

THE CHARACTER AND EXTENT OF FUGITIVE ARCHIVAL MATERIAL¹

A FRIEND of mine on the program committee once heard me make a jocular response to a serious after-dinner speech by a distinguished member of the Society of American Archivists. If I acknowledge the jocularity, then the rest of my accusation must stand, that is, that the gentleman to whom I was replying had been guilty of being serious. The occasion was a historical and archival séance in Chicago in 1937. I remarked that archives were apt to be places in which were kept unimportant documents after the important documents had been borrowed or otherwise removed. I further remarked that the important documents thus abstracted were, in many cases, already in institutions, such as libraries and historical societies, which were founded long before America became archive-conscious.

In dealing with these documents which have strayed from archives, we may consider at least four distinct topics: archival material which has disappeared; archival material which never reached official repositories; archival material which has become separated from archives; and the legal status of archival estrays.

I ARCHIVAL MATERIAL WHICH HAS DISAPPEARED

When, in editing the writings of Washington, John C. Fitzpatrick came to look for the original manuscript of the articles of capitulation at Yorktown signed by Washington, Cornwallis, Symonds, Rochambeau and Barras, he could not find it in the possession of the United States government. In the Washington Papers at the Library of Congress he did find a copy in Jonathan Trumbull's handwriting signed by Cornwallis and Symonds. The Pierpont Morgan Library has part of a draft in the handwriting of Major Ross, one of the British commissioners. But, pointed out Dr. Fitzpatrick, when an earlier editor, Jared Sparks, had printed the document in his edition of the *Writings of Washington* (Boston, 1835), he had printed the whole document from some kind of manuscript which indicated the signatures of all five of the above mentioned principals. A signed copy should have gone to the Americans, but where is it?

¹ Paper read at the second annual meeting of the Society of American Archivists, Springfield, Illinois, October 26, 1938.

We can assume that Cornwallis did surrender; at least we know that the British thought he did, and agreed to a treaty recognizing the independence of the United States. The preliminary treaty was signed at Paris, November 30, 1782, by Benjamin Franklin, John Adams, John Jay, Henry Laurens and Richard Oswald. When Dr. Hunter Miller came to publish his definitive edition of the *Treaties of the United States* (Washington, 1931), he looked for the original which should have been retained by the American commissioners. He reports:

No original of this treaty is to be found in the archives of the department of State or in the Library of Congress. The available evidence tends to support the view that no such original was ever received in the United States. . . . However there was one original in the possession of the American Commissioners at Paris, and the question remains, What became of it? The evidence on this point is negative.

I believe no one will deny that these are two important documents in American history—that by which we actually achieved our independence and that by which our independence was recognized by Great Britain. At the present writing both of these are missing from the archival collections of the United States.

After the British burned the Library of Congress in 1814, it was re-created by the purchase of the private library of Thomas Jefferson in 1815. Recently I had occasion to ask a friend at the National Archives to give me a list of the documents which trace the history of the transfer of the Jefferson Library as the transaction appeared before Congress. This was promptly and courteously supplied, and photostats of the documents were made for me. But, reported the National Archives with genuine concern and sadness, the all-important letter from Jefferson to Congressman Samuel H. Smith of September 21, 1814, offering the library was missing. In his forwarding letter of October 3, 1814, Smith inclosed the original to the chairman of "the library committee of Congress." Smith's letter is now in the National Archives, but the original of Jefferson's offering letter is not to be found. Of course, the careful Mr. Jefferson retained a copy which will be found in the Jefferson Papers at the Manuscript Division of the Library of Congress. It has been printed in Ford's edition of Jefferson's writings. But what became of the original?

Since my subject is, in part, the character of archival estrays, I should say the character may be designated in two words—"very important."

II ARCHIVAL MATERIAL WHICH FAILED TO REACH ARCHIVES

I freely confess that the attempted distinction between "archives" and "collections of historical manuscripts" is not very convincing. Dr. Theodore C. Pease, in reviewing the revised edition of Hilary Jenkinson's *A Manual of Archive Administration*,² has suggested, contrary to Mr. Jenkinson's strict definition, that archives which are not in official custody are archives none the less. My experience with manuscripts prompts me to indorse this view. Furthermore, unless I did question the validity of the principle of continuous official custody in determining what are archives, I could not have prepared this paper. For clearly under that principle, there could not be recognized such a contradiction as an "archival stray."

