

III. Assessment

The starting point for any assessment under the Washington Principles must be the concrete circumstances. All the details of the case must be examined (Art. 8 Washington Principles: "... a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case").

Proceeding from this premise, the present case is characterized by the following elements, namely that:

- a) the seller was persecuted by the National Socialists and the sale of the work can presumably be attributed to this persecution;
- b) the sale took place in a third country outside the Nazi sphere of influence; and
- c) the seller presumably received the purchase price, but used it for a – probably futile – attempt to save his companies in Germany.

There is no question that the seller was persecuted by the National Socialists. What is less clear is whether the sale of the work took place causally as a result of this persecution. It cannot be conclusively determined whether the economic difficulties were due primarily to discriminatory measures. Semmel's financial situation also appears to have been undermined by the global economic crisis. However, such "unavoidable gaps or ambiguities" in the facts of the case (Art. 4 Washington Principles) should only be held against the claimants with caution. The Kunstmuseum and the Kommission assume, in favor of the claimants, that the Nazis at the least substantially contributed to the cause of the financial pressure – and did so against the historical background that, in this case, the economic destruction of Jewish entrepreneurship was carried out in a downright emblematic way, with all the arbitrary and degrading methods it entails. The sale of the painting is therefore a consequence of National Socialist persecution (lit. a).

The sale took place in a third country outside the Nazi sphere of influence (lit. b). Semmel initially attempted to sell the painting at the public auction in Amsterdam, but apparently did not achieve the desired price. In the Netherlands, he was free to choose where, to whom, and at what price to sell the work of art. He subsequently exercised this right and sometime between June and October 1933, he sent the Pissarro painting from the Netherlands to Switzerland, where it can be documented in October 1933 at the Willi Raeber Gallery in Basel as being on consignment from the Zurich art dealer Gottfried Tanner. The claimants question whether the shipment was originally initiated by Richard Semmel or whether other parties acquired the work in Amsterdam and brought it to Switzerland. However, as will be shown later, this is not of decisive significance for the Kunstkommision's assessment.

Sales by Jewish emigrants outside the Nazi sphere of influence are commonly referred to in Switzerland as "flight assets." The Kunstkommision and the Museum have dealt extensively with this category in connection with a claim to a work by Henri Rousseau. In accordance with the Strategy for Provenance Research at the Kunstmuseum Basel, they have considered that these cases should also be assessed under the Washington Principles. The application of the Principles presupposes that the work "had been confiscated by the Nazis and not subsequently restituted" (Art. 1 Washington Principles). The concept of confiscation

comprises two elements of injustice. Firstly, the transfer of ownership takes place against the will of the owner. Secondly, the owner does not receive the equivalent value of the property that was taken from them. There is a financial loss (damage). Such injustice can also be present in "flight asset" cases. Sales in the context of exigency can fall under the Washington Principles.

The applicability of the Washington Principles, however, does not in itself determine whether "flight asset" cases should be treated in the same manner as cases of Nazi-looted art. Persons selling "flight assets" did not generally find themselves in the same life-threatening situation as when they were still within the Nazi sphere of influence. The specific element of injustice, consisting of physical threat or extermination, does not exist, or at least, exists to a much lesser extent. This does not rule out the presence of exigency, but it is not the same exigency as within the Nazi sphere of influence. In Switzerland, for instance, the chances of Jewish refugees receiving help were incomparably better (without wishing here to gloss over the harshness of Switzerland's refugee policy at the time). In Germany or the occupied territories, the same person would simply be putting their life at risk if they turned to the authorities. The extent of exigency (compulsion) in Switzerland and other countries outside the Nazi sphere of influence is different from that in Germany or the occupied territories. The loss of assets in the latter was immediate.

This is related to the fact that the sale was concluded in a place with its own legal system, which must fundamentally be recognized. Switzerland and its legal system cannot be equated with the National Socialist regime of injustice, the reprehensible normative power of which the Washington Principles seek to counter. Anyone engaging in sales and purchases outside the Nazi sphere of influence could categorically rely on the legal system applicable there. There was legal protection against unethical contracts (Art. 20 CO) or against over-reach (Art. 21 CO). While this does not speak fundamentally against the application of the Washington Principles either, it does underscore the special nature of these sales.

