**Empfehlung der Beratenden Kommission
in der Sache
Erben nach A. B. ./. Bayerische Staatsgemäldesammlungen**

Guide English translation:

Berlin - 1 July 2020: The Advisory Commission for the Restitution of Cultural Property Confiscated in the Context of National Socialist Persecution, in Particular from Jewish Property, chaired by Prof. Dr. Hans-Jürgen Papier, established the Advisory Commission for the Restitution of Cultural Property Confiscated in the Context of National Socialist Persecution, in particular from Jewish Property, on 23 July 2020 in the case of the Heirs of A. B. / Bayerische Staatsgemäldesammlungen. On 23 June 2020, the Bavarian State Painting Collections decided to recommend the restitution of the painting "Das Zitronenscheibchen" by Jacob Ochtervelt to the community of heirs of A. B., with the proviso that in the event of a sale within ten years of the transfer of the painting, the Free State of Bavaria is to receive 50% of the proceeds.

The Commission justifies its recommendation as follows:

The subject of the proceedings is the painting "Das Zitronenscheibchen" by Jacob Ochtervelt (1634-1682). It is an oil painting on wood, approx. 48.6 x 37.2 cm, which was painted around 1667. The painting is also known under the titles "Oyster Breakfast", "Interior" or "Lemon Slice". It is owned by the Bayerische Staatsgemäldesammlungen.

a) The applicant is the community of heirs of A. B., represented by Dr. D. B. (great-grandson of A. B.). A. B. was the principal shareholder of the banking house B. & Co. in Berlin. He died on January 31, 1938. His family suffered grave injustice during the National Socialist era. His four children - C., D., E. and F. - were all personally persecuted by the Nazi regime. C. B. was murdered in the Sachsenhausen concentration camp in May 1942. D. B. was in Gestapo custody from October 1938 to March 1939. He, his sister E. and her husband Dr. G. H. had to emigrate. G. H. was interned in the Sachsenhausen concentration camp during the November pogroms in 1938 and was released again against payment of 15,000 Reichsmark to the Jewish community. His daughter F. survived in what the Nazis called a "mixed marriage", affected by the reprisals associated with it.

b) The painting in dispute is connected to a loan which was granted to the lawyer Dr. T. U. in 1927. At the time, Dr. U. was working in Amsterdam and took out a loan of 217,616 Reichsmark with Bankhaus B. & Co. He subsequently provided security for this loan by transferring his collection of 21 paintings - including the "Lemon Slice" - to the lenders as collateral property. It was unanimously assumed that the value was approximately 200,000 Reichsmark. After A. B.'s death in 1938, the bank - discriminated against as "non-Aryan" - was liquidated under pressure from the NS state. For this purpose and in preparation for emigration, U.'s paintings, which had been transferred by way of security, were also to be used. In the course of this, the paintings were transferred from Amsterdam to the safe of the bank in Berlin. At this time, U. had only partially repaid the loan.

The collection of paintings was sold via the art trade and generated proceeds of approximately 190,000 Reichsmark. The "Zitronenscheibchen" was sold to the art dealers Hans Bammann (Düsseldorf) and Johannes Hinrichsen (Berlin) for 35,000 Reichsmark on 19 November 1938. The proceeds were used entirely to repay the liabilities from the loan from U.s. The applicants (neither loan agreement nor security agreement exists), the loan had been taken over personally by A. B. and the limited partner of the bank O. P. for an interim period. From the proceeds of the paintings, P.'s claim was initially settled, the remaining amount was set off against the claim of A. B.'s estate. U.S.'s remaining debts to the heirs of A. B. were settled in full by 1950.

The "slice of lemon" was later sold to the industrialist Fritz Thyssen. His daughter transferred it to the Bayerische Staatsgemäldesammlungen in 1987 in a bundle with other works of art. They exchanged it in 2008 for another painting in the possession of the Kunsthandlung French & Company. French & Company submitted the painting on 5 June 2008 under lot number 46 to Sotheby's New York, where it was acquired for 602,000 dollars by the New York art dealer Otto Naumann Ltd. Since the provenance of the painting had been given inaccurately and, in addition, Otto Naumann had been informed of their claim by the heirs according to A. B., Naumann reversed his acquisition with the consent of the previous owner. After the other transactions of the painting, including the original exchange contract, had also been reversed, it came back into the possession of the Bayerische Staatsgemäldesammlungen.

c) It is undisputed among the parties that A. B. and his family were subjected to massive, even murderous, persecution under National Socialism. The provenance of the painting in dispute is also essentially undisputed.

