

Property Rights and Business Records

By ROBERT W. LOVETT¹

Baker Library

WHEN I was asked to appear on a program devoted to literary property rights, I wondered at first how the subject could possibly relate to business records. This feeling that perhaps I should not have anything to talk about was strengthened by remarks of a few of my friends in manuscript work (and by some of the replies to the questionnaire of this Society's Committee on Business Records) that they did not treat such records differently from other manuscripts. A law librarian whom I consulted said, "the absence of data on your problem implies no problem or one completely overlooked."² In spite of these rather negative remarks, it does appear that enough experience has been gained in the past few years in acquiring and using business records to justify attention to them.

I should like to indicate briefly what some of that experience has been. Baker Library has been actively collecting business records since 1927 and now has at least the equivalent of 75,000 volumes. Incidentally, we refer to business manuscripts rather than records or archives, since the material, after it comes to us, is no longer in original custody. Many other libraries and institutions are also collecting in this field, and I wish to acknowledge here the helpful comments of Mrs. Fox, of Cornell University; Miss Harper, of the State Historical Society, Wisconsin; Dr. Pargellis, of the Newberry Library; Mrs. Renze, of the State Historical Society, Colorado; and Miss Kane, of the Minnesota Historical Society. These persons and many others who replied to the committee's questionnaire of last year testify to an increasing awareness of the importance of business records for many kinds of research. Our questionnaire was distributed to 136 libraries and historical societies, and of the 82 who replied all but 4 indicated that they had some

¹ Paper read at the annual meeting of the Society of American Archivists in Columbus, Ohio, in October 1957. The author, who has contributed several articles to this magazine, is in charge of manuscripts at the Baker Library, Harvard University School of Business Administration.

² Earl C. Borgeson to the author, Aug. 20, 1957.

business manuscripts in their collections. Perhaps a quarter or a third of these institutions have only a few items (such as some early account books, letters, or articles of incorporation for a leading local business firm); but the number of those with substantial collections of business material is considerable. I shall refer to the questionnaire again, but those who wish a full account may find one in a recent issue of the *American Archivist*.³

I need not here describe in detail progress in the writing of business history, stemming from the work of Professor Gras at the Harvard Business School. Nor need I list the achievements of the various management consultant firms, prepared to tell businesses not only how to handle their current records but also how to establish archives and to meet the needs of historians. I can pass over too the achievements of individual firms in setting up archives, of which Ford and Firestone are excellent examples. For all this has been recorded before, by Dr. Holmes' article in the *American Archivist* in 1954, and more recently by my own account in *Library Trends*.⁴ But these developments do call attention to a growing concern with business records on the part of the firms themselves, custodians of manuscripts, and historians.

I wish to emphasize here some of the ways in which business records differ from the usual literary and historical manuscripts. One aspect is their bulk, with the corollary that long series often have to be sifted before useful conclusions can be drawn. This in turn may make it possible to sample some series, discarding parts of them. Another characteristic of business records is that day-to-day routine records are often summarized in more useful form, thus making it possible to discard certain primary series. Business records also generally have no monetary value; most such collections come to libraries as gifts or loans. All of these characteristics raise the question of the disposal of unwanted material; and, if the firm is still in existence, the problem is still further complicated.

If there are differences in the handling of business records, there are also differences in their use. By their very nature, a high proportion of them is likely to be of fairly recent date. And continuing businesses are naturally reluctant to have their competitors learn of their inner workings. I wish to consider these dual aspects of handling and of use, first considering those records that are still

³ Robert W. Lovett, "Business Records in Libraries," in *American Archivist*, 20: 253-261 (July 1957).

⁴ Oliver W. Holmes, "Some Reflections on Business Archives in the United States," in *American Archivist*, 17: 291-304 (Oct. 1954); Robert W. Lovett, "Care and Handling of Non-Governmental Archives," in *Library Trends*, 5: 380-389 (Jan. 1957).

under control of the company and then those that have been acquired by libraries or historical societies. Even in the latter case I shall examine mainly the situation in which the company still functions; for if the company no longer exists the question of legal or property rights in the handling and use of its records differs little from that raised by any other manuscript material.

