Ownership Does Not Equal Possession
Museum Loyalty: Opinion of the court in the Sachs case

by Patrick Bahners

On January 28th the Berlin Higher Regional Court (*Kammergericht*) dismissed the case of the son of German poster collector Dr. Hans Sachs against the German Historical Museum (*DHM*) and corrected the Regional Court's (*Landgericht*) ruling, which found the heir to be the owner of the posters and being entitled to their restitution (FAZ of January 30th). Now the written opinion of the court's 8th civil senate (*Zivilsenat*) is available.

The court upholds the first instance ruling as far as it stated that the collector neither lost his ownership through the confiscation in 1938 nor later. The purely factual privation was not an expropriation even according to national socialist law. Also, the posters that were found in East Berlin in 1953 neither became public property by being conveyed to the Museum for German History nor did Sachs lose his ownership when he – assuming that his collection was completely lost – accepted a compromise settlement in the restitution proceeding (*Wiedergutmachungsverfahren*) in 1961 receiving 225.000 German Marks.

The result is something jurists try to avoid: ownership and possession are split. The Regional Court deduced an entitlement to restitution from general civil law based on its assertion of the ownership. This aspect of the ruling had caused great sensation – restitution policy based on the Washington Principles seemed to be hanging in the balance, because this regime of moral self-commitment is based on the premise that legal titles are expired. The Higher Regional Court now confirmed the pre-eminence of Allied Restitution Law and the Federal Restitution Code (*Bundesrückerstattungsgesetz*) and states that the Allied Laws purported to apply to all claims, even if the privation may have been void. In the public debate these postwar rules have sometimes been vilified as bureaucratic harassment, even as a protection of the robbers. In contrast to this, the Senate states that legislation ruled out the regular process of private law "for a good reason," "due to the orderly disentanglement of the facts resulting from acts of national socialist injustice."

In 1966, Hans Sachs became aware of the rescue of his posters, made connection with East Berlin and stated that his material claims had been compensated. In 1971 he wrote in an article that he saw his collecting activities justified by "museum care": "West and East Germany will, I am sure of that, guard their treasures." Sachs, who died in 1974 made these statements after

he had failed with a restitution claim against the GDR. The DHM could, according to the Higher Regional Court referring to the recommendations of the Limbach Commission, trust in the assumption that its possession of the collection was in accordance with his [Hans Sachs'] last will since the widow and the son did not demand restitution well beyond German reunification. It was not until 2006 when the son claimed his right, when, according to the court, it was already forfeited. In the oral proceedings the plaintiff's lawyer characterized the representatives of the museum as thieves. The DHM conserved, refurbished, indexed and exhibited the posters. Also due to this effort of care for the collection, the Senate considers the belateed claim for restitution as a breach of the principle of equity and good faith (*Treu und Glauben*).

For friends of legal sophistry: The Higher Regional Court reproaches the plaintiff with missing a respite of the Law on the Regulation of Unsolved Property Questions (*Vermögensgesetz*) in 1993 although the Federal Administrative Court (*Bundesverwaltungsgericht*) now ruled that the law is not applicable. The applicability "had to at least be seriously considered"! This way it has been confirmed what Friedrich Kiechle wrote here on March 4th 2009 on the Regional Court's ruling: "It is the regrettable characteristic of respites that missing them has negative consequences."