

Colonial, State, and Federal Court Records: A Survey

By DOROTHY HILL GERSACK

Hang down your head, Tom Dooley,
Hang down your head and cry.
You killed poor Laura Foster;
Now you're bound to die.¹

WE ALL KNOW the fate of poor Tom Dooley from this many-versed, hundred-year-old ballad, and his legend can be substantiated by court records. In Iredell County, North Carolina, one Tom Dula was arraigned for the murder in 1866 of Laura Foster. Dula was indicted first in Wilkes County Superior Court; a woman, Ann Melton, was indicted as an accessory before the fact. The case was removed to Iredell County, where Tom Dula was tried separately, insisting to the end that he was "the only one." Subsequently, Ann Melton was tried and released, and on May 1, 1868, they hanged Tom Dula.² His memory lives on, preserved both in popular folksong and in archival custody.

The use of original documentary materials in researching and teaching American history at the graduate level was surveyed between 1965 and 1967 by Walter Rundell, Jr., under the sponsorship of the National Historical Publications Commission. His *In Pursuit of American History* includes comments by students and teachers regarding the value and use of court records as sources of local history. Rundell noted that the use of such records could provide

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¹ James F. Leisy, *The Folk Song Abecedary* (New York, 1966), p. 325.

² *North Carolina Reports*, 61:211-215; 437-441. See also John Foster West, *The Ballad of Tom Dula* (Durham, N.C., 1970).

legal, social, and economic historians, as well as genealogists, a variety of original data.³

Historian John S. Ezell, in a paper entitled "Legislative and Constitutional Records as a Source for Social, Political, and Economic History," said, "I feel that there are virtually no matters of human concern that are not present to some degree in such records." He listed "a few" subjects, "illustrative rather than definitive," that he had set aside for eventual use by his students in their term papers, theses, and dissertations:

Colonial law as reflecting colonial attitudes; early American education; Indian-white relations; attitudes toward foreigners; prisons and penal reform; state aid to geology, industry, the poor, geography, history, etc. (it may interest you that there are a number of examples of state aid to history as well as efforts to influence the way in which it is taught); governmental impact on the publishing trade (censorship, etc.) and copyright material has been virtually untouched; peddlers and their relationship to law (Parson Weems is about the only one we know of in detail); state libraries and public libraries; law and the theatre and motion pictures; organization of the court system in every state; judicial selection and qualifications; qualifications of members of administrative bodies, both state and federal; legislatures as judicial bodies; married women's property laws; police behavior; and legislative attitudes toward almost any social phenomenon you would care to mention.⁴

In archives and in libraries the quest goes on for quality sources upon which can be constructed the social, intellectual, economic, and political life of the past. Historians, social scientists, economists, archivists, and even balladeers press the search. Court records are among the most fruitful (and least harvested) sources, and colonial and state court records contain local historical data of inestimable value. The greatest block to obtaining these data, however, is that there exists, as one scholar said, "too little historical sense among lawyers and too little knowledge of legal history among historians."⁵

The purpose of this article is to identify available court and other legal records in print, in manuscript, or on film, and to suggest special indexes, lists, and other finding aids to assist researchers in their quests for primary source material. Archivists can do but little to implant "historical sense among lawyers," but we can strive to im-

³ Walter Rundell, Jr., *In Pursuit of American History* (Norman, Okla., 1970), p. 143.

⁴ John S. Ezell, from his paper "Legislative and Constitutional Records as a Source for Social, Political, and Economic History," presented at the session on legal resources in American history of the meeting of the Southern Historical Association, at Houston, Texas, on November 19, 1971.

⁵ Charles Howard McIlwain, "What Legal History Means to the Historian," *Annual Report, 1922*, American Historical Association, p. 350.

prove our own "little knowledge of legal history," and thereby assist in the search.

COLONIAL COURT RECORDS

The earliest "American" court records are of course those of the colonial period. The governments in the colonies produced a small but ever-growing body of records. In the beginning the governors received royal instructions, the king appointed professionally trained judges and attorneys general, and the Privy Council made judicial review in England of American decisions. If lawyers and historians are to understand early American practice, they must have access to judicial records and related material. Although numerous colonial legal records have been lost to fire and water, many important ones have been rescued from obscurity and are now in state archives, historical society libraries, and other depositories. According to Francis S. Philbrick, chairman of the American Historical Association's Committee on Legal History, some sixty volumes of American colonial court records were published by various historical societies between 1900 and 1940.⁶ Since 1940, additional volumes of colonial court documents or abstracts have been published.