Legally, a corporation has a continuing existence, independent of the lives of its directors and stockholders. Although individual businessmen and corporations have, so far as I can see, absolute property in their records, they are in practice hedged about with many restrictions. State laws providing for the incorporation of a business generally require that records, particularly minutes of meetings, be kept. To reinforce the common-law right of a stockholder to have access to the records of his company, provided his purpose is justifiable, many States have enacted laws allowing access to the stock ledger specifically.⁵ There is of course the obvious need of the businessman to keep a record of what has been done, if only to protect himself against unjust claims. Legally, such purposes of recordkeeping are restricted by statutes of limitations to definite periods of time, generally not more than 7 years. State and Federal governments now require that many records be kept, again for varying periods of time. One thinks in this connection of records to support tax returns, of information required by the Securities and Exchange Commission, of records relating to employment and social security, and of regulations of the Interstate Commerce Commission. Checklists of these State and Federal requirements and of the common practices of business in relation to them are often issued by record management consulting firms, manufacturers of safes, and purveyors of filing systems. One can hardly blame the businessman, harassed by such matters, for not giving thought to the long-range interests of the historian.

Yet, human nature being what it is, many large collections of business records have in the past been preserved, whether as a result of family pride, inertia, or some other cause. I have on several occasions gone into vaults or lofts and found complete series of records, even to canceled checks and vouchers — truly an embarrassment of riches. The writings of such men as Professor Gras, Dr. Larson, Dr. Pargellis, and Dr. Bahmer have helped to convince

⁵ John R. Bartels and Eugene T. J. Flanagan, "Inspection of Corporate Books and Records in New York by Stockholders and Directors," in *Cornell Law Quarterly*, 38:289-320 (1952-53); "Inspection of Corporate Books and Records in Delaware," in *Virginia Law Review*, 41:237 (1955), note by R. W. B.

present-day businessmen of the historical significance of their records. Here again we meet with the problem of selection, and firms specializing in record administration and control are trying to show businessmen how the significantly valuable core can be separated from the mass. New developments in the techniques of microfilming and recording can also be of service in the control of modern records. Material is available on the practices of courts in the acceptance of microfilm in evidence and on the preparation and use of interviews as a means of supplementing a firm's records.⁶ For the large modern corporation the only effective way to meet its record problem is to embark on a complete record management and archival program.

As a start on such a program may I be permitted to cite the experience of Harvard University; for, although it is an educational institution, it is also, I believe, the oldest corporation still in existence in this country. In 1939 the Harvard Corporation adopted among its archival regulations, the following:

All administrative officers of the University, including officers of instruction whose regular or occasional performance of administrative duties puts them in possession of files, records or documents pertaining to their official duties, are requested to observe the following regulations:

1. The archives of the official activities of University officers and offices are the property of the University.
2. Such property is not to be destroyed without the approval of a committee of three consisting of (a) the Secretary to the Corporation; (b) the Director of the University Library; (c) the officer in charge of the department where the papers accumulate.
3. The officer in charge of each administrative office will be the judge as to how long it is convenient to hold obsolete papers in his own office under his direct control.
4. All archive material, when no longer wanted in the office to which it pertains, shall be sent to the University Archives in the College Library. The term "archives" in the above statement is taken as meaning: (1) files of letters, both sent out and received; (2) records and memorandum books, ledgers, journals, cash-books, vouchers, mimeographed and similar material; (3) the files of any matter printed for official uses; and (4) other business materials such as photographs of University functions and architectural drawings of University buildings.⁷

I quote this regulation as illustrating the assistance that the his-

⁶ Denmar A. Cope, *Adequacy of Business Records for Legal Purposes* (Lawrence, Kans., University of Kansas School of Business, 1955); Owen W. Bombard, *Speaking of Yesterday* (Dearborn, Mich., Ford Motor Co. Archives, 1952); Helen M. White, "Thoughts on Oral History," in *American Archivist*, 20: 19-30 (Jan. 1957).

⁷ *Harvard University Archives*, p. 1 (Cambridge 1957).

torian may expect to find where provisions are made for preserving the archival material of a corporation.

If the records are not made available, however, the fact that they have been preserved is not of much practical use to the historian. It is encouraging to note that more and more business firms, motivated by a desire to correct the earlier misconceptions of business, are opening their archives to scholars. In a survey of railroads, made on behalf of the Lexington Group in 1956, it was found that, of 36 replies received, 26 indicated that trained historians might have access to the records, and the other 10 that specific requests would be considered.⁸ Other industry groups, such as the Forest History Foundation, are trying to bring together the firms, the libraries, and the historians.

