

Legal Materials as Sources of History

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ONCE upon a time, in the hot and thorny desert of southern Texas, a *bandido* called Gregorio Cortez terrorized the countryside with his "fast gun" and his keen eye for horses — other people's horses, of course. At the end of what was perhaps Texas' greatest manhunt, by posses from half a dozen counties, Cortez was betrayed by one of his own countrymen and was arrested on the point of escaping across the Rio Grande.

There followed a long-drawn-out trial, which welled up through Texas tribunals on appeals to the State's highest criminal court. Convicted at every hearing of murder in the first degree, Cortez was finally given life imprisonment in the State penitentiary. A dozen years later the Governor's parole board was presented with a mass of testimonial letters and documents that seemed to prove Cortez quite innocent of any wrongdoing at all, especially of the particular murder for which he had been convicted. So the Governor freed him from the calaboose with an official pardon, and the former gunman became the hero of a racial minority — a veritable Robin Hood of the Rio Grande. In the dusty shade of mesquite trees, in the peculiar noisy-quiet of the *cantinas*, in the tales of the *paisanos* from Brownsville to Eagle Pass, the legend of Gregorio Cortez grew. Folk-singers developed an enchanting *corrido* — "Con su pistola en la mano," — many stanzas long and with many variants, in which Cortez robbed the rich Anglos to give to the poor Mejicanos and, singlehanded, braved the terrible vengeance of the villainous Texas Rangers.

There is a basic conflict in this episode, a conflict with many interesting ramifications. Was Cortez the foul murderer of honest men, or was he the splendid hero of a downtrodden people? Where could a determined historian turn to try to resolve this conflict objectively? Ballads, folk tales, reminiscences, and contemporary newspaper accounts must all be discounted for bias. Where could one seek the

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truth in this very tangled mass? If the "truth" can be found at all, it must emerge from a careful analysis of the records of the trials and retrials of the case — the sworn testimony, the exhibits, and the depositions of witnesses on oath and under cross-examination. And that is the subject of this paper, the purpose of which is to describe the various kinds of legal materials, to indicate how they may be used for historical research, and to suggest some of the problems that archivists and historians may encounter in handling them.

The term legal materials might include almost anything from official court records to a properly canceled postage stamp, but this paper is restricted to a discussion of records that were created by or involved in litigation of any kind; in other words, to the papers of courts and lawyers.

The Nation's court system consists principally of two separate networks — one maintained by each of the States and the other by the Federal Government. The Federal network includes district courts, one or more in each State, courts of appeal, and the Supreme Court. The Federal Government also operates quasijudicial courts in some of its agencies and military courts in the armed forces. The courts-martial handle violations of military regulations; agency courts handle specialized cases over which Congress has given them authority; and district courts handle violations of Federal statutes. The Federal courts of appeal try cases on appeal from district courts and some of the agency courts. The Supreme Court handles matters involving the Constitution, but a Philadelphia lawyer — if he wants one — can find a constitutional question in a surprisingly large and unrelated variety of cases.

The court systems of the States are of course different in each State, but each generally includes courts of the following functions: a supreme court, a court of civil appeals, a court of criminal appeals, district courts with original jurisdiction over some litigation and appellate jurisdiction over other cases, and lower courts, usually called county courts. The machinery for appeal from justice of the peace and municipal courts, as well as the original jurisdiction of these courts, varies widely from State to State, but the essential elements are the same. In most of the States there is also at some local level, usually in the county government, an administrative court, which is not a court of justice. The records of the administrative courts include such things as probates, testamentaries, and papers relating to school board affairs, library affairs, roads and highways, parks, politics, and dogcatchers. These records are of great impor-

tance to the operation of government and to the local historian but are not the legal materials with which this paper is concerned, since they are not records of litigation.

When a lawsuit is brought to trial in any of the regular State or Federal courts, many records are created. For purposes of discussion, these may be classified roughly in groups as follows: the personal files of the individual attorneys, depositions, briefs, exhibits, trial proceedings, reports, and the case files themselves.

