THE AMERICAN ARCHIVIST

Volume VIII JANUARY, 1945 Number 1

SOME LEGAL ASPECTS OF ARCHIVES[1]

Introductory Remarks

TEN years ago we American archivists were a complacent group of persons, sustained in our poverty-stricken lot by the faith that we had a high patriotic mission to perform—we must preserve the historical heritage of our country. Because most if not all of us had come into the archival field through our interest in history, we made little practical distinction between the private manuscripts and the public archives which came to our institutions. Because we were historians by profession and by training and were members in good standing and regular attendants at meetings of the American Historical Association, we had few, if any, qualms about our ability to take proper care of any archives which might come to us. There were even cases where archivists looked upon their job as a subsidy for their own private historical research. There was at least one instance, well known to you, where a state archivist, having completed his magnum opus, a history of his state (and a good one), simply boxed up his source materials promiscuously and stored them in the basement of his capitol, never making the slightest effort to restore their provenance. I recall an incident where an archivist being notified, while in attendance at an historical conference, that a bill had been introduced into his general assembly to create a new state records department, merely shrugged his shoulders and said that that would just be a department to take care of recent records—those from about 1865 on—and that wouldn't affect him.

Suddenly, about 1936, in the midst of the depression, undreamed of millions of dollars became available for archival work. I need not remind archivists of the chagrin with which we realized that we had neither plans nor technique for meeting the challenging opportunities which had come to us. The National Archives opened and archivists

[1] Presidential address, delivered at the eighth annual meeting of the Society of American Archivists, at Harrisburg, Pennsylvania, November 8, 1944.

had so little to offer to Dr. Connor that he called to his staff, not state archivists, but young ambitious scholars who were willing to experiment with new techniques.

Money was appropriated for new state archives buildings, but we had only the vaguest ideas as to how to go about designing them. I pause here just long enough to pay tribute to our late colleague, Dr. James Robertson, whose wise planning of the Maryland Hall of Records not only set its stamp upon all such buildings erected later, but also gave us an example which I, for one, can testify is eminently practicable.

The greatest stimulus to archival development at that same time was unquestionably the creation of the Historical Records Survey of the WPA. Many of us look back to that project, especially in its later phases, as one of the most trying experiences in our professional careers. There is no denying, however, that the HRS made substantial contributions to archival technique, made for us the first comprehensive, even though uncompleted, survey of the archival resources of the country, and roused public appreciation for better physical care of government records. Granting that the late Dr. Robert C. Binkley's suggestion that assembly line methods might be applicable to research was too revolutionary an idea for most of us to grasp, we must acknowledge that we were unable to give Dr. Luther Evans the practical advice he had a right to expect from us. If he and his staff had not had to spend so many of the early months in experimentation, perhaps the conflict between those who were interested only in making work for the greatest number and the archivists who wanted quality results, would not have developed to the place where it finally wrecked our program.

Of recent years our government officials have increasingly turned to archivists for help in the destruction of their valueless records. Here again we have to admit that we have no more experience than they. More recently these government officials are turning to us for advice in the matter of more scientific creation of records. In the federal government this has taken the form of putting the records program for a department in charge of an experienced archivist. In Illinois our Civil Service Commission has asked us to participate in its in-service training program by presenting a series of lectures on good record practices.

That archivists were quick to recognize their deficiencies is attested

by the founding of the Society of American Archivists in 1936. Since that time we have made substantial progress, particularly along the line of archival technique. We hope we will never again be caught so utterly unprepared as we have been in the past. Certain tendencies in the Society, however, disturb me, and I speak of them, not in a spirit of censureship but rather of warning.

The first is our attitude towards the National Archives. Dr. Buck has often expressed the fear that the National Archives may dominate the Society of American Archivists. My own fear is not that the National Archives will wrest any power from other archivists in the Society, but rather that the state archivists are inclined to sit back and wait for the National Archives to do their thinking for them. To be sure, we in the states cannot afford men or equipment to do scientific research of the type that Arthur Kimberly and Vernon Tate have done for the National Archives. But there are many phases of archival work that have never been explored and many of these phases have to do with problems of the state archivist alone. For instance, the field of local archives is practically a virgin field so far as accomplishments are concerned. The matter of jurisdiction and co-operation between state and national archives is one which needs consideration from a local as well as from the national point of view. State government differs in many respects from national administration. Are their record disposal problems, for instance, also identical? Most state archivists have the broader field of historical society work instead of just archives, and this is bound to affect our technique. For instance, it is doubtful if the National Archives ever will, or may ever need to analyze and index their records as closely as we do in a state archival institution. The impact of business archival establishments on government archives is bound to bring more to us than we give, particularly in the matter of analyzing filing procedures to produce better balanced and more adequate as well as more efficiently created records.