The courts of the colonies were well aware of the need to make and keep records. The General Court of Massachusetts, in a resolution of 1639, recited, "many judgments have been given in our Courts, where no records are kept of the evidence and reasons whereupon the verdict and judgment did pass; the records whereof being duly entered and kept would be of good use for president [sic] to posterity."⁷

Jared Sparks was the first to explore systematically the colonial record-making and record-keeping practices. In 1826 he made a great tour of the states from New Hampshire to Georgia, seeking materials for his history of the American Revolution. He thought that the documentation he sought was "still in the archives of the states, and in the hands of individuals"; but, finding few of the records he wanted, Sparks had to turn to foreign archives for his sources.⁸

About ten years later, Richard Bartlett (lawyer, newspaper editor, and secretary of state of New Hampshire from 1825 to 1829) inquired by questionnaire into the preservation of the archives of the states

⁶ Richard B. Morris, *Early American Court Records: A Publication Program* (New York, 1941), p. 1.

⁷ G. Philip Bauer, "Public Archives in the United States," in *In Support of Clío: Essays in Memory of Herbert R. Kellar*, eds. William B. Hesseltine and Donald R. McNeil (Madison, Wis., 1958), p. 50.

⁸ Michael Kraus, *The Writings of American History* (Norman, Okla., 1953), p. 109.

and of the federal government. He wanted particularly to know what records had been destroyed by fire and how the statutes were being preserved.⁹ Bartlett, backed by Jared Sparks, favored converting all the files in the archives into volumes with suitable indexes. He reported damage to federal records by fire and predicted the destruction of the Library of Congress: "This phoenix library has already been damaged, and is probably liable to total destruction by fire."¹⁰ Bartlett reported nine earlier state fires, six of which damaged public archives, so he had good reason for his dire prediction.

Records from many colonial courts are extant for those who search. In Maryland, for example, from the time of the settlement's organization, colonists recorded the daily work of some eleven types of courts which flourished before 1776. Records of these colonial courts of Maryland, enough to fill 257 printed volumes, are available in the Hall of Records at Annapolis.¹¹ Substantial samples of proceedings from five of these colonial courts fill fifteen volumes of the *Archives of Maryland*, published by the Maryland Historical Society acting as an agency of the state.¹² Each of these volumes is indexed by name and by subject. Calendars, a catalog, and a list of finding aids, published by the Hall of Records Commission, cover the Pre-rogative Court of Colonial Maryland, county courts beginning with the colonial period, proceedings of other courts, and other legal documents among state papers. A list of volume and card indexes available in the Index Room, which adjoins the Research Room at the

⁹ Richard Bartlett, "Remarks and Documents Relating to the Preservation and Keeping of the Public Archives," in *Collections*, New Hampshire Historical Society (Concord, 1837), p. 3.

¹⁰ Richard G. Wood, "Richard Bartlett, Minor Archival Prophet," the *American Archivist*, 17 (January 1954): 15. New Hampshire's Secretary Waldron, for instance, was able to save seven featherbeds and most of the records when his house burned in 1736. A Massachusetts fire in 1747 destroyed a portion of that colony's records, and in Rhode Island part of the town records of Newport and Providence had been burned. New York suffered two fires that destroyed public records during the colonial period. New Jersey reported to Bartlett that an archival fire had taken place in 1686, North Carolina reported no loss of records when its State House burned in 1831, South Carolina acknowledged loss of records in the secretary's office fire of 1698, and Georgia reported only the Yazoo Act destroyed by fire. Part of Virginia's archives were burned during the Revolution while stored, at Benedict Arnold's order, in a Westham public building containing war material.

¹¹ Aubrey C. Land, ed., *Archives of Maryland*, vol. 71 (Baltimore, 1970), xii.

¹² Court records for the years 1637-83 have been published as *Court Series 1-15*, which are volumes 4, 10, 41, 49, 51, 53, 54, 57, 60, and 65-70 of the *Archives of Maryland*. The proceedings of the courts are arranged as follows: Provincial Court (1637-83) in volumes 4, 10, 41, 49, 57, and 65-70; Court of Chancery of Maryland (1668/69-1679) in volume 51; Charles County Court (1658-66) and court-leet and court-baron of St. Clements Manor (1659-72) in volume 53; County courts of Kent (1648-76), Talbot (1662-74), and Somerset Counties (1665-68) in volume 54, and of Charles County (1666-74) in volume 60.