However, the heirs of A. B. as applicants assume that A. B. had acquired unconditional ownership of the painting "Zitronenscheibchen". The loan, originally granted by Bankhaus B. & Co., was later transferred to A. B. personally. Accordingly, A. B. had then become the secured purchaser of the collection of paintings which had been transferred without possession for this purpose. Late after he or his heirs had also been granted possession of the paintings at an unspecified point in time in 1938, the ownership by way of security had become an unconditional right of possession which the heirs could have freely disposed of. The fact that U. had finally paid off his residual debt in full did not affect the question of ownership. For U.'s right to retransfer of ownership expired with the utilization of the pictures provided by way of security. Under the pressure of the National Socialist regime, however, one had been forced to sell the painting. The price which had been achieved had been below the market value. In addition, the heirs had not been able to freely dispose of the proceeds.

The Bayerische Staatsgemäldesammlungen as respondent essentially asserted that A. B. and the community of heirs of A. B. had at no time acquired unconditional ownership of the painting and for this reason alone, restitution, i.e. the transfer of full ownership, was out of the question. In addition, they submit that a possibly too low price - which they expressly dispute - was exclusively at the expense of the Borrower U.

(d) After the parties could not agree on restitution, they agreed to submit the case to the Advisory Commission. By letters of 10 May 2019 from the community of heirs to A. B. and of 18 January 2019 and 23 August 2019 from the Bayerische Staatsgemäldesammlungen, the parties explained their positions. At the hearing of 9 March 2020, the mutual arguments were further elaborated. The Advisory Commission thereupon submitted a proposal to the parties to the effect that the Commission would recommend restitution on the condition that agreement be reached on the use of the painting. Agreement was not reached.

2) The Advisory Commission now recommends the restitution of the disputed painting. However, since this cannot be based on a legal assessment (a) but exclusively on moral and ethical considerations (b), the Commission makes the following restrictive provision

of a sale within ten years of the transfer of the painting, the State of Bavaria is to receive 50 % of the proceeds (c).

In detail:

(a) A. B. or his heirs have never acquired unconditional ownership of the painting in question, but only ownership by way of security. It is to be assumed that A. B. personally assumed the loan to U. after 1929 together with the limited partner O. P. The heirs of A. B. had already provided corresponding information in the application for restitution of 21 December 1948 (to the Central Registration Office Bad Nauheim, file no. Ia 5547). These are supported by the fact that the loan was no longer listed in the bank's tax audit documents after 1929. The borrower U. also continued to be bound by the loan agreement after the sale of the collection of paintings and the liaison of the bank and paid off his debts in full. According to the submissions in the application for restitution of 1950, it can still be assumed that only A. B., but not also O. P., was the secured party.

Nevertheless, the security transaction never led to an unconditional ownership of the painting by A. B.'s heirs. An assignment by way of security is accompanied by a contractual security agreement. In the case of a loan, this agreement means that the ownership exists only as long as the claim of the lender (secured party) against the borrower (collateral provider) exists. Possession of the assigned items regularly remains with the collateral provider. However, the security agreement does not expire automatically upon the transfer of ownership to the secured party for the purpose of realization. The items transferred by way of security are legally but not economically removed from the assets of the collateral provider.

In the present case, therefore, the transfer of ownership of the pictures did not result in the creation of an unconditional ownership of the heirs to A. B.. The paintings came from Amsterdam to Berlin after the death of A. B., when the bank had to be liquidated by force. However, the security agreement remained unaffected by this. The collateral was still only allowed to be sold for the purpose of offsetting the proceeds against the loan. Neither the heirs according to A. B. nor U. assumed that the transfer of possession would have taken place in lieu of performance. U. himself fulfilled his obligations under the loan agreement also in the future.

The sale yielded proceeds of approximately 190,000 Reichsmark, of which 35,000 Reichsmark was for the "lemon slice". Even if these proceeds were in total approx. 10,000 Reichsmark less than the estimated value at the time of the transfer by way of security, an appropriate purchase price can be assumed in any case with regard to the "slice of lemon". The adverse party has submitted in this connection that in 1941, another painting by Ochtervelt (with similar dimensions and subject matter) from the Jewish estate had been sold for only 3,800 Reichsmark, probably because the sale - unlike in the case of the "slice of lemon" - had been described as a "Jewish action". The fact that nine times the proceeds were achieved for the "Zitronenscheibchen" leads to the assumption that this was an appropriate price.

Offset against U.'s residual loan debt, this led to the fact that, according to a communication of the executors of A. B.'s will of 25 September 1941 to the tax office Moabit-West, U. still had to pay approximately 6,666 Reichsmark per annum on the loan until 1945. T.'s residual debt would have been waived on the basis of an express agreement (see letter by Dr. K. L. K. to the Chief Finance President Berlin-Brandenburg dated 26 May 1942) solely in the event of his death, which is also an indication that the ownership of the paintings was not transferred in lieu of performance. Therefore, there is no indication that the security agreement was cancelled by mutual consent and that the full ownership of the collection of paintings was transferred to the heirs of A. B.