Many excellent histories of large modern firms have appeared; one of the groups active in this field is the Business History Foundation, of New York City. Before undertaking the history of a company, the foundation requires, first, that there be adequate records; second, that there be full access to men and records; and third, that there be freedom to publish. It is further expected that money to cover the cost of the history will be deposited beforehand. The agreement may quite likely be covered in an exchange of letters but it is based fundamentally on a mutual feeling of confidence. With such a feeling, any differences of interpretation can be easily overcome. For example, in the matter of access to records, one may meet with the distinction between official and personal papers, similar to that found in the records of Government officials. And it may wisely be agreed that in the final publication nothing will be revealed that would, in a specific instance, make trouble for the company. Criticism from officials of the company is welcomed, but the important point is that the author is finally responsible for what is or is not included.

An interesting account of the reception that an author received in doing research in the records of a company still in existence is to be found in Thomas R. Navin's history of the Whitin Machine Works:

When I began research on the Whitin project in 1946, I was greeted in Whitinsville with exclamations of incredulity. No one could believe that I had been given permission to see all the company's records and that I had been granted freedom to publish whatever I found. As a family concern the company had always treated its records as the private property of the Whitins.

⁸ Reports prepared by R. C. Overton for distribution to the Lexington Group, 1947 and 1956.

Executives of the company and their assistants to whom the records were entrusted had come to feel the responsibility of their trust and had learned to shield the records from the prying eyes of outsiders. My work necessarily took me where even the government's agents had not previously inquired and, for the first few months, brought me into one cul-de-sac after another until the company's reticent New Englanders grew accustomed to what seemed to them to be indiscriminate snooping.

Navin later writes:

In general it may be said that most American companies have not yet reached the point where they are willing to let outsiders have full access to their materials without the exercise of a controlling judgment over what is written from those materials. Those companies that have reached that point are generally of two types. There are those firms who are proud of their past and who are conscious that no fair investigator could write anything seriously damaging to their reputations. There are also a few firms whose present-day managements, for one reason or another, feel no responsibility for the deeds or misdeeds of past managements and so feel free to have the past exposed to public scrutiny no matter what the consequences. In both cases it should be emphasized that companies feel free to waive censorship only when they have confidence that the authors of their histories have no preconceived theories for which they are merely seeking supporting ammunition.⁹

It is worth noting that publication, in the case of business records, is seldom that of an individual letter or document, though such use may be part of it. It is more often a matter of drawing conclusions, often statistical ones, from a whole series of records. The material used is often anonymous. Even where it is signed, there is little question that, if prepared on company time, it is the physical property of the company. An expert on copyright practice declares, "The only exception to the rule of the author's right in his own letters are letters of an agent to an employer, and of men in public office writing in official capacity."¹⁰ Examples of the publication of the complete records of a business enterprise, or even of the letters of a businessman, are not very numerous. The more usual aspects of the question of literary property rights are exemplified in the case of letters of authors in the records of a publishing firm or a professor's letters in a university archives. Or what about an unpublished memoir by an officer of a business concern, found in its records?

As an example of regulations for the use of an institution's ar-

⁹ Thomas R. Navin, *Whitin Machine Works Since 1831*, p. xxvi, 562 (Cambridge, Harvard University Press, 1950).

¹⁰ Margaret Nicholson, *Manual of Copyright Practice*, p. 116 (2d ed., New York, Oxford University Press, 1956).

chives, I should like to quote again from those for the Harvard University Archives:

Departmental records for 1909 or earlier may be consulted after authorization by the Librarian or his representative (the Custodian of the Archives), who in case of doubt shall refer the matter to the head of the department concerned. Quotation or publication shall be permitted only with the approval of the head of the department in question. Departmental records after 1909 may be consulted only after approval by the head of the department or division concerned.¹¹

Many businesses may feel that a 10- or 20-year restriction is enough; and, in fact, that is what Mrs. Fox tells me has been her experience at Cornell.