Let us then consider potentially archival material which never reached an official repository. The headquarters of the British Army in North America from the beginning of the French and Indian War to the end of the American Revolution was an extremely important office. Dr. Clarence E. Carter has pointed out its significance.³ There is no question but that the papers and documents preserved in this office were archival in character, and there is equally no question but that the commanders-in-chief upon being relieved, took these headquarters papers back to England with them. Among those most carefully preserved were the papers during the tenures of office of the Earl of Loudoun, General Thomas Gage and Sir Henry Clinton. Not one of these three collections upon being taken back to England was turned into a public archival repository. The result is that the Loudoun Papers are now in the Huntington Library; the Gage and Clinton Papers are in the Clements Library.

Loudoun, Gage and Clinton all returned to England under the stigma of failure. Hostile ministries confronted them. There was every reason why they should hold on to the official records of the headquarters office to prepare defenses for their conduct. They did so. When the tumult and shouting died, the papers remained in the family libraries of the generals in question. Dr. Stanley Pargellis' analysis of the Loudoun Papers at the Huntington Library, and Dr. Carter's published works on the Gage Papers in the Clements Library are enough to make it clear that these materials are nothing if not "archives," yet they never reached the State Paper Office in London,

² THE AMERICAN ARCHIVIST, 1 (January, 1938), 23-25.

³ C. E. Carter, "The Significance of the Military Office in America, 1763-1775," *The American Historical Review*, XXVIII, 475-488.

and hence today are not in the Public Record Office in Chancery Lane.

When an army is on the march, the headquarters are apt to change position every few days. Papers get lost or mislaid. These find their way into private hands and often into private collections. In the case of the American army at the close of the Revolutionary War there was a good deal of confusion. Individual generals would go home with office papers which should have been turned in to the National Archives at the national seat of government. But we had no national archives and we had no national seat of government. I have in mind an immense elephant folio manuscript volume containing a detailed statement of the weekly strength of forces of the Continental Army under the immediate command of General Washington from Valley Forge (1778) to the disbandment of the army at Newburgh (1783). It was kept by the adjutants general. The last page closing out the record is signed by General Edward Hand, the last adjutant general of the Continental Army. Such a record is of priceless importance for detail. It is now in an institutional collection. From what I can learn, it was simply kept in the family of General Hand and ultimately sold to a New York dealer from whom the present owner acquired it.

It seems to me impossible to say anything definite about the extent and number of this archival material which never reached archives. When I look through the published guides to manuscript collections issued by the older libraries and historical societies in America, I am struck with the tremendous number of collections of papers which are certainly archival in character and which only the definition, to which I have referred above, prevents us designating as archives. Is the reason for this distinction—that whatever papers are not in an official repository are not archives—simply and humanly that some of our colleagues are trying to defend the failures and the losses of their predecessors and excuse what has already happened? Yet it is difficult to understand why anyone thinks this defense and these excuses are necessary.

There are other thoughts which must occur to all of us who get most of our information from the newspapers. When the illustrated magazines and daily papers print pictures of American statesmen returning from official missions and especially call attention to little black boxes which the returning statesmen bring back with them, one wonders how soon the contents of those boxes actually reach the National Archives. When statesmen use this material for the publica-

tion of their own memoirs, one wonders wherein lies the title to these documents. There are thousands of borderline cases which will occur to anyone who, when changing his job, has tried to separate his own private papers from the official papers of his office. The National Archives Act of 1934 empowers the national archivist "to inspect personally or by deputy the records of any agency of the United States Government whatsoever and wheresoever located" with a view to obtaining those records for the National Archives. This is a constructive effort to prevent what has happened in the past, but we do not envy the national archivist in his job of enforcing the law.

III ARCHIVAL MATERIAL WHICH HAS BECOME SEPARATED FROM ARCHIVES

If some nameless official in the State Paper Office had not permitted Lord Shelburne to borrow the correspondence of the English ambassador to France for 1754, that office would still have it today. Instead, Lord Shelburne never returned the papers, and they are now in Ann Arbor with the rest of his papers. This incident—and we can find examples in our own country as well—illustrates one of the ways in which archival material disappears from archives: neglect by custodians. Fortunately, the new spirit in archival administration is overcoming this old complaint.

A further example of "borrowing," this one with a happy ending, is too interesting to be ignored. In spite of a resolution never to let newspapers or maps be taken out of its library, the Massachusetts Historical Society permitted the commission for settling the boundary between the United States and New Brunswick to borrow six maps in 1828. Seven years later the society politely inquired what had become of them and was told that they were still in the Department of State. In 1841 the society, growing suspicious, adopted a resolution demanding the speedy return of the maps loaned and "just compensation for that part of our property which it (the government) has placed beyond its control, or otherwise disposed of for the public service." This resolution provoked a response: the State Department returned one of the maps and reported that none of the others could be found. But in 1852 a second map was returned, and the next year a third. Sometime afterward a fourth map was sent back to the society; and at last in 1924, ninety-six years after they were borrowed, the remaining two maps were restored to the society!