The other tendency is one which is perhaps too delicate to mention, but I shall do so just the same. That is, a feeling that I have in reading THE AMERICAN ARCHIVIST, that we archivists are, consciously or unconsciously, trying to impress each other with our erudition. No one is more sympathetic than I towards Professor Pease's ambition to have that journal as dignified and on as high a plane as any professional journal. But more and more our editor com-

plains that archivists are not submitting articles and that he is hard pressed for material to print. Surely all of us are thinking about our work constantly, and surely each of us is doing something distinctive which is adding bit by bit to our efficiency as archivists. Why are we afraid of each other? Write about your work and ideas, and submit it to Professor Pease. Perhaps it won't be quite suitable for THE AMERICAN ARCHIVIST, but there are other mediums of publication—such journals as *Illinois Libraries*, which publishes popular articles on record matters, and your own biennial reports.

Several years ago I had occasion to review library literature of the early days of the American Library Association. I was amazed at the serious discussion of such matters as the practicability of lending books to the public, whether children should be allowed to come to the library, many other matters that are commonplace today. Melvil Dewey, Frederick Poole, and Justin Winsor did not lose stature in retrospect because they discussed fundamentals simply. Perhaps we need a questions and answers department in THE AMERICAN ARCHIVIST such as the British Records Association publishes in its technical bulletin.

One other matter and I will finish this lengthy introduction and get on with my presidential address. That is the matter of our committees. Association presidents spend many hours selecting just the right persons for committee memberships. All too often, however, these memberships are treated as honors, not as responsibilities. Both you and I have been and are on such ineffective committees. I have been a member of one committee for five years, and in that five years I have not had one letter from the chairman, even in answer to my own letters to him. It is a matter of gratification to me to learn through correspondence that our own committees are working. I wish, though, that their committee reports might be more detailed and that the results of their work could be publicized for the benefit of our members, perhaps through summaries in THE AMERICAN ARCHIVIST, through mimeographed bulletins, exhibits such as our Committee on Local Records has prepared for us, or through verbal reports at our annual meetings.

Some Legal Aspects of Archives

At the annual meeting of this Society last year I participated by proxy in a discussion of some of the differences between archives and

historical manuscripts as those differences affect methods of care, preservation, and use. Limiting my discussion to official governmental records, I endeavored to make the point that the archivist is limited in his procedures for the care of records entrusted to his custody by a paramount duty to preserve the integrity of their use as acceptable legal evidence. In preparing that discussion, I discovered that although we are spending our lives caring for legal records, practically nothing has been written by American archivists on philosophical aspects of the subject of legal aspects of records. I am aware that this is but one phase of archival work, and also that it is not a topic particularly suitable to an audience composed largely of persons chiefly interested in archives as historical manuscripts. Nevertheless, I propose, with your indulgence, to discuss a few phases of this matter this evening as indicative of just one direction in which we need to do more research.

The philosophy of records as affected by our democratic system of government is something we accept without much thought until we try to discuss some of our problems with fellow archivists from foreign countries. Then we discover that our ways are not their ways. An archivist from a country with a highly centralized government cannot understand why the records most important to individuals—title records, marriage registers, probate records, and vital statistics—should be left to the unsupervised custody of what to them appear petty officials of the lowest grade politically and professionally. "Why doesn't the government do something to correct this?" they ask. We try to explain that public records in a democracy belong to the people, that our government is made up of officials merely delegated to do for the people what the people cannot do effectively as individuals; that our officials do not own the records which they create but merely act as custodians of the records on behalf of the people; that the origin of the custom of placing our most important records in the hands of county officials was to be able to watch over them and control them as officials of a remote central bureau could not be watched and controlled.

