

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

Recommendation of the Advisory Commission
in the case of
Dr. and Mrs. Max Stern Foundation v. Bavarian State Painting Collections

Magdeburg – 8/19/2019. In the case of the Dr. and Mrs. Max Stern Foundation vs the Bavarian State Painting Collections, the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, chaired by Prof. Hans-Jürgen Papier, after hearing both parties decided on June 25, 2019 to recommend that the painting “Uhlans on the March” by Hans von Marées, currently in the possession of the Bavarian State Painting Collections, should be restituted to the heir of Dr. Max Stern, the Dr. and Mrs. Max Stern Foundation, subject to two conditions. The first condition of this restitution is that the Dr. and Mrs. Max Stern Foundation undertakes not to sell the painting within the next ten years, in order that the work could be restituted to a primary injured party if new evidence of such a party should be determined during this period. (The term shall commence when unrestricted access to all relevant documents belonging to the Stern estate is assured.) In the event that this subsequent research on Dr. Max Stern conducted within the next ten years does not result in a new state of knowledge that speaks against restitution, for example because it later emerges that the sale of the painting or comparable art sales in this period (June 1936) would in their essence very likely have occurred even had the Nazis not been in power, the Dr. and Mrs. Max Stern Foundation will undertake – as the second condition – to return the painting to the Bavarian State Painting Collections.

Please see the simultaneously published grounds for this recommendation (see **Annex**), which for the first time also include a minority dissenting opinion.

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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 of said cultural goods, 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 aforementioned recommendation as members of the Commission in an honorary capacity included the former President of the Federal Constitutional Court of Germany, Professor Hans-Jürgen Papier (Chair); the art historian Professor Wolf Tegethoff (Deputy Chair); the former President of the German Parliament, Professor Rita Süßmuth; former Member of the Parliament, Marieluise Beck; the former President of the Federal Administrative Court, Marion Eckertz-Höfer; the historian and President of the German Historical Museum, 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 humanities scholar Dr. Gary Smith and the philosopher of law Professor Dietmar von der Pfordten.

The German Lost Art Foundation is the office of the Advisory Commission and the point of contact for claimants.

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

Office: German Lost Art Foundation, Humboldtstraße 12, 39112 Magdeburg

Recommendation of the Advisory Commission in the case of Dr. and Mrs. Max Stern Foundation [Stern Foundation or claimant] v. Bavarian State Painting Collections [respondent] regarding the painting “Uhlans on the March” by Hans von Marées

Magdeburg, June 25, 2019

In the case of Dr. and Mrs. Max Stern Foundation v. Bavarian State Painting Collections the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, chaired by Prof. Hans-Jürgen Papier (chairman of the Commission), has made the following recommendation:

The painting “Uhlans on the March” by Hans von Marées, currently in the possession of the Bavarian State Painting Collections, is to be restituted to the Dr. and Mrs. Max Stern Foundation under the conditions that

(1) the Dr. and Mrs. Max Stern Foundation undertakes not to sell the painting within the next ten years in order to ensure that the work can be restituted to a primary injured party, should such a party be determined, and

(2) the continuing research on Dr. Max Stern conducted within the next ten years (term to commence when unrestricted access to all documents belonging to the estate is assured) does not result in a new state of knowledge that speaks against restitution, such as evidence that the sale of the painting or comparable art sales in this period (mid-1936) would in their essence very likely have occurred even had the Nazis not been in power.

1. The subject of these proceedings is the painting “Uhlans on the March” by Hans von Marées, painted in 1859. The work in question is an oil painting on wood measuring 18.8 x 35.3 cm, signed and dated by year. Its restitution is requested by the Dr. and Mrs. Max Stern Foundation as the heir to Dr. Max Stern. In the 1930s, Dr. Max Stern (hereinafter abbreviated to “Stern”) was the owner of one of the most notable art galleries in the Rhineland, located in Düsseldorf, having taken it over from his father Julius Stern.