A prime reason for the loss of archival material is, of course,

inadequate law. The National Archives Act of 1934 cured a blind spot in our federal government's vision that was 145 years old. Some of our states have long had laws pertaining to preservation of their records; others still lack them. The weakness of many of the state laws is that no adequate repository was provided, no responsible agent was given charge of the work, or in other ways the initial law was not implemented with proper enabling legislation.

Recently my attention was called to a series of studies which Dr. Luther Evans was preparing for the Historical Records Survey under the WPA. One of these was a learned and careful analysis of the law of Michigan on the subject. Since Michigan has an extremely good law which creates a State Historical Commission and gives that body all sorts of rights and powers for assembling and safeguarding of state and county archives, the situation on paper looks almost perfect. In fact the study prepared by the WPA is deceiving, because the legislature of Michigan has not provided the funds with which the provisions of its law may be executed, and the effective agencies of collecting and preservation are not mentioned, since they are not provided for by state law.

Wars and civil disturbances, such as we have had in our country and such as are going on elsewhere in the world today, inevitably cause the loss of records from archives as capitals are shelled or are moved hurriedly to other cities. If we as a society cannot prevent wars, at least we can insist on intelligence and reliability among archivists to safeguard records in peace time, and we can urge adequate legislation in those states lacking it.

IV LEGAL STATUS OF ARCHIVAL ESTRAYS

This question of the rightful ownership of waifs is fraught with confusion and embarrassment. Every time an Englishman tells me that some of the collections in the Clements Library ought to be returned to his homeland, I inquire when the British Museum is going to return the Elgin Marbles to Greece. That is one way of disposing of the matter. But if someone says, "There ought to be a law . . . , " it may be replied that there is law on the subject.

Some of us were interested in running down reported cases involving the return of estray archives, and it was suggested that the National Archives might request the Office of the Attorney-General in Washington to locate them. It may be of interest to record that the Attorney-General's Office replied to the National Archives that it

could not find any such cases. We therefore asked the librarian of the Law School at the University of Michigan to help, and he had no difficulty in ascertaining what apparently is not readily available in Washington. Probably there are more reported cases of this kind than we present herewith, but these are enlightening.

One of these precedents involves a famous military unit in the United States, the "First Philadelphia City Troop" (officially "The First Troop, Philadelphia City Cavalry"). This organization was formed in 1774, and did especially effective service in the campaign of 1776 and 1777. Its captain was Samuel Morris of the well-known Philadelphia family of that name. On January 23, 1777, General Washington wrote a sort of general order to the troop, commending it for its services. Upon being published to the command, the original manuscript, signed by Washington, was retained by Captain Morris and kept in the possession of his family. In 1823 the troop began to take an interest in its history and appointed a committee to search for and report on its archives. In its report the committee specifically mentioned this Washington document which was then in the possession of Captain Morris' son, Mr. Luke Morris. The city troop adopted the committee report and resolved that it had no claim whatever to the document which it acknowledged should remain with the descendants of Captain Morris. In 1870 the troop having become more archive-conscious requested its then owner, Mr. Elliston P. Morris, to return the document to the troop's archives. Mr. Elliston Morris declined, and suit was brought. When the matter came before the Supreme Court of Pennsylvania, the decision was handed down by Justice Sharswood. He pointed out that whatever rights the troop may have had to the document in the first place were utterly negated by its action in 1823 when, being aware of the existence of the document in the possession of the Morrises, it had divested itself of title by its own action.⁴ Obviously the only conclusion the archivist can draw from this case is that it is important to think and act in time. Institutional libraries are full of archives which organizations having no place to care for them, have surrendered. Years later the organization acquires a home of its own and attempts to get its archives returned. Organizations should be extremely careful about the original terms of deposit when they turn their papers over to an institution or person for safe-keeping.