The Kommission and the Museum came to the conclusion that "flight assets" cases should be assessed more cautiously than cases of Nazi-looted art after giving due consideration to international practice. The UK Spoliation Advisory Panel states that in these cases "the sale is at the lower end of any scale of gravity for such sales." In the case of Alfred Flechtheim vs. Kunstsammlung Nordrhein-Westfalen, the German Advisory Commission required "very specific reasons" if the sale of "flight assets" is to be recognized as a loss resulting from Nazi persecution: "If an art dealer and collector persecuted by the Nazis in a safe foreign country sold a painting on the regular art market or at auction, there would have to be very specific reasons to recognize such a sale as a loss of property resulting from Nazi persecution."¹ For the Kunstkommission and the Kunstmuseum, restitution in "flight asset" cases is the exception, although it is not ruled out. It is conceivable that a forced sale could rise to the level of confiscation and only restitution can compensate for the injustice.

¹ Cf. the recommendations of the *Beratende Kommission NS- Raubgut* [Advisory Commission on Nazi-looted Property] in the case the Heirs of Alfred Flechtheim vs. Stiftung Kunstsammlung Nordrhein-Westfalen of March 21, 2016, online at: <https://www.beratende-kommission.de/de/empfehlungen#s-flechtheim-stiftung-kunstsammlung-nordrhein-westfalen> (accessed April 25, 2024).

This practice should be adhered to. However, whether it applies, or is appropriate, in the present case is questionable. One pillar of the special treatment of "flight assets" is the consideration that the specific element of injustice of physical threat or extermination is not present, or at least present to a much lesser extent. Furthermore, anyone engaging in sales or purchases outside the Nazi sphere of influence could in principle rely on the legal system applicable there.

Neither of these is applicable in the present case, or is so only to a limited extent. It is documented that Semmel stayed in Germany for a while even after the Nazis came to power. He was in immediate danger and emigrated to the Netherlands in June 1933. After the Nazi invasion of the country in 1939, he moved on, via Paris to Santiago de Chile and ultimately to New York. While the sale of his painting in Switzerland may be legally incontestable, he used the proceeds of the sale to try to reorganize his ailing companies in Germany – and since he was unable to stay there due to persecution, his resulting exigency was therefore caused by the unjust Nazi regime. The proceeds from the art sale went to the German state. Such transactions do not merit protection. The situation would be different if the companies had been liquidated in Switzerland or another country outside the Nazi sphere of power. Given these considerations, no decisive significance can be attached to the question of how the work arrived in Switzerland. It is noted merely as an aside that the term "flight assets" does not really apply: The goods Semmel fled with, or their equivalent value, were used to save the remainder of his assets. He had fought financially for his German companies from emigration, albeit unsuccessfully and, in retrospect, probably without a chance.

One last consideration remains, namely that the seller is presumed to have received the purchase price (lit. c). The exact purchase price is not known, which means that nothing can be said about its appropriateness. The claimants contend that receipt of the purchase price cannot be proven. The Kunstkommission and Kunstmuseum do not find this plausible. There is no evidence of any kind that the sale in Switzerland could not take place in accordance with Semmel's wishes or that the proceeds of the sale were not settled on him. The receipt of an appropriate purchase price calls into question one of the unjust elements of confiscation: that the owner does not receive the equivalent value of the object that was taken away from them (financial loss, damage).

The present case, however, has the distinctive feature that the purchase price was of no use to the seller. It flowed, albeit only indirectly of course, to the very same unjust regime and its supporters who had through their policies caused the exigent need to sell the work in the first place. From the point of view of the victim, one can also formulate it thus: The proceeds of the sale were useless to the seller. He was harmed.

On the basis of these considerations, the Kunstkommission and the Museum conclude that the asserted claim is justified, even if it is not possible to clarify every question relating to the legal transaction. The sale was involuntary due to the injustice of National Socialism and the seller suffered damages (loss). The Museum will seek a solution with the claimants that includes a payment close to the market value of the work. There remain slight doubts about Semmel's financial situation prior to 1933, which, however – as they cannot be further clarified – should not be held decisively against the claimants. In favor of the museum, it should be noted that it sought contact with the legal representative of the claimants on its

own initiative to arrive at a "just and fair" solution. Finally, although it is not of determinative importance, it should be mentioned that the work was only recently donated to the museum in conjunction with an exhibition that paid ample tribute to an (underestimated) Jewish artist. Pissarro is of particular importance to the Kunstmuseum and to Basel, and there is considerable public interest in the museum retaining the work.

As usual, the Museum will acknowledge the history of the work in consultation with the claimants and place it in historical context. This also includes the publication of the present decision with an extensive account of its reasoning.

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1. The Kunstkommission is in favor of negotiating with the claimants regarding an appropriate amount of financial compensation, which is to be estimated close to the market value of the work.
2. The Kunstmuseum Basel will acknowledge the history of the work in an appropriate form and, where possible, in consultation with the claimants.