Stern died in 1987 at the age of 83. Alongside numerous bequests to individuals, he left his remaining estate to the charitable Dr. and Mrs. Max Stern Foundation (“Stern Foundation”). The Stern Foundation’s legal counsel is Robert Vineberg, who is also one of the three executors of Stern’s will, and who has authorized the Holocaust Claims Processing Office (HCPO) of the New York State Department of Financial Services to act on the Foundation’s behalf in these proceedings. The Stern Foundation benefits three charitable institutions in equal parts: McGill University (Montreal), Concordia University (Montreal) and the Hebrew University of Jerusalem (Israel).

a) After studying and completing his doctorate in art history, Stern initially worked alongside his father Julius Stern at the latter’s highly regarded art gallery in Düsseldorf, which he went on to run as sole

proprietor after his father's death in 1934. One of his sisters, Hedwig, and his mother also worked at the gallery.

From the early days of Nazi rule, Stern as a (by the criteria of the NS regime) Jewish art dealer was subject to increasing discrimination and deprivation of rights by the NS regime; for example, the window of his gallery was smeared with paint during the April 1, 1933 boycott. On September 22, 1933 the Nazis founded the Reich Chamber of Culture in order to centrally control the arts and culture and – as later became clear – enforce conformity. The Reichskulturkammergesetz (Law establishing the Reich Chamber of Culture) organized all professions in the arts and culture throughout the Reich into chambers. Membership in one of seven chambers, among them the Reichskammer der Bildenden Künste (Reich Chamber of the Fine Arts, RKdbK), was a requirement for continuing to practice such a profession – failure to be accepted or exclusion amounted to an occupational ban. At that time, individual art dealers were still indirect members of the RKdbK through their Reich-wide association. This changed in 1935, from when on they had to apply for direct membership in the RKdbK. Jews were generally denied this direct membership. This was also the fate suffered by Stern, who was notified of his non-acceptance by letter dated August 29, 1935. As was common, this letter only seemingly gave reasons for his rejection (allegedly insufficient suitability and trustworthiness; this was the standard reason for rejection derived from the executive order issued on November 1, 1933 [par. 10]). At the same time he was told to “dissolve or regroup” his business within four weeks. Stern lodged an appeal while also – ultimately in vain – seeking ways to sell his business to a buyer who would hold it in trust. His appeal was rejected by order dated July 29, 1936, which confirmed that Stern would not be accepted into the Reich Chamber of the Fine Arts. He was given three months to sell his gallery. This deadline was extended because there were potential buyers for the gallery. Stern had already presented Dr. Cornelis van de Wetering, a Dutch citizen, as a potential buyer in 1935; however, the authorities refused to approve the sale to a foreign citizen. He was also not permitted to transfer the gallery to the former director of the Düsseldorf Kunstmuseum, Dr. Karl Kötschau, as the latter had a Jewish ancestor.

On September 13, 1937 Stern received a further order permanently prohibiting him from trading in cultural goods and requiring him to dissolve the gallery by September 30, 1937. It was suggested that he might transfer the gallery's inventory to an art dealer or auctioneer for sale who was a member of the RKdbK. This deadline was extended a final time until December 15, 1937. Stern had already sold the two buildings at Königsallee 23–25, which alongside the gallery also contained the residential premises of the Stern family, in March 1937. According to a note by the Gestapo dated January 11, 1938, he notified the authorities on December 23, 1937 that he was relocating to London. He had had the remaining gallery inventory of 228 works auctioned off in auction No. 392 on November 13, 1937 by Auktionshaus Lempertz in Cologne. He continued to offer works that had failed to sell at auction for sale – in some cases successfully – until December 15, 1937, then placed the remaining works into storage. They were to be forwarded to him in London – initially with the permission of the authorities. They were however confiscated shortly after his departure and used by the NS authorities to arbitrarily demand payments from him. Stern continued to negotiate these demands from London until the outbreak of the war. By order dated November 19, 1939 he was finally stripped of his German citizenship; at this point at the very latest his remaining assets fell to the state. Stern's mother, who had initially stayed in Düsseldorf, was only issued the necessary departure visas by the authorities in exchange for additional extorted payments. In order to make these payments Stern had to relinquish the proceeds from the sale of the two houses, which were still in a German bank account; his mother was moreover forced to sell paintings of her own.

Together with his sister Hedwig and van de Wetering, Stern ran the art gallery that she and van de Wetering had previously established in London; its name, West's Galleries, was formed by combining the Wetering and Stern names. After the war broke out in September 1939 Stern, like other foreign citizens, was interned as an "enemy alien". Following his release in 1940 he emigrated to Canada, where he spent a further almost two years as an interned "civilian alien". Once released, his expertise allowed him to initially find employment at the Dominion (art) Gallery in Montreal; he was so successful in this role that he became a co-owner of the gallery just a few years later and ultimately – then together with his wife Iris – took it over as owner. As such he was one of Canada's most notable art experts until his death.