Hall of Records, is available as its *Bulletin* No. 17 (October 1972). The Maryland Court of Appeals has published a *Catalog of Manuscripts and Printed Matter*.¹³ Helpful also is a monograph, the *Judicial Process in Maryland*, by Elbert M. Byrd, Jr.,¹⁴ which covers the complex judicial structure from 1634 to 1774 and later. Byrd discusses courts of limited and general jurisdiction, the Court of Appeals, and the Courts of Baltimore City.

While Maryland has centralized its colonial court records in the Hall of Records, other states have assembled theirs in different ways. Connecticut's colonial records are housed in the State Library at Hartford, but in Massachusetts and Rhode Island such records have been left in the colonial county seats. The Virginia State Library in Richmond will make available on microfilm specified colonial Virginia court records.¹⁵

In some states, chance has taken a hand in the centralization of court records. During a recent symposium at the University of Chicago Law School, Stanley Katz, who has been working for three years on Chancery Court cases in colonial New York, reported that he had found in a recent accession of unopened papers acquired by the New-York Historical Society the Register's notes on 1770-1778 chancery cases, which had been missing. The notes were found in a box of papers received from a private donor.

Records from courts in eight different colonies have been published in nine volumes in the *American Legal Records Series, 1933-1964*, thereby providing examples of documentation of inferior courts and a superior court and the records of courts of appeal, admiralty, and equity.¹⁶ These volumes are out of print, but the American Historical Association reports that they are to be reprinted.¹⁷ The *Anglo-American Legal History Series*, nine mono-

¹³ *Catalog of Manuscripts and Printed Matter*, Maryland Court of Appeals (Baltimore, 1926).

¹⁴ Elbert M. Byrd, Jr., *The Judicial Process in Maryland*, University of Maryland Studies in Government (College Park, 1961).

¹⁵ David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, 1969), p. 32.

¹⁶ Carroll T. Bond, Richard B. Morris, et al., eds., *American Legal Records* (American Historical Association, Washington, D.C., 1933-64). The nine volumes of this series consist of court proceedings and records as follows: Volume 1: Maryland (Court of Appeals, 1695-1729); Volume 2: New York City (Mayor's Court, 1674-1784); Volume 3: Rhode Island (Vice-Admiralty Court, 1716-52); Volume 4: Connecticut (Superior Court, 1772-73); Volume 5: New Jersey (Burlington County, 1680-1709); Volume 6: South Carolina (Court of Chancery, 1671-1779); Volume 7: Virginia (Northampton County, 1632-40); Volume 8: Delaware (Kent County, 1680-1705); and Volume 9: Maryland (Court Records of Prince Georges County, 1696-99).

¹⁷ These volumes are to be reprinted by the Kraus Reprint Co., 16 E. 46th St., New York, N.Y. 10017.

graphs published between 1939 and 1944 by New York University, are valuable to those working with early American legal records. Of particular interest are *Early American Court Records: A Publication Program*, by Richard B. Morris,¹⁸ *The Attorney General in the American Colonies*, by O. W. Hammonds,¹⁹ and two by William L. Holdsworth: *Law Reporting in the Nineteenth and Twentieth Centuries*²⁰ and *The Named Reporters*.²¹

Historians of early America will find useful the *Essays in the History of Early American Law*, edited with an introduction by David H. Flaherty.²² The eighteen essays (by scholar-historians of seventeenth- and eighteenth-century law in America) appeared originally in journals now relatively inaccessible. Included are outstanding articles by Julius Goebel, Jr., George L. Haskins, Mark DeWolfe Howe, Richard B. Morris, Joseph H. Smith, and others. The editor's introductory essay surveys the secondary literature and the primary sources for early American legal history.

After American independence, the colonial courts became courts of the several states, with no great change in jurisdiction, procedure, or even personnel. Decisions of English courts continued to be cited by American judges and lawyers.

FEDERAL COURT RECORDS

Almost one-third of the million cubic feet of archival records administered by the National Archives and Records Service are federal court records. Only the records of the Supreme Court (1776-1951) are maintained in the National Archives building. Among these records are the Revolutionary War prize case files (1776-80) and records (1780-86) of the Court of Appeals in Cases of Capture, a court established by the Congress during the Revolution. After twenty years, Supreme Court records are retired to the National Archives, and annually the transcripts of oral arguments before the Court are added. Tape recordings of oral arguments are in the National Archives for the 1955-67 Court terms.

¹⁸ *Anglo-American Legal History Series*, Monograph Number 4, New York University (New York, 1941).

¹⁹ *Ibid.*, Monograph Number 2, 1939.

²⁰ *Ibid.*, Monograph Number 5, 1941.

