

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 the matter of the Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf

Magdeburg – 21 March 2016. The Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, chaired by Prof. Rürup (deputy head of the Commission) has produced the following opinion in the matter of the Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf.

1. The proceedings concern the painting “Violon et encrier” (Violin and inkwell) by Juan Gris (oil on canvas, 89.9 cm x 60.7 cm, Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf), the restitution of which the Flechtheim heirs demand.

Juan Gris painted the still life in 1913, and the art dealer and gallery owner Daniel-Henry Kahnweiler acquired it in Paris in 1913/14. Because Kahnweiler was a German citizen, the painting was seized by the French government during World War I as “enemy property”. In 1921, a buyers’ syndicate formed by Kahnweiler bought the painting for 470 francs at an auction of the confiscated stock of his gallery. Alfred Flechtheim, one of Kahnweiler’s most important business partners, was a member of this syndicate, with a stake of 6,000 francs. Later, the painting came into the possession of Alfred Flechtheim, although it is not entirely clear how. In 1925, Flechtheim displayed the painting at his Düsseldorf gallery and in 1930 at his Berlin gallery. From the late 1920s at the latest, the painting was in Berlin, as confirmed by two photographs of Flechtheim’s private home in Berlin (taken around 1929/30) and by Carl Einstein’s book, *Die Kunst des XX. Jahrhunderts* (The art of the 20th century), which in its first and second editions (1926 and 1928) listed the painting as being in Flechtheim’s collection in Düsseldorf and in its third edition (1931) as being in his collection in Berlin. In the spring of 1933, Flechtheim loaned the painting to the Kunsthaus Zürich for a Juan Gris exhibition (2–26 April). The catalogue for this exhibition listed the painting, which was not for sale, as having been loaned by “Mr Alfred Flechtheim, Berlin”. Flechtheim stated that the painting was insured for 5,000 Swiss francs (4,067 Reichsmark).

In accordance with Flechtheim’s wishes, the painting remained in Zürich, along with other works he had loaned, after the exhibition ended. In November 1933, it was sent to the Galerie Simon in Paris, whose managing partner was Daniel-Henry Kahnweiler. Flechtheim picked up the painting there in early December. In early 1934 at the latest, Flechtheim transferred the painting to London, where it was displayed with numerous other paintings from his collection in an exhibition of works for sale that he organized at the Mayor Gallery, “20th Century Classics”. During this exhibition or later, the painting was sold to Anna Dorothea Ventris (London) for an unknown price. After her death in 1940, the painting was inherited by her son Michael Ventris, who died in 1956. No further information is available on how the painting went from Galerie Berggruen in Paris to Galerie Nathan in Zürich. In

1964, Werner Schmalenbach bought the painting from Galerie Nathan on behalf of the Kunstsammlung Nordrhein-Westfalen for 450,000 Deutschmarks. Given the prices paid for similar Gris paintings at Christie's sales in New York (2011) and London (2012), the Kunstsammlung Nordrhein-Westfalen estimates the current market value at "more than 15,000,000 euros".

Concerning the application for restitution lodged by the heirs of Alfred Flechtheim, two things above all are in dispute: firstly, whether Flechtheim was the owner of the painting "Violon et encrier" when it was sold in London in 1934; and secondly, whether the sale of the painting at the Mayor Gallery constitutes a loss of property as the result of Nazi persecution (*NS-verfolgungsbedingter Vermögensverlust*).