In extensive restitution proceedings after the war Stern submitted claims for damages with the aid of lawyers Dr. Wenderoth (Düsseldorf) and Dr. Saalheimer (USA). Insofar as can be gathered from the documents, these proceedings centered on reimbursement of the Reichsfluchtsteuer (emigration tax) and the excessive income tax arising from the forced auction at Lempertz in 1937; further on the goodwill of the compulsorily dissolved Galerie Julius Stern; damages due to having to sell the paintings auctioned by Lempertz under market value; damages relating to the paintings that were confiscated and had ultimately disappeared following the Lempertz auction; reimbursement or payment of damages with regard to the premises Königsallee 23–25 in Düsseldorf; and damages arising from expulsion from his self-employed profession in Germany. The sum total of the claims made at that time and the lastly awarded amounts have not been presented in full in these proceedings.

b) On June 24, 1936 Stern sold a Marées together with other paintings to Daniel Wermecke through his gallery. Whether this was the work "Uhlans on the March" by Hans von Marées was originally disputed between the parties; in the hearing held on June 25, 2019 however the respondent no longer contested this point. It remains in dispute whether Stern sold the work as a commission agent or as its owner. It is further disputed whether this sale through the gallery can be considered an asset loss resulting from Nazi persecution.

The Stern Foundation as the claimant bases its claim for restitution on the fact that Stern was persecuted both collectively and individually from the outset. The claimant notes the boycott against Jewish businesses of April 1, 1933, in the course of which paint was smeared on the window of the Stern Gallery. Furthermore, the "Gesetz zur Beseitigung der Missstände im Versteigerergewerbe" (law to combat abuses in the auction trade), issued on August 7, 1933, with its subsequent acts and implementing orders prohibited art dealers from holding their own auctions, which the claimant states significantly impacted the Stern gallery's ability to do business. In the hearing on June 25, 2019 the claimant further elaborated that Stern had already been unable to hold an auction scheduled for March 18, 1933 as intended due to the significant disruptions. The banning of Jewish art dealers from their profession from 1935 onwards – in Stern's case from August 29, 1935 – and hundreds of laws, ordinances and decrees designed mainly to stigmatize and exclude Jews had only exacerbated this situation. It must therefore, according to the claimant, be assumed that Jewish art dealers were already subject to persecution from 1933 onwards, and as a result were by no means able to conduct "orderly normal business" any more. Sales concluded in the course of gallery operations served the purpose of creating the financial circumstances required for the necessary emigration, according to the claimant; accordingly, the sale of the Marées painting in June 1936 can also not be considered to have taken place in the course of normal business operations. The claimant further states that it is highly likely that the Marées painting was the property of Stern himself and not sold on commission.

The Bavarian State Painting Collections as the respondent also assumes that Stern was persecuted for racial reasons from the very beginnings of the Nazi state; however, the respondent holds that this had no effect on the sale of the Marées painting, which cannot in the view of the respondent be by any means considered a forced sale due to Nazi persecution. Stern continued to maintain business operations at the Julius Stern art gallery, making numerous purchases and sales, into the year 1937 and, until the gallery's forced dissolution, did so profitably. The respondent claims that it is absolutely not the case that Stern was only making sales in order to prepare the dissolution of his gallery. This is evident, in the respondent's view, from his multiple business activities, his operating profits in the years from 1935 to 1937, and his own assessments of his ability to do business at the time. The respondent points out that the Marées painting was sold to a buyer of Stern's choice at a price he himself had set, with no influence from third parties; the sale price of 2,250 RM he achieved for the Marées painting was standard for medium-sized paintings by Hans von Marées at that time; there is no indication that Stern was unable to freely dispose of the proceeds. Moreover, the Marées painting is equally likely to have been sold on commission.

c) As the parties were unable to reach a consensus regarding restitution of the painting, they agreed to submit the case to the Advisory Commission. In a letter dated May 3, 2017 the Stern Foundation as the claimant petitioned the Advisory Commission, presenting the case in extensive detail; the claimant expanded its statement in a letter dated May 9, 2018 and submitted a power of attorney and documents pertaining to its status as legal successor on March 14, 2018. The Bavarian State Painting Collections as the respondent joined the claimant in appealing to the Advisory Commission, presenting the case from its point of view in a letter dated September 28, 2017; the respondent expanded on this statement on August 21, 2018 based on further research into the not yet fully explored estate of Max Stern held in the archives of the National Gallery in Ottawa, Canada. Both parties took the opportunity of the hearing before the Advisory Commission on June 25, 2019 to present further statements.