At this point, it is not significant that the heirs of A. B. have undoubtedly suffered considerable financial loss as a result of the forced liquidation of the bank. It is ruled out that the heirs according to A. B. were able to freely dispose of the proceeds from the sale of the property by way of security at the end of November 1938, not only because of the conflicting security agreement, but also because of the persecution and deprivation of rights by the National Socialist regime. Since the realization of the paintings also served to prepare for one's own escape, only the "Confidential Decree No. 64" of 14 May 1938 is to be referred to here; on 3 December 1938 the "Ordinance on the Use of Jewish Property" followed, of which § 14 in particular was relevant. Irrespective of the details, it is therefore safe to assume that the heirs of A. B. had to accept major losses of assets as a result of the liquidation of the bank.

This pecuniary loss, however, cannot be the subject of restitution proceedings. This was also the view of Dr. and Mrs. H., acting on behalf of the heirs of A. B., in the course of the restitution proceedings. In a letter dated 3 October 1950, they withdrew the pending restitution claims (file numbers RÜ 214/50 and RÜ 215/50) against the Restitution Office at the Regional Court Düsseldorf, also with regard to the "slice of lemon". They justify the withdrawal as follows: "Bammann had acquired the two paintings when they were Jewish property. In the meantime, the original owner, who is not Jewish, has paid off his debts. Although this Aryan owner may unfortunately have suffered damage due to the fact that the paintings had to be sold as Jewish property, the subsequent repayment of debts means that the paintings can no longer be considered Jewish property. Thus, the prerequisite of our application, which we hereby formally withdraw, no longer applies. We assume that the proceedings have come to an end. Even if the applicant has put this withdrawal in a different context in light of the prevailing practice at the time, which was hostile to reparations, the legal assessment of the facts is clear: The applicants could not lose ownership of the painting in question because they never had it in any form. From a legal point of view, the restitution of the painting is therefore also ruled out.

(b) However, the Consultative Commission is not limited to a legal examination in its search for a "just and fair solution" in accordance with the Washington principles. Rather, it is expressly called upon to take into account ethical and moral aspects in order to arrive at a recommendation that also takes into account the particularities of the individual case.

In the present case, this moral and ethical consideration leads to a modification of the legal assessment. At the hearing before the Commission, the applicants gave an impressive account of the outstanding symbolic importance the family attaches to the painting. The family has suffered enormously from the persecution. Their own art collection was lost through persecution and war. The forced liquidation of the bank, during the course of which the existing credit insurance funds were also used, did not release any funds that the family could have freely disposed of. The painting brings together the family memories of this terrible story of suffering. Its auction on November 19, 1938 - ten days after the pogroms that swept across the Reich - coincided with a time when the persecution of the Jewish population was completely transformed into a policy of existential annihilation. This renewed radicalisation of the National Socialist repression has also left deep traces in the family history of the applicants. All four children of A. B. were, as described above, persecuted by the NS regime. Until today, the family lives almost exclusively abroad due to the persecution.

With the return of the "lemon slice" the applicants associate the hope to make peace with this unhealed past - as far as this is possible at all. The pecuniary loss, which is legally in the foreground, is thus overlaid by a non-material damage, the compensation of which is of great importance to the applicants. But this idealistic damage is inextricably linked to the controversial painting. For this reason - and this alone - the Commission recommends the restitution of the painting, in order to contribute in this way to recognising and making amends for a piece of historical injustice. In so doing, the Commission also takes into account the fact that the interests of the applicants are not opposed by any comparably important interests of the applicant. The defendant received the painting as part of a larger purchase. With regard to the "Lemon Slice", this was not based on a curatorial decision; the painting is not part of the concept of the collection and has not been exhibited by her to date.

(c) The Commission, however, emphasises the fact that the defendant was not obliged to restitute on legal grounds. It is still the owner of the painting in dispute. In general, it has declared its intention to clarify the disputed provenance in its own collection and, if possible, to arrive at an amicable restitution. In the present case, too, the respondent has endeavoured not to take advantage of the unclear provenance. Therefore, it is important to the Commission not to attach a moral-political verdict to the previously negative attitude of the Bayerische Staatsgemäldesammlungen.

In this particular individual case, it was only a comprehensive weighing of all relevant interests that ultimately tipped the scales for the restitution recommendation. As the applicant Dr. D. B. has not yet submitted powers of attorney of the remaining co-heirs of A. B., the recommendation refers to restitution to all co-heirs of A. B. (see para. 2039 of the Civil Code). In the foreground is a gesture of reconciliation. In order for this gesture to remain recognisable, the Commission considered it important that the parties reach a mutually agreeable solution. After its failure, the Commission now recommends restitution with conditions.