²¹ *Ibid.*, Monograph Number 8, 1943. See also Michael G. Kammen, "Colonial Records and the Study of Early American History: A Bibliographical Review," *American Historical Review*, 70 (April 1965): 732-39; Edwin C. Surrency, "Federal District Court Judges and the History of Their Courts," in *Federal Rules Decisions*, vol. 40 (St. Paul, Minn., West Publishing Co., 1967), pp. 139-310; and G. Edward White, "The Appellate Opinion as Historical Source Material," in the *Journal of Interdisciplinary History*, 1 (Spring 1971): 491-509.

²² David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, 1969).

In the twelve Federal Records Centers in the General Services Administration Regions or in the Regional Archives Branches (housed in the same buildings) are stored records of ten of the Courts of Appeal (1891–1969) and of ninety-three of the District and old Circuit Courts (1789–1970). These regional centers are located in Boston, New York, Philadelphia, Atlanta, Chicago, Kansas City (Mo.), Ft. Worth, Denver, San Francisco, Los Angeles, Seattle, and in the Washington National Records Center at Suitland (Md.). Also in the centers are records of special courts (Court of Claims, 1855–1952; Customs Court, 1890–1962; Commerce Court, 1910–13; Tax Court, 1924–57; the Emergency Court of Appeals, 1952–62; and the Court of Military Appeals, 1950–61).

Additional research materials related to cases in the federal courts are to be found in the records of the Department of Justice. These records have been created in the exercise of the Attorney General's function of representing the United States in cases before the Supreme Court in which the United States is involved and in the supervision of United States Attorneys in similar cases before the Courts of Appeal and the District Courts. The other government departments and agencies also create files relating to cases in the federal courts.

STATE COURT RECORDS

State courts, the tribunals with which citizens most often have business, decide almost every type of case, subject only to the limitations of state laws, and handle the great bulk of legal business concerning divorce, probate, and all other matters not assigned to the United States courts.

Several states have passed legislation regarding court records, but only a few have comprehensive programs for handling the records of their courts. The state archivists of Colorado, Maryland, and North Carolina are responsible for the records of the courts of their states. In Colorado over half of the reference services in the State Archives are concerned with court records. Both Colorado and North Carolina use microfilm in work with their court records. Among other states to enact some legislation regarding court records are California, Delaware, Kentucky, Massachusetts, New York, and Virginia; the city of Philadelphia also has a court records program.

Records of colonial, territorial, and other pre-state courts were passed on to the successor or appropriate state or federal court. Usually, records of the territorial supreme courts were turned over to the new state supreme courts, while unfinished cases were transferred to the U.S. District Courts. Several of the federal records

centers have received records, along with those of the district courts, of cases begun in territorial courts and even in colonial courts (vice admiralty). Records of state courts not in the custody of the state archivist are not usually as available as those of the states which have provided for the care and servicing of these records by the State Archivist.²³

INDEXES AND OTHER FINDING AIDS

When the archivist acquires court records he becomes the custodian of source materials covering the spectrum of human experience. Each trial records historical data. The nonlegal researcher—the general or special historian, economist, and social scientist—needs both subject and name indexes if he is to be able to locate court case records pertinent to his research. Published documentation for the courts of the colonial period usually includes both subject and name indexes. Currently, most federal courts maintain case indexes recording both names and subjects, information which can be used for eventual computer-assisted indexes.

Until adequate indexes can be produced, however, the search for court records of the years between the colonial period and the start of modern indexing by the courts (begun some twenty years ago) will remain a cooperative project of the inquirer and the archivist-custodian. In the meantime, a number of existing information sources can be used fruitfully. They include the following:

(1) Inventories of records in the courts, both those produced by the Historical Records Survey prepared under the Work Projects Administration, 1935–40, and also those inventories of their holdings produced by the National Archives and Records Service and the Federal Records Centers. Similar inventories were prepared at the state and county level.

(2) General publications such as *Federal Justice: Chapters in the History of Justice and the Federal Executive*, by Homer Cummings and Carl McFarland (New York, 1937); *The Supreme Court in United States History*, by Charles Warren (Boston, 1935); *Guide to Federal Archives Relating to the Civil War*, by Kenneth W. Munden and Henry P. Beers, National Archives Publication No. 63–1 (Washington, D.C., 1962); and *Guide to the Archives of the Government of the Confederate States of*

²³ Early court records in the states, microfilmed by the Library of Congress in association with the University of North Carolina, are listed in *A Guide to the Microfilm Collection of Early State Records* and a *Supplement* issued in 1950 and 1951, respectively. They are available from the Photoduplication Service of the Library of Congress. The *Guide* and its *Supplement* list court records of the colonial, territorial, and/or early statehood years of the following: Arizona, Colorado, Connecticut, Dakota, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Wisconsin.