2. Following an extensive review of the written statements from the parties and the attached documents, and based on the arguments presented in the hearing of June 25, 2019, the Advisory Commission made the recommendation set out at the beginning of this document. This recommendation is based on the following considerations:

a) The work "Uhlans on the March" by Hans von Marées was sold by Stern through his gallery to Daniel Wermecke on June 24, 1936 together with four other paintings; the price of the painting was 2,250 RM. Whether the painting Stern sold at that time was this or perhaps a different Marées painting was initially disputed between the parties but was no longer in dispute at the hearing on June 25, 2019, so that it can now be assumed that the two works are identical.

Whether Stern was the owner of the Marées painting or sold it on commission, i.e. in his own name but on behalf of the actual owner, could not be established. A letter from Stern to his German lawyer dated April 27, 1959 indicates that between 1934 and 1937 he predominantly sold works on commission rather than works he owned. This presents a significant likelihood that the painting was in fact sold on commission. It is thus possible that the owner of the painting was also subject to racist persecution by the Nazi regime and there may therefore in the person of said owner or their heirs exist a primary injured party with a better claim to restitution. The Advisory Commission has therefore limited its recommendation for restitution such that the Dr. and Mrs. Max Stern Foundation enter into an agreement undertaking not to sell the painting within the next ten years so that the work can be restituted to a primary injured party should such a party be determined. Should a primary injured party

not emerge until after this period the Advisory Commission expects that the Stern Foundation will ensure adequate compensation in the spirit of a fair and just solution.

The Advisory Commission was not prevented from taking into consideration the aforementioned and other letters from Stern to his lawyer Wenderoth submitted in the course of the proceedings. Lawyer Robert Vineberg, representing the Stern Foundation, however informed the Advisory Commission in a letter dated June 7, 2019 that these letters were erroneously made available to the Bavarian State Painting Collections by the National Gallery of Canada and were not permissible evidence in these proceedings because they were subject to solicitor-client privilege. The Advisory Commission does not agree with this view. Solicitor-client privilege is never absolute and the Advisory Commission is not bound by it, especially once the standard confidentiality periods enshrined in archiving laws have expired. The Bavarian State Painting Collections came into possession of these letters in a legitimate manner. According to section 2 of the Washington Principles a fair and just solution moreover requires that pertinent documents and archives be made accessible, which means that their content can also be evaluated.

b) The Advisory Commission considers the sale of the *Marées* painting to be equal to a forced sale due to NS persecution. The Advisory Commission rejects the assumption presented by the Bavarian State Painting Collections that Jewish art dealers were initially able to continue to conduct “orderly normal business” (as per the Allied restitution laws and also the arguments of the Bavarian State Painting Collections) as they had prior to 1933. This assumption would require that Jewish art dealers, who can surely be presumed to have intelligently and vigilantly observed societal developments, behaved naively in regard to these developments and trusted blindly that the situation of Jewish businesspeople would not change. This is more than unlikely. Even if the impending “final solution” was not and could not generally be within subjective expectation, animosity, threats and administrative measures were ubiquitous and rising. The ultimately hundreds of laws, ordinances and decrees with the main purpose of stigmatizing and excluding Jews were on the horizon early on and restricted the lives of those German citizens who were of the Jewish faith or had been declared Jews by the Nazis. The repressive measures became more severe when the Nuremberg Laws were issued on September 15, 1935, but they had been clear enough before.