The second legal aspect of records also grows out of our democratic system of government—that is the theory that government records once created may not legally be destroyed without authorization from the representatives of the people in General Assembly—by that body which authorized the creation of the records by direction or by

implication. The national government and all state governments have statutes making unauthorized destruction of records a criminal offense, yet these prohibitory laws are constantly flaunted with impunity. The most generally accepted explanation for this is that prosecution for violation of the law must be by fellow officials who hesitate to prosecute because of social or political pressure.

The real reason why records are destroyed with impunity is that the law is impracticable because it fails to give an adequate definition for the term "records." Under a strict and commonplace interpretation of the law, almost any piece of paper with writing upon it which flutters by chance into a government office must be deemed a record. The absurdity of treating as equally sacrosanct a record of a transfer of a piece of real estate and an office memorandum requisitioning a typewriter ribbon is undoubtedly at the bottom of the contempt of the average official towards prohibitory laws in the face of patriotic calls for scrap paper. Most officials fail to take a long-range view of their records and are interested only in preserving those records which would prove their financial honesty in case of an investigation of their department. Some legal control over the creation and disposal of records must be applied.

The best solution to the disposal of valueless records which has been tried so far is through laws creating a commission, board, or other official body which passes upon the advisability of destroying records submitted for consideration. That this is not completely successful is attested by the large number of records which are still being destroyed illegally without consultation with the records commission.

A profitable study for archivists would be a redefinition of the term "record" as used in laws relating to the destruction of records. This redefinition might be in terms of purposes for which records are created, requiring that records which accomplish certain purposes, such as establishing property or citizenship rights, must be preserved permanently; that other records such as those administrative records establishing policies may, subject to the consent of the records commission, be kept in microfilm copies only; that certain records of temporary utility such as records of investigations of complaints may, also subject to review of the records commission, be destroyed after a period of years.

As our record disposal laws are now working we are compiling

long lists of records already created which have proved to be of doubtful utility. This is a negative process. It is not contributing towards the creation of a well-rounded archives system. From my own study of the history of state administration I can faintly see a pattern emerging which might make possible such a record disposal law as I have outlined above. Would that some of the energy spent by graduate students in rehashing the history of the Illinois and Michigan canal could be diverted to useful and basic studies on the history of governmental functions!

A third legal implication of our democratic system is that all records of public business are public records and as such must be open to any person applying to see them, subject only to reasonable regulations as to hours of access and to necessary safeguards for their physical protection. That theory is embodied in the working of many laws creating records and is implicit in all others except where the law specifically exempts certain records from public inspection as being of a confidential nature. Records may be classed as confidential only where examination by outsiders would be prejudicial to public or to private good—for instance, in the case of certain financial reports made by corporations in connection with franchise or other taxes, and such personal records as pardon papers. Departments transferring records to the archives sometimes do so with the condition that the records may be shown by the archivist only on orders from the department. If this stipulation is so worded that it does not in effect prevent an interested individual from demanding access to the records through the department, this is not construable as a violation of the law. It does save the archivists many headaches in borderline cases which the department can pass judgment upon more wisely than the archivist. The knowledge that information can be obtained only by going through certain formalities also acts as a definite check to sensation mongers.

The substitution of a certified copy to save wear and tear on the original record, an increasingly common practice, is likewise perfectly legal, especially when the original has been preserved as a check against possible error and for use upon those rare occasions when only the original can suffice. Certified copies of these certified copies, particularly when the first copy has been made photographically, are also acceptable to the court.

Opening of records to public inspection implies a duty to supervise

that inspection to protect the records against undue wear, theft, mutilation, or deliberate or accidental tampering of any kind. This theory of free access to records has been carried to a dangerous degree in many offices, particularly in the county court houses. In some of our county recorder's offices the abstract companies have practically taken possession of the records and order the recorder and his deputies about as if they and not the recorder were in charge. In most recorders' offices in Illinois the deed and mortgage record books are on open shelves, among which all comers are welcome to browse without restraint. This custom has become so rooted in tradition that progressive officials who feel some safeguards should be applied, find it difficult to interpose the minimum checks. These officials should be encouraged to substitute certified copies of the original for public use wherever possible. The probate clerk of Cook County (Chicago), Illinois, has found this practice the only means of curbing serious abuses particularly in the way of substitutions and thefts of individual documents in his unbound files.