As I have said earlier, much information about individual businesses may be found in the archives of government regulatory agencies. Some of this is public from the start; some is kept confidential for varying periods of time. The established procedure may be found in the Federal Reports Act of 1942; and T. R. Schellenberg's book, *Modern Archives*, devotes some space to the subject.¹² In general, information about a specific business is not released unless the firm has granted its permission. A good deal of information about a company that has gone through reorganization may be found in published legal documents; and Baker Library has on occasion received from the Circuit Court exhibits relating to business.

The acceptance by libraries of the records of business firms still in existence is a matter of interest to many here, as is shown by the returns to the committee's questionnaire of last year. To the question, "Do you take records of companies still in existence?", 34 answered yes; 6 said that they would if asked; and 20 said no. Of the 34, it is likely that some have only the treasure pieces, the early records of a local firm and its founding family. But, as I have already noted, several have substantial collections, and I shall refer to some of these again. A further question was: "If you do take records of firms still in existence, are there restrictions as to use?" Twelve of the 34 replies were of the "if asked" variety. Eight answered yes; 14 said they imposed no restrictions. A final question relating in part to recent records was: "Do you attempt to weed business records after receipt?" Forty-one answered yes; 18, no. It is of interest that a few respondents hope that firms will make a

¹¹ *Harvard University Archives*, p. 4.

¹² T. R. Schellenberg, *Modern Archives; Principles and Techniques*, p. 229 (Chicago, University of Chicago Press, 1956).

financial contribution to the library when they turn over their records. It appears that, if a library serves in effect as the archives of the firm and if it is prepared to furnish reference service on the records to employees of the firm, it is entitled to recompense. Reference service however, would be likely to present a problem only if very recent records were accepted, and this is not commonly done.

It is wise, in accepting the records of companies still in being, to have some form of written agreement. Mrs. Renze emphasizes strongly the value of a deed of gift. A company may not feel legally justified, however, in giving its records away; and in such a case a loan or deposit is necessary. Even so, agreement is essential on what to do with unwanted material and how scholars may use the records. For some years Baker Library has had a card form entitled "Memorandum on Manuscript Acquisition." We do not always have it filled out, and I do not know what its legal status would be even when signed, but some of its provisions may be of interest. The introductory statement reads:

The following material is herewith presented to the Baker Library with the understanding that it shall be cared for in a manner which will, in the judgment of the Library, best provide for its physical preservation and at the same time make it most readily available to research students. The library will return to the donor all personal papers. It reserves the right to transfer to a more suitable depository valuable papers which do not pertain to business and economic history, and to destroy such papers as may, in its judgment, be of no value. The material shall be available to properly qualified research students.

On the memorandum is space for a brief description of the collection under the following topics: industry, name of firm, location, period covered, and amount and type of material. A footnote dealing with deposited material states that if no demand for its return is made by the depositor, his heirs, or his authorized representative within 20 years, it shall automatically become the property of the library. There is a space for entering specific restrictions, and the examples of those that have been written into the signed agreements cover many other matters. I shall mention a few.

One of the most restrictive is that for the Dwight Manufacturing Co. records; the company continued in a different location under different management. It provides that "all the material is to remain the property of the Dwight Manufacturing Company, reserving to us the right to withdraw any part of it." This is a common provision where the records cannot be given outright; and although it may work hardship for the library, in practice I have found that few volumes are ever recalled. In fact, I have found

that fewer businesses recall records than do historical societies that have deposited records in other libraries. A second Dwight Co. restriction is that "no part of this material will be destroyed without the permission of the company." After being troubled a few times by us, the company saw the wisdom of giving blanket permission to destroy certain routine records. It stipulated, however, that all records of original entry, as well as any data having to do with property, should be retained. This reflects a common concern for the so-called corporate records — the minute books and the general accounting series. So long as a company exists it has perhaps a legal responsibility to maintain such records; and it is justified in asking for their return should a library decide to dispose of them. The third restriction reads: "No one will be permitted to publish or make public use of these documents except with the permission of the Dwight Manufacturing Company." In practice, the company has in each case relied on the judgment of the librarian as to the fitness of users of the records: In one case, where considerable use of the records was made, the librarian did feel it his duty to question certain interpretations made by the student and to suggest that the company and the student get together to iron out differences.