This also affected individual circumstances. Stern for example had to deal with paint smeared on the window of his gallery in the course of the boycott in April 1933. That this was not without effect on him is apparent from the fact that he mentioned the incident even in a letter dated February 25, 1945 to his family members in the UK in connection with recollections of a painting he had sold in April 1933. These early reprisals also included that he evidently canceled an auction of paintings from the Heinrich Horten collection, German museums and private owners planned for March 18, 1933 at short notice due to the political circumstances after an auction by competitor gallery Kunstgalerie Flechtheim had been prohibited; it had been forcibly dissolved by the “Kampfbund der deutschen Kultur” [Militant League for German Culture] run by Alfred Rosenberg (according to Bähr, *German Sales 1930–1945*, 2013, p. 269 [<https://core.ac.uk/download/pdf/32980390.pdf>], referring to a handwritten entry in a copy of the catalog for an auction with inventory from the Palais Radziwill in Berlin, which is located in Kunstbibliothek Köln under lot no. 141, and research by Tisa Francini/Heuß/Kreis, *Fluchtgut – Raubgut. Der Transfer von Kulturgütern in und über die Schweiz 1933 – 1945 und die Frage der Restitution*, Zürich 2001, p. 41). Regarding the auction planned by Stern for March 18, 1933 there exists a copy of a cover page of the catalog he published, on which presumably Prof. Dr. Wilhelm Martin (Quakenbrück 1876–Den Haag 1954), a specialist in old Dutch painting to whom Stern had personally recommended

the auction in a letter dated March 2, 1933, noted by hand that the auction had not taken place for political reasons (“Deze veiling heeft wegen politieke omstandigheden niet plaats gevonden”).

The laws with which art dealers were generally prohibited from holding auctions from as early as August 1933 could be understood by Jewish art dealers as an act of exclusion. Even if the “Gesetz zur Beseitigung der Missstände im Versteigerergewerbe” (law to combat abuses in the auctioneer trade) issued on August 7, 1933 (RGBl I p. 578; cf. “Gesetz über das Versteigerergewerbe” [act regarding the auctioneer trade] of October 16, 1934, RGBl I p. 974, and “Verordnung zur Durchführung des Gesetzes über das Versteigerergewerbe” [ordinance on implementing the law regarding the auctioneer trade] of October 30, 1934, RGBl I p. 1091; “Viertes Gesetz zur Änderung des Gesetzes über das Versteigerergewerbe” [fourth act amending the act regarding the auctioneer trade] of February 5, 1938, RGBl I p. 115) was not according to its wording aimed explicitly at “non-Aryan” auctioneers, the intentions of the government, the circumstances under which the law was adopted and how it was applied in practice must also be considered alongside its wording. This law was not put before the Reichstag and debated based on a general, ideologically neutral discussion of possible actual issues in the auction trade. Rather, it was one of the laws issued based on the Ermächtigungsgesetz (Enabling Act) by the Reich government, for which accordingly Hitler himself was responsible. It is thus one of a large number of laws with which Nazi rule – and thus the persecution of the Jews – was given “legal” and administrative structure based on the Ermächtigungsgesetz of March 24, 1933. This also places the – in terms of its wording seemingly innocuous – text of par. 1 of this law in a different light: “Exercise of the profession may be prohibited if the businessperson cannot guarantee that business will be conducted in an orderly manner.” What the NS regime considered “orderly” is well known, and that Jewish businesspeople did not trade “in an orderly manner” in the sense of the NS ideology and its governmental and administrative practices is equally clear. This seemingly so innocuous law was thus one of the initial sparks for the persecution of Jewish art dealers (cf. analysis by Astrid Bähr, *ibid.*, esp. p 18–26). It must be assumed that Jewish art dealers also understood it in this way. From August 1933 at the latest Jewish art dealers were thus individually and collectively persecuted, so that from this point at the latest it can in no way be assumed that “orderly normal business” was being conducted.

c) On this basis, the sale of the Marées painting was a sale due to persecution even regardless of the date of sale. This assessment applies all the more to the period in which the painting was sold in June 1936. The Nuremberg Laws proclaimed on September 15, 1935 at a rally there differentiated between “Reich citizens of German and related blood” as holders of “full political rights” and mere “citizens”, the Jews, who would in future have no political rights. This greater level of threat from the regime, the animosity it increased further, also had to affect Stern’s business activities in this period, so that from this point on Stern’s sales through his art dealership can certainly no longer be considered “orderly normal business”. Added to the societal and political developments in this period was that Stern had received his first ban from his profession with an order dated August 29, 1935. His appeal had not yet been decided, but he is unlikely to have had any illusions about its probability of success. Stern personally was moreover at particular risk because his sister Gerda (1902–1994) and her husband Dr. Siegfried Thalheimer had moved to the Saarland (and later, after its “Anschluss”, on to Paris) in 1933, and had founded and distributed the anti-Nazi newspaper “Westland” there. His brother-in-law Thalheimer (1899–1981) was thus in the sights of the NS authorities, and in light of widespread collective punishment of family members Stern must also have felt threatened.

