

Case Study

On Deposit: A Handshake and a Lawsuit

RONALD L. BECKER

Abstract: This essay underscores the importance of using widely recognized formal procedures and terminology in the execution of a deed of gift. The archives of the *Partisan Review* were accepted by Rutgers University through what now appears to be a very informal transaction. When the relationship between the prominent literary journal and the large state university changed and the *Partisan Review* found a new home at another university, the transaction was challenged, mostly on the meaning and use of the term *deposit*. The legal case brought about by that challenge is detailed, and advice for avoiding the misunderstandings that can lead to such litigation is provided.

About the author: Ronald L. Becker served as curator of manuscripts at Rutgers University from 1974 to 1991 and has been head of special collections since 1991. A version of this article was presented as a paper delivered before the Manuscript Repositories Section meeting at the annual conference of the Society of American Archivists held in Philadelphia in September 1991.

UNTIL THE 1970s, Rutgers University (and other research institutions) often dealt informally with potential donors of manuscript collections. In its accession records, Rutgers University used more than one term interchangeably to indicate how manuscript collections were acquired. The decision to use one term or another was often based on what would make the donor more comfortable. One of the terms used approximately thirty times in 1800 accessions was *deposit*. Today's general understanding of that term is fairly clear (legal title remains with the depositor). However, the former usage at Rutgers implied transfer of ownership to the university, regardless of the term selected to describe it in the exchange of letters with the donor and in the accession record. Since the early 1970s, deeds of gift and other agreements with donors have been more formal and precise. The earlier informal statements including the term *deposit* remained, and nothing was done (or, in many cases, could be done) to clarify the older records. The university assumed that it owned these manuscript collections and treated them no differently than holdings acquired through formal donation. Finding aids were prepared with no less effort, and the collections have been widely reported and used by researchers for many years. Until the summer of 1978, there was no challenge to these informal procedures. Unfortunately, the first challenge resulted in prolonged litigation centered almost exclusively around the term *deposit*, the loss of a major literary collection, and, ultimately, an effort to clean up the accession files wherever possible to remove the ambiguities.

A Prominent Journal Moves to Rutgers

To place the depositor's challenge to the term *deposit* in perspective, a brief historical note is in order. The *Partisan Review* is a journal of literature and criticism founded in 1934. It is universally known

in its field and has published numerous important authors such as William Faulkner, Albert Camus, Ernest Hemingway, and Jean Paul Sartre. Its advisory board has included such literary luminaries as Gore Vidal and Lionel Trilling. The journal was originally published by the John Reed Club of New York, but corporate ownership shifted several times, both to individuals and organizations such as the American Committee of Cultural Freedom. Despite the prominence of the *Partisan Review*, the journal faced financial difficulties throughout its early history and survived on what its editor termed "hand to mouth contributions."

Rutgers University is a large modern state university with years of significant accomplishments in many fields and even greater aspirations for the future. However, as one of the nation's oldest colonial colleges (founded in 1766), Rutgers remained a small liberal arts school for generations. With its tremendous growth and development in the second and third quarters of the twentieth century came a new sense of mission and purpose, but less change in some of its informal procedures. By the time the distinguished but poverty-stricken literary journal and the big state university crossed paths in 1963, Rutgers still operated very informally, making commitments with handshakes and eschewing formal contracts, which were perceived by some of its highest level administrators as relevant to the outside business world but not to academia. This evidently suited the *Partisan Review* since there was no real effort by either party to memorialize the relationship upon which they were about to embark—a relationship that began with a handshake and ended in the courtroom.