2. The Flechtheim heirs justify their claim to restitution by arguing that the prominent Jewish art dealer Alfred Flechtheim was one of the most visible representatives of modern art already during the Weimar Republic and thus one of the explicit targets of National Socialist enmity; from the time the Nazis came to power in 1933, Flechtheim was such an object of Nazi aggression and persecution, the heirs argue, that already in spring 1933 he must have felt it would be impossible to continue working as an art dealer in Germany. According to the heirs, the manager of Flechtheim's gallery in Düsseldorf, Alex Vömel, took over that gallery in late March; the Berlin gallery and the business Alfred Flechtheim GmbH, whose sole partner since 1925 had been Alfred Flechtheim himself, had to cease operations effective 1 November 1933. The heirs say that Flechtheim had to hire an auditor to conduct liquidation proceedings and that this auditor had reached an out-of-court settlement with Flechtheim's creditors in order to avert the threat of bankruptcy. According to the heirs, from late May Flechtheim, who maintained his primary residence in Berlin until 1936, was forced to spend most of his time, apart from brief visits to Berlin, in Zürich, then Paris and, starting in late 1933, above all in London and was unable to duplicate his earlier success as an international art dealer before his death in March 1937.

The Flechtheim heirs view the sale of the Gris painting by the Mayor Gallery as a sale under duress (*Zwangsverkauf*) made necessary by Flechtheim's financial emergency resulting from Nazi persecution. The sale thus constitutes a loss of property as the result of Nazi persecution, according to the heirs. Although the price paid for the painting is unknown, the heirs say it must be assumed that the sale price was below the market value. They also argue that, although the sale took place outside Germany, Flechtheim would not have been able to dispose freely of the proceeds from the sale, because, as he wrote to George Grosz in mid-April 1934, he had to pay off his creditors in the Berlin liquidation proceedings.

With regard to the question whether Alfred Flechtheim was the owner of the painting "Violon et encrier", the heirs believe there can be no reasonable doubt that in 1933 Flechtheim was the sole owner of the work in question. They assert that he apparently purchased the painting from the pool of works bought by the syndicate at auction in 1921 or shortly thereafter, by taking advantage of the right of syndicate members to buy individual works and buy out the other co-owners' shares. The fact that the painting was located in his private home for years is a clear indication, according to the heirs, as is the fact that Carl Einstein's definitive work and the exhibitions since the mid-1920s listed its provenance as the collection of Alfred Flechtheim. The heirs argue that all attempts by the opposing side to construct co-ownership of the painting by others or to declare the painting goods on commission of Flechtheim as gallery owner are pure speculation.

On the basis of these arguments, the Flechtheim heirs therefore demand restitution of the painting “Violon et encrier”.

3. The Stiftung Kunstsammlung Nordrhein-Westfalen (Foundation of the art collection of North Rhine-Westphalia) has no doubt that Alfred Flechtheim was among those persons directly threatened by the National Socialists’ coming to power and forced to leave Germany owing to racism and reasons of cultural policy. The Stiftung also believes that it was clear from the start that Flechtheim had no future as an art dealer in a National Socialist German Reich.

Unlike the Flechtheim heirs, however, the Stiftung does not believe that Alfred Flechtheim found himself in an extreme financial emergency at the time “Violon et encrier” was sold. The Stiftung notes that, after the loss of his galleries in Germany, Flechtheim was able to remain active in the international art trade, thanks to his knowledge, experience and business contacts abroad; and that he successfully collaborated with Galerie Simon (Kahnweiler) in Paris and Mayor Gallery in London, took part in a considerable number of modern art exhibitions and was able to dispose of a significant share of artworks in Zürich, Paris and London that he had collected as a gallery owner or private person. The Stiftung argues that the Gris painting was sold to Anna Dorothea Ventris not under duress, but rather in the context of his normal activity as an art dealer which he had continued in London. According to the Stiftung, there is no reason to assume that the sale price was less than the market value. Flechtheim was able to dispose freely of the money in London, according to the Stiftung, which also asserts that he had already made all the payments owed by him in connection with the liquidation of the GmbH by this time.