Due to the massively coercive nature of the general political situation and the collective and individual persecution Stern suffered from 1933 onwards it must therefore be assumed that the sale of the *Marées* painting to Wermecke would not have occurred in the same way had Germany not been under National Socialist rule. It has not been disproved that Stern suffered a financial loss. It is irrelevant in this regard that there are no indications that he failed to achieve the market price for the painting. It must be assumed that any profit was used to cover levies such as the Reichsfluchtsteuer (emigration tax) or similar that Stern had to pay when he left Germany in December 1937. There is certainly no evidence that he was able to freely dispose of the proceeds. That he sued and was largely compensated for these levies in restitution proceedings he launched after the war is irrelevant.

As a fair and just solution in the spirit of the Washington Principles the Advisory Commission therefore recommends that the *Marées* painting be restituted to the Stern Foundation without deducting the originally received purchase price, subject to the above conditions.

3. Minority dissenting opinion

The recommendation of the Advisory Commission was made with more than the required two-thirds of the votes. The following minority dissenting opinion sets out on what basis a fair and just solution in the spirit of the Washington Principles could also lead to different assessments.

a) The claim that it was not possible for Jewish art dealers to conduct “orderly normal business” from 1933 on and any sale by a Jewish art dealer should be considered equal to a forced sale under Nazi persecution cannot be reconciled with the findings of historical research.

Examining the research on the persecution of Jewish people in the Nazi state, the political and societal situation in the years 1933–1937 appears complex. The following presents an example based on the research of Ian Kershaw (*The Nazi Dictatorship. Problems and Perspectives of Interpretation*, rev. 2015), Norbert Frei (in: Broszat/Frei, *Das Dritte Reich im Überblick*, 6th edition, 1999), and – evaluating regional primary sources – Ina Lorenz/Jörg Berkemann (*Die Hamburger Juden im NS-Staat 1933 bis 1938/39*, Vol I to VII, 2016), which all contain a large number of references to the – impossibly vast – existing research. The findings suggest that at least until the Nuremberg Laws of September 1935 a large number of Jewish art dealers (or art dealers described as such by the Nazis) were able to continue trading and conducting “orderly normal business,” and certainly not every sale can be considered equal to a forced sale. In individual cases this even remained true until 1937; Dr. Max Stern is an example of this.

The historical research does not show that the NS regime already had an overall plan in 1933 to drive out and murder the Jewish population. In 1933 and the following years, in some cases even beyond 1937, the internal power structure of the NS state and the execution of its anti-Jewish policies presented as contradictory, not least in the coexistence of state authorities and party structures and in a lack of clear parameters from the NS regime. This already permitted a range of interpretations at the time. Stern himself did not consider the situation hopeless until early 1937. Rather, after the death of his father on October 31, 1934, he assumed that the NS regime would be a passing phenomenon and he would (initially) be able to run the gallery himself or have it run as he wished by a buyer of his choice who would hold it in trust. This is apparent from the submitted section of the (English) manuscript of

his (unedited) autobiographic memoirs. In 1935 his plans became more concrete: he intended to establish an art gallery in London through his sister Hedwig and Dr. C. van de Wetering, the potential buyer of his gallery whom the Nazis had rejected, equip the gallery with a basic stock of paintings by old masters, and run the Düsseldorf gallery as a kind of subsidiary via a buyer holding it in trust; he would then return to the gallery in Düsseldorf after the end of the NS regime, which he was certain was coming. Stern's assumption that this plan could succeed was in fact based on his real personal experience. He personally had found that on the death of his father in October 1934 the local paper had still written an enthusiastic obituary for the Jewish art dealer Julius Stern; in his memoirs he describes the obituary as: "a glowing report of his achievements". His (non-Jewish) friends not only attended the funeral, they also remained loyal in the following period and kept him apprised of potential threats ("They were loyal and kept me well-informed about all the now menacing dangers") although they no longer met with him publicly from this point on. Neither the consequences of the boycott of April 1, 1933, nor the cancellation of the auction he had planned for March 18, 1933 due to the general situation, nor the auction prohibitions affecting the art trade as a whole from August 1933 onwards deterred Stern from his plans. The artistic and financial success of the gallery must also have reinforced him in his intentions. As he wrote to his lawyer in 1951: "Even under Nazi pressure, the Stern Gallery was one of the most important galleries in Western Germany. ... Despite the Nazi pressure, the gallery was financially a very lucrative business as long as it existed." In place of the auctions that were now no longer possible he bought and sold paintings and held at least three major sales exhibitions between February 1934 and August 1935, for which extensive catalogs were produced ("When we were not anymore allowed to hold auctions I simply concentrated on buying important paintings and selling them. We had of course also done this before ...").