In 1963, the editor of the *Partisan Review* entered into negotiations with Rutgers about the possibility of the journal's moving its editorial offices to the university. Original discussions were held not with the administration, but with a faculty member who was about to join the Rutgers' English

Department the following fall semester. Since the professor lacked authority to make such an agreement, he asked the provost of the university to intercede. The benefits of such a relationship seemed to be advantageous for both parties. The *Partisan Review* would have a permanent, stable home and would be directly subsidized by the university, which would pay the editor's salary and that of an assistant editor, a secretary, and graduate assistants; provide rent-free office space and utilities; and supply the ancillary support services that come with being affiliated with a big institution. On the other hand, Rutgers would benefit from the prestige of its association with a well-known literary journal; the editor and his assistant would teach a few courses; and, potentially, there would be future lecture series and symposia organized by both parties and featuring the best-known writers and scholars in their fields. Reflecting the relaxed academic atmosphere of the early 1960s, the parties conducted their discussions during coffee meetings at the editor's home, over the telephone, and during luncheon meetings at clubs in New York City. No attorneys were ever consulted by the university. The provost later stated that it would be insulting to employ legal counsel.

Just as important as having the journal at the university was the acquisition of its archives by the library. According to the former provost's testimony, the editor "unambiguously stated that he would give the papers to the University Library" as part of the agreement.¹ He stressed to the provost the benefits to the university in obtaining the archives of such an important journal. The provost in turn used this argument in seeking the approval of the agreement from the president and board of governors of the university. After three months of relatively

casual negotiations, an agreement was struck; it consisted of an extremely short letter (a little over a page) detailing the new relationship.² The first sentence noted that the editor would be appointed as lecturer in English in the College of Arts and Science. The second sentence read: "It is to be understood that in coming to Rutgers you will bring with you the files of the *Partisan Review* to be deposited in the Rutgers Library. You will have to work out an agreement with the Librarian about what files are to be opened, if any, to the public and what are to be closed for the time being." The next paragraph spoke of the appointment of the provost and the soon-to-be-appointed professor of English to the *Partisan Review* editorial board. Also mentioned in one sentence was the provision of office space as well as a graduate assistant and secretary. The following sentences stated that the university would not be liable for anything printed in the journal, that the journal would (like all other departments and programs) continue to solicit outside funding to supplement the university's share, and that the university would pay the moving expenses from New York to New Brunswick, New Jersey. The longest statement followed in the concluding paragraph, which read, "All of this sounds to me horribly cold and legal and it does not express in any way my own excitement at the prospect of having you on our staff and having so pleasant and profitable a connection with the *Partisan Review*." Thus a major commitment on the part of both parties began.

Growth of Special Collections and the *Partisan Review* Archives

Like the university itself, the Rutgers Library began as a small liberal arts college

¹Deposition of Richard Schlatter, 6 March 1979. Superior court of New Jersey Chancery Division, Middlesex County, Docket C-605-78, pp. 421-77.

²Richard Schlatter to William Phillips, 20 March 1963, Provost's Records, Rutgers University Archives.

library that expanded greatly in the second half of this century but that continued its ways of operating much as it always had. The university librarian was a former English professor whose demeanor reflected the informal nature of the university administration as a whole. There is no evidence to suggest whether he knew anything about the negotiations that were taking place or, if he did, whether he had anything to say about the depositing of the archives in the library. In any case, he never communicated anything to the curator of the Special Collections Department, where the papers were ultimately placed.

By 1963, Special Collections was growing into a major repository for manuscripts, archival collections, books, pamphlets, maps, newspapers, and other materials relating mostly to the history and culture of New Jersey as well as some significant holdings in other areas. The *Partisan Review* archives did not “fit in” to the department’s unwritten collecting policy, but the acquisition probably made sense in that the journal was at Rutgers. Special Collections in 1963, like the university itself and the university library, maintained the old academic traditions of informality when dealing with potential donors. Words like *deposit* and other terms such as *placed* and *transferred* were used if words like *donate* were not comforting to the giving party. Any word that would get the collection to Rutgers without creating any ill feelings would suffice. All collections except those clearly marked as *loan* were accessioned and were candidates for whatever finding aids were warranted, given the usual constraints of time and money.

