



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, decided unanimously on 29 January 2024 in the case of the heirs of Max and Martha Liebermann versus Kulturstiftung Sachsen Anhalt, Kunstmuseum Moritzburg (Saale) – without an oral hearing, at the request of the parties – to recommend the restitution of the drawing *Bauarbeiter / Maurer beim Bau* by Adolph von Menzel to the heirs of Max and Martha Liebermann.

**Recommendation of the Advisory Commission
in the case of the**

heirs of Max and Martha Liebermann

v.

**Kulturstiftung Sachsen-Anhalt, Kunstmuseum Moritzburg Halle
(Saale)**

1. The subject of the proceedings is the drawing *Bauarbeiter* (also: *Maurer beim Bau*) [Construction Worker, or: Bricklayer at Work] (1875) by Adolph von Menzel (1815–1905). It is a pencil drawing on paper measuring 24.5 x 32 cm. The drawing was acquired by the city of Halle (Saale) in 1936 for the Städtisches Museum für Kunst und Kunstgewerbe. It belongs to the holdings of Kunstmuseum Moritzburg, which is funded by the Kulturstiftung Sachsen-Anhalt (inv. no. MOIIH00262). The claimants are the heirs of Max and Martha Liebermann.

2. Max Liebermann (1847–1935) was a distinguished artist himself during his lifetime and is regarded as one of the most important representatives of German Impressionism. He was the co-founder and president of the Berlin Secession and president of the Prussian Academy of Arts in Berlin, which under his leadership developed into a powerful voice for art and culture in the Weimar Republic. On his 80th birthday,

Liebermann was awarded honorary citizenship by the city of Berlin in recognition of his services.

Max Liebermann started collecting works of art during his time as a student in Paris, building up an extensive art collection over the years which was mainly focused around works by Édouard Manet and Edgar Degas, as well as Claude Monet, Camille Pissarro, Auguste Renoir and Paul Cézanne. Other highlights of the collection included works by Rembrandt and Adolph von Menzel.

The couple Max and Martha (1857–1943) Liebermann were indisputably persecuted individually and collectively during the period of National Socialism. The National Socialists seized power on 30 January 1933 and Liebermann submitted his resignation from the Prussian Academy of Arts shortly afterwards, at the beginning of May of that year, also renouncing his honorary presidency so as to pre-empt imminent expulsion. At the same time, with the help of Walter Feilchenfeldt (1894–1953), co-proprietor of Kunstsalon Paul Cassirer, he had fourteen Impressionist works from his collection deposited at Kunsthaus Zürich for safekeeping outside the Nazi sphere of influence. He also handed over some works to the art dealer Fritz Nathan (1895–1972), who sold a drawing by Adolph von Menzel to the Winterthur collector Oskar Reinhart (1885–1965) in the spring of 1934.

Max Liebermann fell seriously ill in November 1934 and died on 8 February 1935. His widow and heiress Martha Liebermann was forced to leave the couple's house at Pariser Platz 7 in autumn 1935 and move into an apartment at Graf-Spee-Strasse 23 (today Hiroshimastrasse). Immediately following this she began to sell an increasing number of her husband's works and items from his collection in order to be able to support herself. As a result of National Socialist coercion, she also lost a significant portion of her other assets, including the house on Pariser Platz and the villa on Lake Wannsee. In desperation after unsuccessfully attempting to emigrate and in view of the threat of deportation and murder, she finally decided to take her own life. She died on 10 March 1943. The German Reich took possession of all her remaining assets on 31 March 1943, without any compensation being provided.

Max and Martha Liebermann's daughter Käthe Riezler (1885–1952) managed to flee Germany with her family in December 1938. She was able to take a small part of her late father's collection with her to New York; at the same time, with the help of Walter Feilchenfeldt, she was able to ensure that the paintings deposited in Zurich in 1933 were successfully transferred to the USA via Amsterdam. Ten further works were saved on behalf of the family through the safekeeping of Käthe's brother-in-law Walter Riezler (1878–1965). However, most of Max Liebermann's collection was lost under the pressure

of National Socialist persecution, expulsion and extermination. An initial attempt to reconstruct the collection was made in 1973; more intense research was conducted from 2008 onwards, and it is assumed that the Liebermann Collection comprised more than 450 works of art.

3. Max Liebermann acquired the drawing under the title *Maurer beim (auf dem) Bau* [Bricklayer at Work/at the Building Site] on 17 May 1916 from the art dealership Kunstsalon Paul Cassirer for the sum of 800 marks. From this point onwards it formed part of his collection, as is evidenced by two photographs taken in the drawing room of the family's villa on Lake Wannsee. From 1910 onwards, the Liebermann family would move from their city home on Pariser Platz to their summer residence on Lake Wannsee from May to autumn, taking with them any necessary household items along with certain selected works of art. There are two photographs in which the drawing in dispute can be partially seen hanging on a wall in the background: one of the Liebermanns with their daughter Käthe and granddaughter Maria taken in 1924, and a portrait photograph of Max Liebermann dated 1932. The 1932 photograph belongs to a set of seven photographs taken for an article that appeared in the newspaper *Münchener Illustrierte Presse*, for which the journalist Dr. Leo Matthias (1893–1970) received a payment on 24 November 1932. There is no further evidence of the whereabouts of the drawing in question in the possession of the Liebermann/Riezler family.