America, by Henry Putney Beers, National Archives Publication No. 68-15 (Washington, D.C., 1968).

(3) News items and articles regarding court case files which appear in legal, historical, and society journals and publications such as the *Newsletter* of the American Historical Association; *Prologue*, the quarterly journal of the National Archives and Records Service; the *American Archivist*; the *Information Bulletin* of the Library of Congress; the *William and Mary Quarterly*; *Journal of American History*; *Western History Quarterly*; and the *Journal of Southern History*.

(4) Guides to the records in the National Archives and to microfilm publications covering early state records, the *List of National Archives Microfilm Publications* (Washington, D.C., 1968), and *Special List* No. 21, "Index to the Manuscript and Revised Printed Opinions of the Supreme Court of the United States in the National Archives, 1808-73." Also, No. 31, the "List of pre-1940 Federal District and Circuit Court Records," which is a guide to the joint program of the University of Oklahoma and General Services Administration for microfilming records of the United States District and Circuit Courts, 1789-1840, as part of the Irwin S. and Elizabeth F. Rhodes Collection of American Legal Records. The new National Archives Guide will cover records in the Regional Archives as well as those in the National Archives.

(5) Indexes and publications such as the card indexes to the Central Files of the Department of Justice; books on trials, of which the seventeen-volume *American State Trials*, edited by John D. Lawson (St. Louis, Mo., Thomas Law Book Co., 1914-36), is a notable example; jurisdictional studies such as Charles Merrill Hough's *Report of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York, 1715-1788* (New Haven, Conn., 1925) and Carl Ubbelohde's *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill, N.C., 1960).

(6) Legal literature and law journals, especially subject treatises, texts, and indexes, citation books, even digests such as the *Civil Rights Court Digest* (New York, 1968-), and tables of cases; and the *American Journal of Legal History*, the *Quarterly Legal Historian*, and the *Law Library Journal*. Finally, the Annual Reports of the Attorney General of the United States since 1870, which cite precedent and unusual, unique, and important cases handled by the Department of Justice during each fiscal year.

The Work Projects Administration's *Survey of Federal Archives in the States*, cited above, unearthed a rich lode. Bankruptcy case files in the U.S. District Court in Tallahassee, Florida (1867-71), and in Oxford, Mississippi (1867-68), revealed economic conditions in these states following the Civil War. In the federal court in Louisville, Kentucky, the first minutes of the well-known Filson Club were found. The Richmond, Virginia, District Court records contained the original indictment of Robert E. Lee for treason, and in

a Michigan court, records involving fugitive slaves and attempts to return them to the southern states were discovered. In still another court some 5,000 naturalization applications, 1845-97, were found, arranged and indexed. Records of Canadian vessels seized as prizes during the War of 1812 were located in Maine, while in New Orleans documents bearing on piracy in the Gulf of Mexico following the War of 1812 were discovered. The latter included Jean Laffite material and a death warrant and a respite in the execution of sentence on fifteen pirates, signed by President Monroe and his Secretary of State John Quincy Adams. And in Oklahoma the 1891-97 proceedings of the Supreme Court of the Osage Indians were located.²⁴ One legal scholar, Irwin S. Rhodes, analyzed the first one hundred appellate cases considered by the Supreme Court of the United States and discovered that although most pertained to admiralty matters, they also contained considerable data regarding trade routes, commodity prices, money values, state securities (including trading in them), operation of committees and their foreign purchasing agents in the Revolutionary War, and enforcement and evasions of neutrality acts.²⁵

Such rich and varied contents indeed make court records a new frontier for the venturesome explorer. As historian Kathryn Preyer has observed, "the role, or roles, of a legal system in the history of any society is too important to be persistently ignored by historians whose very purpose is the study of man in society and the analysis of continuity and change over periods of time. Our analyses are weakened, often rendered inaccurate, by our inattention to legal sources."²⁶ It is the archivist's responsibility to understand these sources, map the terrain, and guide the search.

²⁴ Report of the National Director of the Survey of Federal Archives to the Works Progress Administration for the fiscal year ending June 30, 1937, in the *Third Annual Report of the Archivist of the United States, 1936-1937*, pp. 100-105.

²⁵ Irwin S. Rhodes, "Court Records as Original Source Materials for Historians," a paper presented at the session on legal resources in American history at the meeting of the Southern Historical Association, Houston, Texas, November 19, 1971.

²⁶ Preyer's "Some Thoughts on Legal Sources and the Historian" was presented at the same session on legal resources in American history cited above.