In the case of the *Partisan Review* archives, they just appeared in the library one day. Having no access to the one semi-formal letter that existed and no indication that this was anything other than a gift, the Special Collections Department promptly accessioned the archives with no indication of its origin. Stated restrictions were that

permission to use the collection had to be secured from both the curator of Special Collections and the editor of *Partisan Review*, who interviewed nearly every potential user of the collection. The original collection consisted of thirteen manuscript boxes of correspondence, subject files, legal documents, manuscripts of published and unpublished articles, and other related materials dating from 1938 to 1962. Later accessions included the editor’s “personal correspondence,” material documenting persecution of English intellectuals, and other miscellaneous items. Material was transferred to the library on a regular basis from 1963 until shortly before the controversy developed nearly fifteen years later. Use of the collection exceeded original forecasts by staff members, and a letter index was created to allow easier access to the correspondence of all the literary figures represented. When it came time for the second edition of *American Literary Manuscripts*³ to be published, the library dutifully reported in great detail its holdings of each well-known correspondent on its list. (Although the collection has been gone for twelve years, requests are still being received on the basis of the entries in that guide.) Meanwhile, the library dutifully reported new *Partisan Review* accessions, both in its own journal and to other appropriate publications.

The relationship continued unaltered well into the 1970s. The university’s financial contributions increased steadily. The staff grew and Rutgers occasionally contributed extra funds to cover emergency situations. In 1974, the journal filed a “Taxable Status Questionnaire” with the State of New Jersey, at which time it declared that it had no tangible personal property in the state.

³J. Albert Robbins, ed., *American Literary Manuscripts: A Checklist of Holdings in Academic, Historical, and Public Libraries, Museums, and Authors’ Homes in the United States*, 2nd ed. (Athens, Ga.: University of Georgia Press, 1977).

This declaration was later used by the university in litigation to attempt to prove that *Partisan Review* did not believe it owned the archives. By the time *Partisan Review* was ready to leave Rutgers, it was determined that the university had invested well over \$1 million in the journal.

The journal's relationship with the university probably would have continued indefinitely were it not for the fact that the editor was about to reach his seventieth birthday, the mandatory retirement age for all Rutgers faculty to this day. In discussing his upcoming status, the editor asked that an exception be made, and that he be kept on the faculty beyond this age. After some consultation, the university administration decided not to make an exception. The editor was to retire with full benefits in June 1978.

The Dispute Begins

In early 1978, the editor began a search for a new home for the journal, and an agreement was reached with Boston University in July 1978. The agreement was spelled out in much more detail than the one with Rutgers and was drafted with the assistance of attorneys rather than directly by both parties. Boston University insisted that all of the *Partisan Review* archives, including the materials deposited in the Rutgers Library, must be transferred to its library. Ownership rights were to be assigned to Boston University. The editor would cooperate in the effort to retrieve the archival materials from Rutgers and, if necessary, would cooperate in legal proceedings to secure title and possession of the archives. The editor then began the process to obtain the release of the archives from the Rutgers Library. He first contacted the former provost with whom the original agreement had been made. The former provost reminded the editor of the one-page letter which mentioned the deposit agreement. Having been rebuffed by the provost,

the editor went to the English professor originally involved in the move to Rutgers and, later, to the acting president of Rutgers University. After some consultation, the acting president expressed his reluctance to remove the files. The acting university librarian and the curator of Special Collections were unaware of what was transpiring and were not consulted. It was also discovered that, in addition to the papers in the library, there were similar papers dating from the journal's inception still housed in the *Partisan Review* office.