The general political and societal circumstances made Stern's positive personal experiences among his (non-Jewish) friends and his ongoing business success somewhat unlikely. There is however no reason not to accept his own assessment of his situation as presented in his memoirs and various letters, and supported by submitted documents. Regardless of detectable memory shifts it can be assumed that the core events of the period burned themselves firmly into his mind. This is proved by various attempts in his memoirs to describe one and the same occurrence. He clearly did not yet understand either the orchestrated boycott activities of April 1933 or the general legislation regulating the auction business that was issued from August 1933 onwards as measures that could have entirely destroyed his plans. Beyond his personal experiences, NS research shows that Stern also had a realistic basis for his relativizing assessment of what was happening.

It is known that the country-wide boycott of Jewish businesses on April 1, 1933, which also led to paint being smeared on the window of the Stern Gallery, was organized by the NS regime in response to the pressure "of Party radicals, especially within the SA, during the wave of violence and brutality unleashed by the 'seizure of power'. [...] As is well known, the boycott was a notable failure, and in light of the negative echo abroad, the lack of enthusiasm among important sectors of the conservative power-élite (including President Hindenburg), and the cool indifference of the German people, it was called off after a single day and a co-ordinated national boycott was never again attempted. The shameful discriminatory legislation of the first months of the Dictatorship, aimed at Jews in the civil service and the professions, arose in the same climate and under the same pressures." (Kershaw p. 123, 124; cf. Lorenz/Berkemann Vol. II, p. 808 ff., Frei p. 126 f.). Even though this campaign, like other violent excesses by the SA and other party radicals, led to a first wave of emigration by German Jews, discrimination against them progressed at a "comparatively slow speed; a significant number of Jewish Germans returned from emigration" (Frei p. 127). "After a relatively quiet period between summer

1933 and early 1935 a new wave of anti-Semitism began and continued until the autumn of 1935“ (Kershaw p. 167 f).

With the Nuremberg Race Laws issued on September 15, 1935 a new level of escalating discrimination was however reached. “The NS regime had begun implementing a comprehensive apartheid policy” (Lorenz/Berkemann Vol. I, p. 454). Earlier in 1935 Stern had been forced to apply for membership in the Reich Chamber of the Fine Arts, one of the NS regime’s forced conformity institutions. That his application was refused by order dated August 29, 1935 targeted him as a Jew and constituted a ban against practicing his profession: he was to “dissolve or regroup” his business within four weeks. Together with the Nuremberg Laws Stern must have seen this as a profound infringement on his livelihood. It therefore seems appropriate to formulate an assumption – that can only be disproved in individual cases – that sales by Jewish art dealers from the summer of 1935 on would not in their essence have also occurred without Nazi rule.

b) The Marées painting was sold on June 24, 1936, after the Nuremberg Laws were enacted. Can the assumption that this sale is to be considered equal to a forced sale thus be disproved? In this respect we should follow the Guidelines for the implementation of the “Declaration of the German Federal Government, German states and leading municipal associations to locate and return cultural assets confiscated through Nazi persecution, especially those of Jewish ownership” according to which this is possible under certain circumstances. Regarding losses from transactions from September 15, 1935 onwards, the assumption can be disproved by demonstrating that the seller received an appropriate purchase price, was able to freely dispose of this money, and the transaction would in its essence also have taken place without the National Socialist regime. These principles set out in the Guidelines represent the essence of the laws and judgments handed down by the Allies in restitution cases after World War II as they are generally accepted and were also known to the signatories to the Washington Principles.