In 1669 the Spanish viceroy of New Spain confirmed to the In-

⁴ *Morris' Appeal*, 68 Pa. 16 (1871).

dians of the Pueblo of Acoma (now within the state of New Mexico) a certain tract of land, and in testimony thereof, executed a kind of title deed known as a "Privilege." Some time about the year 1833 this "Privilege" came into the hands of one Victor de la O, the son of a Spanish soldier living in Chihuahua. Apparently it came into his possession as part of the strife incident to the struggle for Texan independence. It had been originally deposited in the archives of El Paso when that was a part of Mexico. De la O's possession was unexplained, but the purpose to which he proposed to devote the document was worthy of the best traditions of the dime novel days on the southwestern frontier. The Indians of the Pueblo of Acoma in the 1850's needed the paper to defend their title. De la O offered to sell it to them for \$600, and if they refused to pay that sum, threatened to destroy it and hence also their chance to defend their claims. Under this extortionate menace the Indians did apparently contract to pay him the \$600, but failed to make the payment. Whereupon De la O brought suit, threatening again to destroy the paper. The Indians of Acoma prevented this destruction by a writ in the chancery court of New Mexico, and the case was argued on the merits of De la O's title. It soon became evident to the court that De la O had been accustomed "to speculate in Indian pueblo documents"; that his statement alleging this document had come to him as jetsam "floating upon the boisterous ocean of some of the revolutions of his day" was highly specious; and that when he became possessed of this "profitable article of traffic in his trade in public documents in New Mexico," his reason for not giving it back to the Indians was his allegation that in fact it belonged to the archives of El Paso. Just how this gave him the right to extort \$600 from the Indians whom it so vitally concerned was not clear to the court. Therefore, Justice Benedict ordered the paper restored and confirmed to the Indians of the Pueblo of Acoma.⁵

If El Paso had been within the jurisdiction of New Mexico, it is possible that Justice Benedict would have directed its return thither, but by that time the Texan Revolution and the war between the United States and Mexico had created new jurisdictions. In view of the many stories afloat as to the theft of lands and land titles by the conquerors of the southwest, it is pleasant to reflect upon the fact that the villain was not a gringo and that the traditionally persecuted Indian was given a full measure of justice.

⁵ *De la O v. The Pueblo of Acoma*, 1 N.M. 226 (1857).

Our next illustration involves a far more famous document. In May of 1785, George Washington wrote out an address in the form of a letter to the mayor and aldermen of the city of New York. It happens to be an extraordinarily fine Washington holograph document and naturally belonged to the mayor and aldermen of New York.

Now there lived in New York in the first half of the nineteenth century a distinguished book collector, John Allan, by name. He died in 1863 and in the next year his library was advertised for sale at auction by Joseph Sabin. Item 3442 of the Allan catalogue offered the veritable Washington holograph manuscript which had been delivered to the mayor and aldermen of New York in 1785. At the Allan sale the document was knocked down to Mr. DeWitt C. Lent for \$2050. Then someone raised the question as to how that document ever got out of the archives of the city of New York. The city of New York brought suit against Mr. Lent for the return of the document. This cause was finally decided in 1868, and presiding Justice Barnard of the Supreme Court of New York delivered the following opinion:

In the present action the letter was a particular and peculiar species of property. Its style, address and responsive character to a legislative act, should of itself be regarded as having imparted notice to all, that from the moment of its reception and sending it became the property of the corporation to whom it was addressed.

Unlike other personal property, which ordinarily possesses but little, if any, distinctive mark which might place individuals upon inquiry, this letter, so written, in such terms, and so addressed, held Allan to constantly recurring notice of its ownership by the corporation.

His possession was wholly unexplained, and the jury have charitably found that he had become possessed of it, but without title by any alienation from the corporation who were originally and rightfully its possessors and owners.

No notice is shown to have been at any time given to the corporation of the possession by Allan. Had such notice been shown, the statute of limitations by appropriate lapse of time might have had application.⁶

Judgment was rendered for the mayor and aldermen of the city of New York.

In the year 1862 Lieutenant Colonel David Thomson of the Eighty-second Ohio Infantry found himself stationed in Fairfax County, Virginia. The headquarters detachment under his command

⁶ 51 Barb. 19 (1868).

were occupying Fairfax Courthouse, and since the soldiers were chilly, they were remedying that condition by shoveling the Fairfax county archives into their stoves. Colonel Thomson alleges that he stopped this deplorable conduct on the part of the Union soldiers just in time to rescue from the floor the holograph will of Martha Washington. This was indeed a meritorious act upon the part of Colonel Thomson, but apparently his virtue extended only as far as the soldiers' conduct was concerned. He put Martha Washington's will into his own baggage and took it back to Ohio with him. The document descended to his daughter who, years later, sold it to Mr. J. Pierpont Morgan, the elder. After Mr. Morgan's death, it became known that the document was in the Pierpont Morgan Library in New York. The Daughters of the American Revolution in a convention at Chicago in 1914 began to agitate for the return of the document to its proper home. When the matter was brought to the attention of Mr. J. P. Morgan, Jr., he offered to send a photograph of the will to those concerned. This did not satisfy the Daughters who seemed divided between those who were grateful to Mr. Morgan for preserving the document all those years and those who thought he ought to return it to Fairfax Courthouse.