With the knowledge that the journal would be moving soon, legal counsel was consulted and the decision was made to seal the *Partisan Review* office by having the locks changed until an understanding could be reached on the archives issue. A letter was drafted to inform the editor of this decision, but it did not arrive until the next day. Meanwhile, the editor, his assistants, and a moving van arrived the following morning to a locked door. However, entry was gained through an unlocked window and some materials were moved to the van. When word reached the administration as to what had occurred, the current provost was sent to deliver and read the letter personally to the editor, university police were called, and the building was sealed before anything else could be loaded on the truck. As assistant curator of Special Collections at the time, I received a call shortly thereafter from the acting university librarian informing me that I was needed at the *Partisan Review* office immediately to help them with a "problem." Since the office was across the street from the library, I arrived a few minutes later to be greeted with the situation as described, but without having any previous knowledge of what was occurring. In the building were the editor and several assistants, an associate provost, moving men, and university police officers. Nobody else was allowed to enter the building for the remainder of the day. The controversy was summarized for me by the

associate provost and the *Partisan Review* staff.

The editor, his attorney, and counsel for the university conferred at length over the telephone and agreed on an interim arrangement by which the university would retain the editorial and all other noncurrent material pending a resolution of the dispute concerning the materials' ownership. The editor would be permitted to remove back issues of the journal, current financial files, and additional archival material necessary to continue publication at Boston University. My role would be to determine which documents had potential historical value and thus would be retained by Rutgers. A photocopier was wheeled into the building so that individual copies of these documents could be made for the editor if he felt that they were needed to publish the journal at Boston University. This nearly item-by-item procedure lasted several days. Ultimately, the parties agreed to seal the archives and the personal papers of the editor pending the outcome of the dispute. That done, the moving van was loaded and the *Partisan Review* left Rutgers in August 1978.

The *Partisan Review* was now physically absent, but the dispute over the ownership of its archives had just begun. I was asked to compile an inventory of everything left in the *Partisan Review* office and to move the contents to the Special Collections vault. Material similar in both content and date to what was already in the library was found in the building. There was nothing in the journal's archives that could shed any further light on the agreement, but some relevant letters from 1964 and 1969 were located in the correspondence files of two university librarians. In 1964, the librarian wrote the following to the editor of the *Partisan Review*: "This will serve as an additional receipt for the files of the *Partisan Review* which have been accepted by the Rutgers University Library on the basis of 'permanent loan.' It is our understanding that this material will rest indefinitely with

us . . . It is our understanding that the intention at the moment is [that] this state of 'permanent loan,' is preliminary to the transfer of the files to the University. On that basis we are very happy indeed to have it."⁴ There was no reply to that letter, but in the materials found in the journal's offices, there was a letter from another manuscript repository asking the editor to donate the archives to that institution.⁵ The editor's reply stated that "I regret to have to tell you that our papers are now housed at Rutgers, which is natural because of our association."⁶ In 1969, the next university librarian wrote to the editor: "I have just learned of your intention to present your papers, with those of the *Partisan Review*, to the University. This is a natural, wise, and generous decision, for which please accept my congratulations and warmest thanks."⁷ The editor wrote back: "Thank you for your nice note. I'll arrange things with the library as soon as I come up for air."⁸

The Lawsuit

While the papers in the *Partisan Review* office were being inventoried, the news of the controversy reached the press and readers throughout the country were made aware of what was going on by articles in the *New York Times*, the *Chronicle of Higher Education*, and other local and national media. Meanwhile, the editor filed suit and the case began. Before it was over, hundreds of pages

⁴Donald F. Cameron to William Phillips, 2 March 1964, University Librarian's Correspondence, Rutgers University Archives.

⁵Martin H. Bush to William Phillips, 14 February 1964, Provost's Records, Rutgers University Archives.

⁶William Phillips to Martin H. Bush, 8 April 1964, Provost's Records, Rutgers University Archives.

⁷Roy L. Kidman to William Phillips, 19 December 1969, University Librarian's Correspondence, Rutgers University Archives.

⁸William Phillips to Roy L. Kidman, 16 January 1970, University Librarian's Correspondence, Rutgers University Archives.

of testimony would be taken from a dozen witnesses and the word *deposit* would be analyzed again and again.