In March 1936, Galerie Commeter in Hamburg offered several drawings by Adolph von Menzel for sale to various customers, including the Städtisches Museum für Kunst und Kunstgewerbe in Halle (Saale), the Schlesisches Museum der Bildenden Künste in Breslau and the Städtisches Museum Düsseldorf. The written offer to the museum in Halle is dated 12 March 1936. The very next day, on 13 March 1936, the Städtisches Museum für Kunst und Kunstgewerbe requested that the works – “with the exception of the five small glass pictures” – be sent for viewing for two to three days. On 25 March 1936, the museum applied to the municipal authorities for permission to purchase the drawings *Hausbau mit Bauarbeitern bei der Arbeit, von oben gesehen* [House Construction with Construction Workers, Seen from Above] and *Rebus (Darstellung Generalfeldmarschall, Fuhrwerk etc.)* [Rebus (Depiction of Field Marshal, Carriage etc.)] for a total sum of 600 Reichsmarks. Permission was granted in April 1936, and the drawing *Bauarbeiter* was then added to the collection held by the Städtisches Museum für Kunst und Kunstgewerbe (today Kunstmuseum Moritzburg, funded by the Kulturstiftung Sachsen-Anhalt). There is no evidence that the sale via Galerie Commeter took place on behalf of Martha Liebermann, nor is there any evidence of any other client being involved.

4. Neither party disputes the fact that Max and Martha Liebermann were persecuted, both individually and collectively. However, it is contested whether proof has been provided that Max Liebermann was the owner of the work under dispute at the time of the National Socialist seizure of power on 30 January 1933, and also whether Martha Liebermann still owned the drawing in 1936.

a) In the opinion of the Kulturstiftung Sachsen-Anhalt, the claimants have not put forward evidence that Max Liebermann was still the owner of the drawing at the time the National Socialists seized power on 30 January 1933, though there is proof that the drawing was owned by Liebermann from 1916 until autumn 1932. What is more, according to the Kulturstiftung Sachsen-Anhalt, there is likewise no proof that the drawing belonged to Martha Liebermann when it was sold in 1936, and that only in the case of evidence being provided to this effect can it be assumed that the confiscation of the drawing was the result of Nazi persecution.

b) From the claimant's point of view, providing evidence of something *not* being true is an impossible task – in this case proving that Max Liebermann did *not* part with the work before the National Socialist seizure of power and that his wife did *not* do so prior to the sale of the drawing. Since it would have been an atypical situation for Max Liebermann to have sold the work between autumn 1932 and the National Socialist seizure of power on 30 January 1933, the claimants propose that the Kulturstiftung Sachsen-Anhalt would have to provide evidence that this was indeed what happened. What is more, according to the claimants, it is known that from February 1935 onwards, Martha Liebermann was increasingly forced to sell works from the collection in order to be able to support herself, which also tends to bear out the assumption that the drawing was sold by Martha Liebermann in 1936.

5. In the opinion of the Advisory Commission, Adolph von Menzel's drawing, *Bauarbeiter* is to be restituted to the claimants as cultural property seized as a result of Nazi persecution. It has been established that the claimants are the rightful legal heirs to Max and Martha Liebermann. According to the Rules of Procedure of the Advisory Commission on Nazi-Looted Property in the version of 2 November 2016, the basis for assessing the facts is provided by the *Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999* (new edition 2019; hereinafter: *Guidelines*).

a) According to the *Guidelines* (p. 33), the relevant period in terms of deciding whether or not an item of cultural property was seized as a result of Nazi persecution is 30 January 1933 to 8 May 1945. It is therefore pertinent to ask whether the disputed work belonged to Max Liebermann at the time of the Nazi seizure of power. Here, the burden of proof lies with the claimant. It is a proven fact that Max Liebermann acquired the drawing in 1916 and that it was still in his possession in autumn 1932. According to the general rules of evidence, this already indicates his ownership status at the time of the Nazi seizure of power.

Anyone asserting that something is true must present a substantiated factual claim to this effect, i.e. put forward concrete facts. If the Kulturstiftung Sachsen-Anhalt suggests that the work of art was transferred to a third party in the few months before the seizure of power, it must present verifiable facts in support of this assertion. Such facts are lacking here. Instead, the legal concept of Section 1006 BGB (German Civil Code) must be applied. Accordingly, it applies in Max Liebermann's favour that, as he held the drawing in his possession, he was also its legal owner and remained so, unless specific circumstances of a loss have been presented and proven.