Since each collection is unique, many variations in restrictions are possible. When families have given material, they have on several occasions asked that permission to publish be first obtained from them; in fact, they are likely to be more concerned than are impersonal corporations. Among corporations, banks and investment houses are particularly sensitive about the use of their records; few have as yet come to libraries. We have two collections that are to be completely sealed for a considerable period of time; it is of interest that both are the papers of individual businessmen. In the case of one, a reputable historian is writing the history of the business to which the papers refer. Fortunately, the donor (the son of the businessman in question) is still alive, and he gave permission to this one scholar to use the papers. Some of our collections have come to us because a member of the Business History Department is writing the history of the particular firm. I am glad to say that all these collections have become available for public use very soon after their receipt.

Other institutions can also furnish examples of varying treatment of individual collections. Mrs. Renze sent me a copy of the rather elaborate provisions entered into by the State Historical Society of Colorado for the use of the nonofficial papers of Gov. John

Evans. The agreement between the Newberry Library and the Burlington Lines is contained in an exchange of letters. The Minnesota Historical Society has a contract relating to a bulky set of financial records unsupported by correspondence or other papers, whereby the society may microfilm the records and destroy or return the originals. We recently received a collection from the founder of a firm who, over the years, had had a particular type of record preserved and bound in several hundred volumes. The firm changed hands; and the original owner, feeling that he had spent a good deal of money on the volumes, offered to sell them to the new owners. When the latter refused the offer, he turned them over to us. The assumption is that he had the right to do so, but the occasion might arise when the receiving library would need to seek legal advice as to such a right.

Even though the records are received from a company going out of existence, there may still be a few special problems. If bankruptcy is the reason, the records may be offered by the lawyer or receiver, who may need to withhold the recent records until the affairs of the firm have been finally settled. Persons offering the records of old family businesses may ask for the return of personal letters or diaries. They may also expect the return of stamps and stamped envelopes, although most collections have already been gone over for these. If there are restrictions, they can be incorporated in the written agreement, whether it be an exchange of letters or a more formal document. If there are none, then the treatment of the records, in the matter of literary property rights, would be the same as in the case of any other manuscript collection. Shaw states that any manuscripts given by the author to a library have in effect been published.¹³ Whether we agree with all Shaw's arguments or not, I think it is very unlikely that any legal question would arise regarding the use of older business records in libraries. You may be interested, however, in the formula that the Harvard Library has devised to answer requests for permission to publish older letters in unrestricted collections: "In so far as the Library can give permission to publish, it is given; however, the Library does not presume to act for the heirs of the writer of the letter, if such still exist; nor can it attempt to trace such heirs."

I should like to conclude by summarizing some of the points we have covered. It appears that many going concerns are happy to turn over their older records to historical societies and libraries and

¹³ Ralph R. Shaw, *Literary Property in the United States* (Washington, Scarecrow Press, 1950).

that the latter are happy to receive them. The occasion for transfer may arise at the time of an anniversary or when a firm is moving to new quarters. The impetus may come from the firm or from the depository, but it is likely that the latter will have to do some promotional work. Much help may be received from the historian doing research in the company's records, who may suggest the wisdom of turning them over to a library for preservation. It is important to have some form of written understanding, covering such matters as the disposition and use of the material. It is wise not to accept current records, which might be expected to have frequent use by members of the firm, unless the library is to be paid in some way for its labor. The library should prepare as promptly as possible a listing of the material, so that both the firm and the scholar may know what is there. Restrictions on handling and use should be kept to a minimum; but, rather than lose a collection entirely, reasonable restrictions may be accepted. The very transfer to a library of a firm's records would seem to imply their availability for use. In most cases officers of the firm are willing to rely on the judgment of the curator in granting access to scholars. If an extensive history is considered or if recent records are involved, common courtesy would suggest that the user be advised to get the company's permission for such use. The acknowledgment of material and the quotation of individual documents in published form would conform to general practices in the field of literary property rights; these I have deliberately not elaborated here.

Thus, in their legal aspects, it appears that business records in libraries do not differ greatly from other manuscripts. As my friend the law librarian wrote: "Practically speaking, there seem to be few legal problems for an institution or a corporation if such gifts are made, unless the timing is wrong." And enough experience has been acquired by libraries and business firms to guide those who are faced with problems in the handling and use of large collections of recent business records.