The complaint consisted of seven counts against Rutgers University and read: "The plaintiffs seek an adjudication that the literary archives and files generated by the *Partisan Review* are the property of the plaintiffs and related adjunctive relief. Additionally, the Complaint seeks specific performance and damages for breach of an alleged contract giving the University temporary custodial possession of the documents; compensatory and punitive damages for interference with the editor's contracts to write his memoirs and to deliver the archives to Boston University; and damages for trespass to chattels, intentional infliction of mental distress, invasion of privacy, false arrest, and false imprisonment."⁹

One of the key witnesses for the university was the former provost who drafted the original agreement. He claimed that the agreement was "more or less like a gentlemen's agreement." He was "uncomfortable with writing everything down." It was simply his approach to administration and the way academic professionals should behave. The editor claimed that by *deposit*, the provost really meant that rather than giving the papers to Rutgers, the *Partisan Review* would only be leaving them there as if it was depositing money in the bank. The provost countered with "I understand the word deposit to mean gift." The university even quoted from *Webster's Third New International Dictionary*, (1961 edition) which gives an archaic definition of the word *deposit* as "to lay aside or give up; rid oneself of" and claimed that this was the definition meant by the provost. The provost based his further understand-

ing of the term on his knowledge of depository libraries and copyright law. He stated that the use of the term *deposit* was similar to the arrangements depository libraries made with the federal government to serve as receptacles for federal government documents. Furthermore, the federal depository law provides for the "deposit" of two copies of a copyrighted work in the Library of Congress. In each case, the "deposited" copies of government documents and copyrighted books were owned respectively by the depository libraries and the Library of Congress.¹⁰

Other witnesses for the university spoke of the "moral" right that Rutgers had to the archives, given its huge investment in the journal (including the investment made by Special Collections in maintaining, describing, and servicing the collection). The editor in turn claimed that his privacy had been violated when the university went through his "personal papers." He stated: "I don't think I should say that you are to be the judge of my personal papers. I think I should be. All of literary history indicates that people's papers are to be judged by them, not by outside people."¹¹ The university countered by attempting to show that the editor's "personal papers" were in fact part of the archives of the *Partisan Review* and could not be separated from the archives.

The curator of Special Collections testified that the Rutgers Library used the word *deposit* rather specifically to indicate that an organization intended to establish a continuing relationship in which further so-called deposits would continue to come in

⁹*PR, Inc. v. Rutgers, the State University of New Jersey*. Superior Court of New Jersey, Chancery Division: Middlesex County, 20 October 1978.

¹⁰Deposition of Richard Schlatter, 6 March 1979, Superior Court of New Jersey Chancery Division: Middlesex County, Docket No. C-605-78, pp. 421-77.

¹¹Deposition of William Phillips, 21 February 1979, Superior Court of New Jersey Chancery Division: Middlesex County, Docket No. C-605-78, pp. 100-64.

on a regular basis as they did in the case of the archives of the *Partisan Review*. He claimed that title to these documents stayed with the university in the three dozen or so cases that he knew. He said “we’re not very legalistic about it.” When asked if the accession record would use the term *deposit* if that was how the donor characterized the transaction, he responded, “Not necessarily. It would depend on my knowledge of the relationship. A person may use the word in his own terms, but I would still put it down as I understood the relationship to be, not the way he happened to find a word out of the dictionary.” He said that he would have followed up the original 1963 agreement, but it was not shown to him at the time.¹²

Most of my own testimony dealt with what transpired in the building during the chaotic days of the attempted move and the aftermath in inventorying and servicing the records. Special Collections continued to provide mail reference to the *Partisan Review* office, but otherwise the collection was completely closed to the public. I was also asked to explain our practice in the usage of such terms as *deposit* and attempted to show how the archival definition of that word at Rutgers had changed over time. Opposing counsel asked about standards common to the Society of American Archivists, the Association of College and Research Libraries, and other professional associations.¹³ It became clear that a professional expert would be called to counter the basis given for the reasoning behind the usage of that term and to offer a modern definition such as Kenneth Duck-

ett’s “manuscripts or archives placed in the physical custody of a repository without transfer of ownership.”¹⁴