In addition, the Stiftung believes that the Flechtheim heirs have no firm evidence that Alfred Flechtheim was the owner of the painting “Violon et encrier” at the time it was sold in 1934, but merely presented circumstantial evidence, all of which the Stiftung says has been refuted. As a result, according to the Stiftung, the fundamental prerequisite for restitution, namely proof of ownership at the time of loss, has not been met. Although Flechtheim had the painting in his possession since the 1920s, the Stiftung argues, there is no document to show without a doubt that it was his property. The Stiftung says there is no evidence for the supposition that Flechtheim, as a member of the buyers’ syndicate of 1921, acquired sole ownership of the Gris painting. The fact that the painting hung in his private home during the late Weimar Republic has no value as evidence, according to the Stiftung, because other examples could be found to show that artworks for sale on commission also hung in Flechtheim’s home. Nor do the references to provenance constitute conclusive evidence, according to the Stiftung, because other examples could be found to show that Flechtheim did not strictly distinguish between his private property and that of his galleries. The same applies to the question whether there were co-owners of the painting, the Stiftung argues, because it would be possible to show that in certain cases, Flechtheim described artworks co-owned by others or works of which he owned no part at all as belonging to the Alfred Flechtheim collection. The Stiftung says that even in Flechtheim’s estate, there were a number of paintings, mainly works by Paul Klee, that were jointly owned by Kahnweiler and Flechtheim in equal shares.

On the basis of this information, the Stiftung Kunstsammlung Nordrhein-Westfalen rejects the restitution claim by the Flechtheim heirs.

4. After the parties were unable to achieve a consensus, they agreed to refer the case to the Advisory Commission. The Stiftung Kunstsammlung Nordrhein-Westfalen appealed to the Advisory Commission on 15 December 2014 and the heirs of Alfred Flechtheim did so on 2 March 2015. The parties presented extensive arguments on 30 March and 7 July 2015, with additional written documents submitted on 14 December 2015 and 21 and 23 January 2016.

After careful examination of the documents and evidence presented and after hearing the parties on 12 February 2016, the Commission came to the conclusion that the sale of the Juan Gris painting “Violon et encrier” in London in 1934 did not constitute a loss of property as the result of Nazi persecution and that it therefore cannot recommend returning the painting to the heirs of Alfred Flechtheim.

The Commission is aware that, as a leading advocate of modern art, internationally active art dealer and prominent German Jew, Alfred Flechtheim was a clear target of National Socialist hate even before the Nazis came to power, and that as a result he not only faced special personal threat from the rising Third Reich, but also and above all had absolutely no possibility to continue in his chosen career. In view of this persecution, in 2013 the Commission recommended returning Oskar Kokoschka’s portrait of Tilla Durieux from Cologne’s Ludwig Museum to Flechtheim’s heirs. That case differed from the present case, however, in that Flechtheim’s ownership of the Kokoschka painting was not in dispute and that the loss of ownership was directly connected to the closing of the Galerie Alfred Flechtheim in Düsseldorf which was forced by the political circumstances.

With regard to the present case, the Commission views the situation of Alfred Flechtheim in the five years from the end of the Weimar Republic in 1933 and his early death in London in 1937 as follows: In financial terms, Flechtheim was in an extremely difficult situation on the “brink of ruin” already in 1932 as the result of the global economic crisis and the “almost total collapse of the market for the paintings that Flechtheim preferred to deal in” (Drecoll/Deutsch, 2015). An attempt to revive the business through joint auctions with another Düsseldorf gallery and a well-known Munich auction house in December 1932 was not particularly successful. After a second auction in mid-March 1933 had to be discontinued following Nazi disruptions, Flechtheim realized immediately that it would be impossible for him to continue as an art dealer under the Nazi regime. Within a few days, he handed the Düsseldorf gallery over to the gallery manager, ceased the operations of the Berlin gallery and the business Alfred Flechtheim GmbH effective 1 November 1933 and hired an auditor to start liquidation proceedings. Although the liquidation proceedings ended favourably for him with an out-of-court settlement, although he did not lose any artworks to direct action by the Nazi regime before his death and was able to send much of his art collection and gallery holdings abroad, and although he was able to maintain his official residence in Berlin until 1936 and stay there repeatedly for brief visits, as an art dealer forced to live abroad in Western Europe he was certainly one of the victims of the National Socialist regime.