The first records created in any lawsuit are those made by the attorneys involved, and the private files of important lawyers often contain valuable historical data. Usually they include extensive correspondence with the lawyer's clients and with prominent people of the area. In addition, many lawyers make written memoranda of conferences and telephone calls — those elusive missing links in the compilation of any twentieth-century history. Further, when preparing for a case, most lawyers collect for background purposes a good deal more material than they use in the trial. Quite often much difficult research, on which copious notes are kept, goes into the preparation of a case. Of great value to the historian are a lawyer's files of correspondence with clients whom he serves under a retainer, year in and year out. An example of the usefulness of such files can be found in the history of the Peters Colony, which was responsible for the original settlement of the Dallas-Fort Worth area in Texas. The records of the colonizing company in Louisville, Kentucky, were destroyed. An extensive file of letters and documents, however, had been kept by the company's Texas attorney; and his papers, fortunately, were deposited some years after his death in the archives of the University of Texas. Without these papers the role of the colonizers could not have been assessed.

The briefs that attorneys prepare for trial should be discussed separately from their personal papers. Because of the nature of some litigation, these briefs become semiofficial documents. Some of the time, out of courtesy and in the best interests of their clients, and in other cases because they are required to do so, lawyers submit copies of their briefs for the trial to the judges of the court and to the opposing attorneys. Such briefs are required in the Supreme Court, in all Federal circuit courts, and in many of the State superior courts, for which they are customarily printed. Some briefs are little masterpieces of history, since it is often necessary for the attorney to delve deep in the background of specific situations. This is particularly true of land litigation. When the ownership of expensive property is involved, attorneys go into careful detail on all matters that may in any way be linked to the title of the land.

An outstanding example of some of the most extensive historical research of the present day can be found in the preparation of briefs in the numerous Indian land cases being heard by the Indian Claims Commission. These cases, some 400 in number, result from an authorization by Congress in 1946 permitting the Indian tribes of the United States to sue the Government for compensation for land (and other property) allegedly taken from the tribes illegally during the expansion of settlement in the nineteenth century. A few of the claims have already been heard by the Commission and decided in favor of the plaintiff Indians. All are appealable to the U. S. Court of Claims, and in a test case this court has upheld the Commission's decision. These claims are no small matter; they involve almost 70 percent of the land area of the United States, including such cities as Chicago, Denver, Birmingham, Indianapolis, and even

Depositions formed the core of what was probably the most interesting lawsuit ever tried in this country over a piece of historical writing. This was the famous libel suit against J. Evetts Haley and the Capitol Syndicate Company in 1932. Every producing historian (indeed, every author of nonfiction) should know something of the details of this case. The Capitol Syndicate Company, which owned the 3,000,000-acre X. I. T. Ranch in Texas during the 80's and 90's, was a Chicago concern backed in part by British capital. In his history of the ranch J. Evetts Haley traced its problem with cattle thieves. Among others, he named members of a prominent and respected family as leaders of a gang of rustlers, some of whom had been shot down in New Mexico. The family, which had always claimed that its kinsmen had been murdered by hired killers of the foreign syndicate, promptly filed several libel suits against Haley and the Capitol Syndicate, asking approximately \$1,500,000 in damages. Both sides then set about to collect evidence; but, as the alleged rustling had taken place more than 30 years earlier, positive proof on either side was elusive. Teams of lawyers collected several hundred depositions from cattlemen all over the Southwest who had even the slightest knowledge of this range war. Former X. I. T. cowboys, friends of the plaintiffs, hands on adjacent ranches, cattle buyers, known rustlers, an outlaw in exile in Old Mexico, and others serving terms in State penitentiaries — all were interviewed, and their sworn statements were made a part of the case. More than two years in preparation, at an estimated cost to both sides of \$150,000, this case presents a remarkable example of the use of depositions as historical documents.