The Settlement and Its Implications

In the end, a settlement was reached. Rutgers agreed to microfilm all the materials that had been in the library before 1978. The originals and all materials taken from the *Partisan Review* office were transferred to Boston University.¹⁵ Since the microfilm cannot be consulted without the editor’s permission, it does researchers at Rutgers little good. All requests to use the collection have been referred to Boston University. The letter index and other finding aids also were transferred to *Partisan Review*’s new home.

Thus what was originally meant to be a permanent enduring relationship ended in legal controversy, expense, and a great deal of embarrassment to the university and the *Partisan Review*. Unrelated to this case, the university subsequently has been asked to return two other deposits. In one case, a nearly fifty-year-old deposit agreement was found in a safe deposit box by relatives of a recently deceased woman. The second case was similar, in that relatives had obtained a copy of the deceased depositor’s letter. Wherever possible, we have tried to clean up some of our ambiguous records and have had some success. In one case, what has become a very large urban medical center gladly agreed to donate previously “deposited” records of the nineteenth-century charity hospital that preceded it. However, in most cases, the “depositors,” “trans-

¹²Deposition of Donald A. Sinclair, 8 March 1979, Superior Court of New Jersey Chancery Division: Middlesex County, Docket No. C-605-78, pp. 542–83.

¹³Deposition of Ronald L. Becker, 22 February 1979, Superior Court of New Jersey Chancery Division: Middlesex County, Docket No. C-605-78, pp. 279–336.

¹⁴Kenneth W. Duckett, *Modern Manuscripts: A Practical Manual for Their Management, Care, and Use* (Nashville, Tenn.: American Association for State and Local History, 1975).

¹⁵Settlement, *PR, Inc. v. Rutgers, the State University of New Jersey*. Superior Court of New Jersey Chancery Division; Middlesex County, 12 December 1979.

ferers,” “presenters,” and “leavers” are impossible to track down, so the records used to describe the transactions must remain unchanged. The only occasions on which Rutgers has used the term *deposit* since the *Partisan Review* case have been with records that by statute clearly cannot be donated such as municipal or county records. In these cases, the terms and length of the deposits are indicated clearly.

There is other sound reasoning behind current uses of deposit agreements. For instance, the archives of labor unions and other large organizations are routinely accepted “on deposit” at the Walter P. Reuther Library of Labor and Urban Affairs at Wayne State University. However, the depositors are charged for the storage and processing of their collections on a fee-for-service contract basis. These arrangements have worked well for all parties through the years, and not one collection has been recalled by its depositor.¹⁶

The *Partisan Review* case is somewhat

unusual and not likely to be repeated often at Rutgers or other repositories. However, as long as terms such as *deposit* appear in accession records and agreements with donors, the legal assumption will likely remain that the *deposit* is not meant to be a donation. Examining old accession files and attempting to clear up ambiguities might help avoid future disputes, but the long passage of time makes that impossible in most cases. Fortunately, the archival profession now possesses more formal procedures to help guide the relationships between potential donors and repositories. Manuals such as Gary M. Peterson and Trudy Huskamp Peterson’s *Archives and Manuscripts: Law*¹⁷ reinforce those procedures and offer sample deeds of gift and deposit agreements. Without some formal agreement, with clearly defined terminology equally understood by both parties, there exists the possibility of ending the relationship in the courtroom.

¹⁶Philip P. Mason, unpublished paper, Manuscripts Repository Section, Society of American Archivists Annual Meeting, 27 September 1991.

¹⁷Gary M. Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* (Chicago: Society of American Archivists, 1985).