Flechtheim’s efforts to become established in Paris and London as an expert for modern art and a leader in the international art market had only limited success not least because of the lack of demand for modern art. He was able to travel and make new business contacts as well as promote, organize and participate in ambitious exhibitions. He also had an expense account and was paid a commission for works sold. He was able to send the painting “Violon et encrier”, like other paintings in his possession, to Zürich, Paris and London without having to meet special requirements from

Germany. In February/March 1934, the Gris painting was shown in the exhibition “20th Century Classics”, initiated by Flechtheim, at the Mayor Gallery in London; during the exhibition or shortly thereafter, the painting was sold. The Mayor Gallery was damaged in the war, and no sale contract now exists. As a result, although the name of the buyer (A. D. Ventris) is known, the name of the seller is not.

The question whether Flechtheim owned the painting “Violon et encrrier” at the time it was sold to A. D. Ventris cannot be answered beyond a doubt. The only certainty is that Flechtheim, as a member of the buyers’ syndicate formed by Kahnweiler, was a co-owner of the painting in 1921. It is conceivable, but cannot be proved, that he later acquired sole ownership of the painting. The written documents submitted by the Flechtheim heirs state that Flechtheim apparently acquired the painting in 1921 or shortly thereafter, and that it is reasonable to assume that he took the painting to Berlin as his personal property. It is undisputed that Flechtheim had the painting in his possession from 1925 at the latest, that he described it in exhibitions as part of the Alfred Flechtheim collection and that it was on display in his private home, alongside many other works of art. These are circumstances that speak in favour of Flechtheim as owner; however, as the Stiftung Kunstsammlung Nordrhein-Westfalen has shown and as can be read in the recent research on the Flechtheim case, they are not necessarily proof of ownership. Because Flechtheim was both an art dealer and a collector, it is almost impossible to distinguish between his private property and the property of his galleries without specific information in the individual case. Such information is not available for “Violon et encrrier”. There is thus no proof of ownership for the period in which Flechtheim was subject to persecution; such proof is the necessary prerequisite for restitution.

Even if one assumed that Flechtheim was the painting’s owner, the question remains as to whether the sale constituted a loss of property as the result of persecution. The sale price is not known, but there is nothing to indicate that it would not have been sold for a fair price on the London art market of the time. The same applies to the question whether Flechtheim (if he was the sole owner) was able to freely dispose of the money received from the sale. There is no evidence to support the assertion of the Flechtheim heirs that Alfred Flechtheim had to use the money to immediately pay off his creditors in Berlin; and this does not appear very likely in view of the fact that an out-of-court settlement had already been reached by that time. The reference to Flechtheim’s comment in his letter of 15 April 1934 to George Grosz, stating that he had included all his pictures among the assets to be liquidated and was selling them to pay off his creditors, does not necessarily constitute proof, because Flechtheim was still in control of a surprisingly large share of his paintings in Paris and London even after the settlement. According to the Flechtheim heirs, Alfred Flechtheim sold more than 150 artworks abroad between 1933 and 1937.

If an art dealer and collector persecuted by the Nazis sold a painting on the regular art market or at auction in a safe country abroad, there would have to be very specific reasons to recognize such a sale as a loss of property as the result of Nazi persecution. In the case of Flechtheim and the painting “Violon et encrrier”, no such reasons are apparent. For this reason as well, the Advisory Commission cannot recommend the restitution desired by the Flechtheim heirs.

5. On 26 February 2016, the legal representatives of the Flechtheim heirs declared they were withdrawing from the proceedings before the Advisory Commission, leading to public confusion. As a result, the Commission points out that the proceedings were properly concluded already on 12

February 2016 with a hearing of the parties and the Commission's discussion and decision, so the declaration by one party that it was withdrawing from the proceedings has no effect on the publication of the Commission's recommendation.

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 President of the German Bundestag Professor Dr Rita Süßmuth, former President of the Federal Constitutional Court Professor Dr Jutta Limbach, former President of the Federal Constitutional Court Professor Dr Hans-Jürgen Papier (successor to the deceased former Federal President Dr Richard von Weizsäcker), 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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