research. So it is not possible to see how George E. Behrens was "forced" by a situation of political persecution to sell the property.

According to the documents, Behrens was interested in selling, "in Germany or abroad", a number of paintings from the "Galerie Ed. Behrens" common property, including the painting "Pariser Wochentag", "as soon as the financial market situation seemed favourable" once the ten-year agreement with the Hamburg Kunsthalle expired (note on a conversation with Behrens at the

Hamburg Kunsthalle dated 8 March 1935). On the list of paintings to be sold that Behrens sent the Kunsthalle on 28 March 1935, "Pariser Wochentag" was already crossed out, so it may be speculated that he was already engaged in serious negotiations with another interested buyer.

In July 1935, the painting appeared in the log of incoming paintings of the Düsseldorf Galerie Paffrath, with the price noted as "30,000" and the origin given as "G. Behrens Hamburg d[urch] Uhde Bern[ays]" (G. Behrens Hamburg via Uhde Bernays). It is undisputed that the city of Düsseldorf art collections bought the painting with the permission of the lord mayor and the responsible city official, which was issued no later than 31 July, although the exact date of the purchase is not known. Regarding the question whether the Galerie bought the painting or only took it on commission: The volume commemorating the 100th anniversary of Galerie Paffrath (*100 Jahre Galerie Paffrath*) clearly refers to the "purchase" of the painting and notes that it was then bought by the Düsseldorf art museum. Nor is it disputed that Galerie Paffrath bought a second Menzel painting from Behrens in 1938 (and did not take it only on commission).

To answer the question whether the gallery bought the painting from Behrens or only took it on commission, it is crucial that the city of Düsseldorf art collections agreed on the mode of payment for "Pariser Wochentag" not with Behrens or Uhde-Bernays, but with Galerie Paffrath. And the mode of payment agreed – only 15,000 RM was paid in cash, with the remaining 18,000 RM paid in paintings from the city of Düsseldorf art collections – would only make sense for an art dealer, not for a seller in the process of dissolving a collection. So there is every indication that Behrens (via Uhde-Bernays) sold the painting to Galerie Paffrath in July 1935, which then sold it in the following weeks (or months) at a premium of 10% to the city of Düsseldorf art collections. The date that Behrens sold the painting is important, as it was clearly before 15 September 1935, the date on which the Nuremberg laws were passed.

If one assumes, as does the community of heirs, based on the collective persecution of George E. Behrens, that the painting was sold under duress and thus constitutes a loss of property as the result of Nazi persecution, this assumption is contradicted by the fact that Behrens received an appropriate price for the painting and was able to freely dispose of this sum.

The Commission believes that 30,000 RM sale price for "Pariser Wochentag" was in line with the market situation at the time and was thus appropriate. Another indication of this is the fact that the

sale was relatively rapid and the seller did not wait for better offers. The higher prices for “Pariser Wochentag” and two other Menzel paintings cited by the community of heirs do not contradict this assessment, because the price of 50,000 RM given by Uhde-Bernays was explicitly based on an appraisal made ten years earlier, during a period of stabilization in the Weimar Republic, under much different market conditions. And market conditions for Menzel paintings were also better in 1940/41, when Germany seemed to be winning the war. We therefore do not find that the sale of “Pariser Wochentag” constitutes a loss of property.

The remaining question is whether George E. Behrens received the sale price and was able to freely dispose of the amount. It is true that no receipts exist. But there are no indications that Galerie Paffrath did not pay. In the summer of 1935, an art gallery could not have afforded not to pay for a painting sold by the owner of a large, well-known collection, and at that time Behrens could have taken legal action without difficulty against someone who did not pay on time. If Galerie Paffrath had not paid, the city of Düsseldorf would doubtless not have paid the full price to the gallery in the subsequent years. Nor is there any doubt that Behrens was still able to freely dispose of the money in 1935. The sale was conducted properly.

The overall result of the individual steps in the examination is therefore that the community of heirs’ claim for restitution cannot be granted because the sale of the painting “Pariser Wochentag” did not constitute a loss of property as the result of Nazi persecution.

The task of the Advisory Commission is to mediate in case of disputes between the parties presently in possession of cultural goods and their former owners or the heirs of the latter, if both parties so desire. The Commission can issue an ethically grounded recommendation for resolving the dispute. Former Federal President Dr Richard von Weizsäcker, former President of the German Bundestag Professor Dr Rita Süßmuth, former President of the Federal Constitutional Court Professor Dr Jutta Limbach, legal scholar Dr Hans Otto Bräutigam, legal philosopher Professor Dr Dr Dietmar von der Pfordten, historian Professor Dr Reinhard Rürup, art historian Professor Dr Wolf Tegethoff and philosopher Professor Dr Ursula Wolff have agreed to serve as honorary members of the Commission.

The Deutsches Zentrum Kulturgutverluste (German Lost Art Foundation) is the office of the Advisory Commission and point of contact for those submitting claims.

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