The assertion by the Kulturstiftung Sachsen-Anhalt that the drawing may no longer have been Liebermann's property at the time the National Socialists seized power is merely speculative. The Kulturstiftung Sachsen-Anhalt does not put forward any conclusive explanation that would suggest a sale or other loss of ownership that might have occurred in the few months between the summer of 1932 and 30 January 1933.

In the present case, it is not necessary to resort to simplified reasoning based on so-called *prima facie* evidence. According to the *Guidelines* (p. 34), *prima facie* evidence is to be applied in the case of gaps in provenance within the meaning of Art. 4 of the Washington Declaration, insofar as such gaps result from the passage of time and the fate of the victims of persecution. However, in the present case there are no such gaps in the records for the period between autumn 1932 and the National Socialist seizure of power on 30 January 1933. As stated above, the fact that proof of ownership cannot be provided retrospectively for every moment in the relevant period is irrelevant with regard to Section 1006 BGB. The presumption according to Section 1006 BGB also benefits the person who derives their right from the previous owner (BGH – Federal Court of Justice, verdict of 19 July 2017, V ZR 255/17) and continues to apply even after loss of ownership (BGH, verdict of 10 November 2004, VIII ZR 186/03, *Neue Juristische Wochenschrift* 2005, 359). As such, it may also be assumed to the benefit of Martha Liebermann, in accordance with the general rules of evidence and in the absence of any facts to the

contrary, that she became the owner of the drawing as of 18 February 1935 as Max Liebermann's heir.

b) Martha Liebermann's ownership of the drawing was lost at the latest when Galerie Commeter sold it to the city of Halle in April 1936, if not before. According to the *Guidelines*, a special rule of presumption applies to victims of Nazi persecution, which includes Martha Liebermann as a Jew. This states that the loss of a cultural asset through a legal transaction involving a persecuted individual during the period of persecution is generally deemed to be a case of unjustified seizure due to Nazi persecution (*Guidelines*, p. 36f.). In such a case, the onus is on the current owner or holder to rebut this presumption. In the case of legal transactions that occurred prior to 15 September 1935, this is refuted by proving that an appropriate purchase price was paid which the recipient was free to dispose of as desired. In the case of legal transactions after 15 September 1935, the current owner must also provide evidence that the legal transaction would have taken place even if there had been no National Socialist rule or else with the assurance that the victim's financial interests were safeguarded. This reversal of the burden of proof in favour of former owners reflects the enormous pressure of persecution to which those persecuted by the Nazi regime were subjected from 30 January 1933 onwards, and even more so from the time the Nuremberg Laws came into force on 15 September 1935.

According to these principles, there can be no doubt that the sale of the drawing by legal transaction in April 1936 constituted an unjustified expropriation of Martha Liebermann's property. It is not significant whether it was Martha Liebermann herself who sold the drawing to Galerie Commeter or consigned it for the purpose of sale, or whether this was done via an intermediary. A possible earlier sale by Martha Liebermann would also have to be considered as a result of Nazi persecution. Even then, Martha Liebermann would have lost ownership of the drawing through a legal transaction, with the result that the aforementioned presumption rule would have applied in her favour.

Neither the published research relating to the Liebermann Collection nor the parties' submissions provide any indication that the drawing was lost by means other than legal transaction, such as by theft or looting, for example. Nor is the presumption of seizure as a result of Nazi persecution rebutted by any evidence that Martha Liebermann might have received an appropriate purchase price which she could have freely disposed of, or that the legal transaction might have taken place even if there had been no National Socialist rule or with the assurance that the victim's financial interests were safeguarded. The latter grounds for refutation in particular can be ruled out in view of Martha

Liebermann's fate as a victim of persecution – and nor are such grounds proposed.

c) Taking all circumstances into consideration, the Advisory Commission therefore arrives at the recommendation that the drawing *Bauarbeiter* by Adolph von Menzel is to be restituted to the heirs of Max and Martha Liebermann.

In the event of disputes concerning cultural property confiscated as a result of Nazi persecution, the function of the Advisory Commission is to mediate between those currently in possession of the cultural property and the former owners, or their heirs, if requested to do so by both parties.

The contributors to the above recommendation as members of the Commission in an honorary capacity were Prof. Dr. Hans-Jürgen Papier (Chair), Prof. Dr. Wolf Tegethoff (Deputy Chair), Marieluise Beck, Marion Eckertz-Höfer, Prof. Dr. Raphael Gross, Dr. Eva Lohse, Dr. Sabine Schulze and Dr. Gary Smith.

Beratende Kommission im Zusammenhang mit der
Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts,
insbesondere aus jüdischem Besitz

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