In accordance with what we know here of Stern based on his memoirs, his letters and the documents, insofar as these survived and have been submitted, it appears compelling to consider the assumption in the present case to have been disproved. The criteria of the Guidelines are all met. As is evident from Wermecke’s customer file, Stern wanted to sell the painting to him after he and his wife had shown interest in a total of 10 artworks in the gallery, among them the Marées painting, during a visit on June 17, 1936. Stern obviously set the price for the Marées painting himself. It can be assumed that he originally wanted a price of 2,500 RM, the same price at which he had offered the painting to another customer (Kaesmann) around eight weeks earlier. The later price reduction of 250 RM for Wermecke is easily explained by the fact that the latter bought not only the Marées painting but also four other works. It was not contested during the proceedings that the price paid for the Marées painting was within the market price range. Insofar as the Stern Foundation believes that the painting in question would definitely have fetched a higher price at auction, this is speculation and also does not argue against the painting having been sold at the current market price. Firstly, even before 1933 it was only permitted to auction off goods on commission, while the claimant maintains that Stern was the owner of the Marées painting; Stern would thus not have been allowed to auction it off even before 1933. Secondly, the auction prohibition was also aimed at “non-Aryan” art dealers; the auction prohibition could therefore not have been causal to the sale of this single painting in the sense of a persecutory action. In light of these circumstances the sale could only be described as forced if there were indications that Stern had not wanted to sell the painting, or had not wanted to sell it at this time, for example in order to await an increase in its value. There is nothing to support this view. There is no evidence

that Stern had a particular interest in the painting, or that it was expected to increase significantly in value.

There are also no indications that Stern was not able to dispose freely of the proceeds of the sale. In his memoirs and letters he does not mention sales of this type although he strove to fully record the damage he had suffered. There is no evidence that he had to use the revenue to fund his or his mother's emigration. At the time of the sale on June 24, 1936, Stern's appeal against his non-acceptance into the Reich Chamber of the Fine Arts had not yet been rejected. His interest at this point in time was mainly in continuing to run the gallery as successfully as possible in order to enhance its reputation and preserve its value for the time after Nazi rule. In his memoirs he also describes where the money came from that the authorities extorted him into paying for his mother's emigration visa – in addition to money that belonged to his mother herself he had to expend the revenue from selling the houses and also other paintings ("The money for the houses was lost in this way but at last we were safe in England. Again the Nazis break their promise, they send the furniture but withheld the very valuable paintings, now asking for not German money but English money of which they were rather short"). He does not mention income from gallery operations before 1937 or individual sales, which indicates that he did not connect these to a loss of assets.

That the sale of the *Marées* painting was, despite the pressure of the political situation, from Stern's point of view a sale in the course of "orderly normal business" is evidenced by his previously mentioned plans and activities in this period. As his memoirs show, he did not give up on his plan to find a buyer to hold the Düsseldorf gallery in trust in order to preserve it until early 1937. His interest was to maintain the gallery's goodwill for the buyer and, in the interests of his "subsidiary idea," also for himself and his family. His taxable income for the years from 1935 to 1937, respectively, which he claims corresponds to his profits from the gallery, shows that in his opinion he had succeeded in this. In her essay "Auktion 392 – Reclaiming the Galerie Stern, 2006" Max Stern expert Catherine MacKenzie describes his activities in this period as follows: "Travelling to Holland and Belgium and throughout Germany, he engaged in a frenzy of buying and selling. He purchased from the Rhineland's aristocrats, found an American buyer for a Simon de Vlieger painting in 1936, and" That Stern did not feel that the persecution situation forced him to conduct his purchases and sales in this period is also demonstrated by the fact that none of these sales were mentioned in his compensation and restitution suits after the war, or even in the submitted letters as a question to his lawyers as to whether restitution in this respect might be feasible.

A fair and just solution in the spirit of the Washington Principles could therefore, taking into account the many known circumstances of this specific case, also have been interpreted in another way.

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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 of said cultural goods, 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); the former president of the German Bundestag, Professor Rita Süßmuth; former member of the Bundestag, Marieluise Beck; the former president of the Federal Administrative Court, Marion Eck-

ertz-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; humanities scholar Dr. Gary Smith and philosopher of law Professor Dietmar von der Pfordten.

The German Lost Art Foundation is the office of the Advisory Commission and the point of contact for claimants.

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