Somewhat similar to depositions in a lawsuit are documentary exhibits. When a case involves written evidence instead of (or as well as) oral testimony, attorneys submit the needed document to the court as an exhibit, and it is made a part of the case files. Should the attorneys have difficulty in getting the document needed or a certified copy of it, the court may issue a subpoena requiring the owner or custodian of the item in question to appear with it in court. Hundreds of lawsuits every day in this country involve pieces of documentary evidence as exhibits, ranging from registration cards at hotels and tourist courts to instruments from official depositories. In a great many instances certified copies of the document in question are acceptable to the court in lieu of the original. All archivists who have served in any official capacity for State or Federal governments have had experience in certifying copies of material in their custody for use by courts or by any citizen who may request them. Most

States have laws establishing this practice and providing an official seal for the certifying archivist.

Of less importance from the historian's point of view, although certainly not in a lawyer's eyes, are the proceedings of the trial itself. In all but the most limited courts a verbatim record of the trial is made by unusually capable stenographers known as court reporters. The court reporter occupies a unique position. He is an official of the court, employed by the court to record the proceedings, but he is authorized to sell transcriptions of his notes to attorneys (or others) who may desire them. Normally the notes are not transcribed unless an attorney buys a copy of the proceedings; but, since the transcriptions are expensive, they are rarely ordered unless needed. An almost standard necessity for the transcription exists when a case is to be appealed. Consequently, if a historian would make use of the verbatim proceedings of a particular case, he should search in the records of an appellate court. Except for satisfying a specific interest in the trial itself or the verbal testimony at the trial, the records of the proceedings are of much less historical value than the other legal materials mentioned.

Published abstracts are available of cases tried in superior and appellate courts in which written decisions or opinions are made. These printed *Reports* are well indexed and are so often used as historical sources that no further description is necessary here. Occasionally, however, a researcher may wish to probe deeper into the case, perhaps to examine the depositions or the exhibits. He must then turn to the case file itself.

Every court has its archives, in the custody of the clerk of that court. The records of any given case are filed as a unit, usually under a docket or case number, but the clerk customarily maintains an excellent index and cross-index to the cases. Each case has a title, or a "style," by which it is known and cataloged. The excellence of the system of finding aids used by the average court clerk should be commended; its efficiency would put many archival institutions to shame. The case file contains all the instruments relating to the case, including the exhibits, original copies of depositions, written briefs (if these were submitted), and a record of the findings and disposition of the case. Here the researcher will find all the legal materials discussed in this paper except the private files of attorneys.

The historical uses of these materials vary from the obvious to the devious and depend largely on the ingenuity of the researcher and the problem he is trying to resolve. Perhaps the most obvious use is in the writing of constitutional and legal histories of the Fed-

eral or State governments. An equally obvious use would be made by any historian who might be so foolhardy as to attempt to write a history of jurisprudence in his State. Such materials are vital to the preparation of political histories. If one wishes to write the history of any unit of government, from county to Federal, on a political basis, as most histories have been written, it is not enough to research the records of the executive office and the statutes, laws, or ordinances passed by the legislative body. For in the decisions of the courts often lie the ultimate meaning, and sometimes the original cause, of the actions of the other two major branches of government. How could one begin to interpret American history without such old standbys as *Trevitt v. Weedon*, *Marbury v. Madison*, *Fletcher v. Peck*, *Texas v. White*, and so on?

Legal materials are of course important to any form of biographical history, but the extent of their usefulness depends logically on the subject of the biography. Court records are more significant sources for books about criminals or lawyers than they are for books about preachers or doctors. The number of parking tickets the subject has paid is not particularly important, but the number of murder raps he has taken may be vital to the biography. In this regard, perhaps the popular American pastime of ancestor-hunting should be mentioned. Genealogists often can find much of their needed data in court files.

Another interesting use of legal materials is in the preparation of what might best be called "topical" history, which, incidentally, is an almost untapped field for creative research. The historical profession has largely neglected to use these sources to anything like the extent possible, and it is in this area that much depends on the imagination and inventiveness of the researcher. It is relatively common for a historian to follow the stereotyped patterns that have been developed in historical writing, using the traditional source materials. But it is rare indeed to develop a new pattern out of a different kind of source material. *The Great Plains*, by Walter Prescott Webb, recent president of the American Historical Association, was such an innovation — a new idea based on materials no one had ever thought of using.