The governor of Virginia then took the matter up with Mr. Morgan, who offered two alternatives. He believed that Fairfax Courthouse was not a sufficiently safe place for the document. Therefore he proposed to give the will of Martha Washington to Mount Vernon, or to the Library of Congress on condition that the state of Virginia would place along side of it the will of George Washington which was still at Fairfax Courthouse. The governor of Virginia declined both alternatives. The document belonged to Fairfax Courthouse and to Fairfax Courthouse it should be returned. A year elapsed and then suit was brought against Mr. Morgan. He thereupon returned the document to Virginia, and the suit was dismissed.

These four precedents, three cases which actually went to trial and one which was compromised out of court, seem to indicate that it is possible to compel the return of archival estrays when the original owner to which they belonged is a continuing corporation or agency. But more recently an extremely interesting case has been decided.

In the 1920's bibliomania in the United States reached unheard of intensity. The name of Button Gwinnett came to have a magical connotation, particularly after a document containing his autograph fetched \$54,000 at a sale in New York. In 1926 there was sold at

the Anderson Galleries the autograph collection of Colonel James Manning of Albany. A document, a will in fact, containing the autograph of Button Gwinnet was offered for sale and was knocked down to Dr. A. S. W. Rosenbach for \$22,500. Before the transaction could be completed, the state of Georgia interfered, claiming the will was part of the archives of that state. The Rosenbach Company returned the document to the Galleries pending a law suit to clear the title. This suit was so arranged that the heirs of Manning sued the Galleries for the amount of money the document had fetched (less commissions, etc.). The state of Georgia joined with the plaintiff in the suit, and the case came to trial. Of course the Galleries were perfectly willing to pay the heirs of Manning in the event Colonel Manning's title was good, so the case turned on whether his right to the document had ever been valid.

In 1927 Justice Staley of the Supreme Court of New York rendered the following decision:

Possession of property alone and without explanation is evidence of ownership; but it is the lowest species of evidence. . . .

The authority [on the part of the state of Georgia] to retain a private paper such as an original will in public custody must be predicated upon some statutory enactment, or upon some legal practice or custom sustained by common law. There is no proof in this case of such authority by any statutory enactment, nor do I find any rule of the common law which requires or permits it.⁷

In Georgia in colonial times the mere act of registering the will did not give the registry office the right to retain the document. The law is otherwise in many states today. Here then is a case in which an estray was not returned, because it could not be shown that in fact it was an estray.

The common law permits a state or federal government to sue to recover a piece of public property, such as archives, regardless of how long it has been in the hands of a private citizen. The underlying principle is *nullum tempus occurrit regi*, which has been translated, "time runneth not against the king." In other words the sovereign is exempt from any statute of limitations which affects the right of recovery on the part of a private citizen. This principle is a recognized part of our law because it protects the people from the negligence of public officials. However, in a case decided only last April, the Supreme Court declared that this principle did not apply to a foreign

⁷ 130 N.Y. Misc. 131 (1927).

sovereign suing in a United States court. In such a case the foreign sovereign is subject to the local law of limitations.⁸

V CONCLUSION

The foregoing cases hardly constitute an invitation to state and national archives to begin wholesale legal proceedings for the return of archival estrays. Whatever the cause of separation of genuine archival material from official custody, the undoubted fact remains that at this date in our history there exist quantities of archives in private and institutional hands. We know some of the ways in which they reached their present resting places, and we hope that in a country that is growing more careful of its records, the archives of the future will be retained and properly guarded in official repositories.

Having said that, we are still faced with the question of how the archivist shall regard those archives that are not in his keeping. Moreover, some of the archival material which is at large in private hands is on the market today, and more of it will be offered for sale in the future. I doubt if the federal or state governments will have the authority or the money to purchase. The private collector and the endowed library will continue to obtain material for which the mouth of the archivist may well water. But since these agents are all pursuing the same end—the preservation of valuable manuscripts—should the archivist permit himself to feel envy toward these collectors?

I trust that in this society there will be such co-operation between archivists and curators of manuscripts that common standards of administration may be worked out to the benefit of the material itself as well as to the investigators who may wish to use it. Archivists should feel grateful toward the individual collectors and institutional libraries for seeking out, acquiring, and preserving archival records which would probably have perished before Blades's "enemies of books" without this attention. Without them our country would be the poorer in scholarship, and the archival material which has disappeared or is unavailable would bulk much larger than it does.

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⁸ *Guaranty Trust Co. v. U.S.* 304 U.S. 126.