Legal materials can provide historians who may have fresh ideas with sources that few have utilized. For instance, more important to Texas than cattle or cotton is the State's oil industry; but it was a lawyer, not a historian, who saw the need for a history of the ownership rights of subsurface mineral properties. He wrote a fascinating book on this topic, *El Sal del Rey*, which traced mineral rights from

the early salt wars to the recent oil booms. Thus a fresh idea and unused sources resulted in a worthwhile contribution to Texas history. In such topical histories may lie the real value of "legal materials as sources of history," and a real opportunity for some historians.

For the archivist the problems associated with legal materials are twofold — those connected with official court records and those connected with the private papers of lawyers.

Lawyers' papers present several problems. First, assuming that he is given custody of a lawyer's files, should the archivist keep the collection intact or employ sampling and microfilming techniques? Second, how should the collection be handled for inventory and catalog purposes? It is a heterogeneous manuscript group involving numerous people and events. Should cross-entries of one kind or another be made in the archivist's catalog to *each* of the individuals? to each case? to the major cases? Or should a simple catalog entry be made only under the lawyer's name? Third, should the archivist preserve the arrangement of the lawyer's papers as they were in the lawyer's office, with proper archival respect for origins — or should he give the files a little professional help by organizing them in a more useful fashion? What if a collection is presented to the institution many years after the lawyer's death and is obviously not in its original arrangement when the archivist gets it? All these are, of course, questions that archivists face daily, in varying degree, with any private collection of papers, but because a lawyer's files are (or were) professional working files, the decisions are perhaps harder to reach.

But these problems are minor compared to the major problem of persuading lawyers that their files should be preserved and institutionalized. Most lawyers are reluctant to put their private papers in a public depository — so reluctant that the overall percentage of lawyers' papers in captivity is relatively small. The ethics of the legal profession are almost an insurmountable bar to institutional preservation because of the confidential relationship between a lawyer and his client. How can an attorney ethically turn over to the public use a highly confidential letter or memorandum from one of his clients? Lawyers are extremely sensitive on this point; their general attitude is that their files are nobody's business but their own. Many a private bonfire has consumed papers which might have been historically valuable but which some barrister preferred to destroy rather than expose to the public. With all due respect for the confidential nature of such papers, how can the historical and

archival fraternity persuade lawyers to save and deposit their papers in public institutions?

Official court records pose fewer and less difficult problems to the archival world. For the most part, court records are maintained by the courts, and the archival work is performed by the court clerks. Occasionally, in some States or in areas in which a court has ceased to function, court records are transferred to a public depository. The chief problems such records present are storage and repair. It would normally be criminal for an archivist to attempt to rearrange the case files, although occasionally the records have been so poorly cared for by incompetent clerks that this may be necessary. More often, court records are not transferred to an archivist's custody until many years after they have been abandoned and as a result of abuse their original order has been destroyed.

Although court clerks are usually diligent and efficient in indexing and filing the case records in their care, they are rarely equipped for or capable of making repairs on their records. Because most court records, especially the older ones, are filed in 3½-inch to 4-inch packets or envelopes, they are of necessity folded two or three times. In a few score years and with only occasional use, folding and unfolding will break down the sturdiest record. Consequently the greatest single problem connected with court records, in or out of an archival establishment, is the need for adequate manuscript repair.

In summary of this paper, it may be said that legal materials offer very valuable sources for historical research. These include the papers of lawyers as well as official court records, in which may be found briefs, depositions, exhibits, and trial proceedings. It seems particularly possible that a greater use of such sources by historians would be most rewarding, and it therefore becomes an implied obligation for the nation's archivists to help collect and preserve these materials.

A Case of Lost Records

10. The following named enlisted men, now in confinement in the Military Prison near Fortress Monroe, Virginia, who were tried by a General Court Martial, the records of which trial have been lost, will, upon the receipt of this Order, be released from confinement, and returned to duty . . .

— Special Orders no. 319, War Department, Adjutant General's Office, Washington, Sept. 24, 1864.