Another legal aspect of archives is the power of replevin. All governments have laws permitting the seizure of public records found in private hands. These laws are useful in the recovery of deliberate thefts from the archives, but are practically never successfully invoked in the case of records taken by officials going out of office, which is the most common way by which public records disappear. Letters, for instance, which discuss matters of office policy in one paragraph and political gossip in the next paragraph tend to end in the official's private files. A century or less ago it was not uncommon for a county or township official to keep his office records in the back of the account books of his law office or his store. All sorts of legal complications can and do arise where it becomes necessary to get back official records thus taken away accidentally or deliberately. Once again we feel the need for a more precise definition of the qualities which constitute an official record.

Audits of accounts of financial receipts and expenditures and inventory checks of furniture, filing equipment, typewriters, and pencil sharpeners between outgoing and incoming officials are becoming routine matters, but similar checks on public records so transferred are practically unknown. In Illinois law the county recorder and the probate clerk are the only county, and so far as I know, the only public officers in the state who are required to sign

a receipt to their predecessors for records turned over to them. Less loss of records and better quality of records would result if the laws were amended to require an inventory of records to be compiled, checked, and receipted for in duplicate, one copy to be given by the incoming official to his predecessor and one copy retained as a part of the official records of his office.

Most states have laws making provision for the reconstruction of public records in case of destruction of the originals through fire, flood, or other catastrophe. It has been stated that eighty per cent of Illinois counties have lost at least part of their records that way; most states have also had similar losses, some of them of major proportions. In general these laws name commissioners, generally some court, to which private persons and government officials may submit evidence from which the public records may be rebuilt. Illinois, for example, has very detailed laws on these points, necessitated by the destruction of all the Cook County and Chicago municipal records in the fire of 1871.

Much work is being done throughout the country in the microcopying of government records, particularly county records, as insurance against loss of the originals. We find that very little, if any, attention has been given to certifications which would make these copies acceptable to courts as evidence. We find that commercial firms are glibly citing court decisions accepting photographic copies of public records, but we doubt whether the courts will accept photographic or other copies as paramount evidence where proper certificates have been omitted. We have worked out forms for use in microfilming Illinois county records. Copies of these forms are on exhibit at this meeting and will be published in an early issue of *Illinois Libraries*.

This brings us to the matter of records as court evidence. This subject has been largely ignored in American archival literature. It is impossible to discuss it here in any detail. The standard work on the subject is the late John Henry Wigmore's *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, commonly cited as *Wigmore on Evidence*. Sections 2128-2169 in the third edition (1940) deal with "Authentication of Documents."

The first question which the judge asks concerning a document presented in evidence is, "Is this actually the document which it purports to be?" Next he asks, "Are the facts alleged in the document true or false?" Ordinarily the archivist has to reply only to the first

question. It is the rule of evidence that "the existence of an official document in the appropriate official custody is sufficient evidence of its genuineness to go to the jury."[2] This proof is shown by presenting the document to the court in one of several ways. First, the original document itself may be presented by its legal custodian, who takes oath verbally before the court that this is the document in question. In the case of a public record it is improper for the custodian to remove the record from its legal repository without a subpoena from the court. Because of this impropriety of removing the record, the court is commonly satisfied with a copy certified under the seal and signature of its custodian that this is a true and complete copy of the original. Some of the complications which arise in the presentation of a record or a certified copy thereof as the result of transfer of custody from the department of origin to the archivist, and in certifying records which have been returned to the archives after having been for a time out of official custody were discussed in my paper which was read to you last year. This article appears in the December, 1943, number of *Illinois Libraries*.

In addition the court may demand proof that the person producing the original or signing the certified copy is indeed the legal custodian of the document. When the court is within the same state and the identity of the custodian is easily ascertainable, it customarily suffices for him to state in his verbal oath or in the certified copy, that he is the official whose title he names, and that as such he is the official custodian of the document. Where the court sits under a different jurisdiction and particularly where it is under a foreign government, it is customary to add a certificate under the great seal of state to the effect that the custodian has been legally appointed or elected, as the case may be, to the office, and that he is authorized by law to sign and seal the certified copies.

Occasionally government records are presented as evidence by private persons. Since the taking of an original file from official custody by a private person exceeds all bounds of propriety and safety, the court rejects such testimony in all but the most extraordinary cases. "When a *private person* testifies to a *sworn* or *examined copy* of a *public record, i.e.* a record examined by him for the purpose of making the copy, it is obvious that proving the copy includes not only proof that its contents are a genuine transcription of the original,

[2] *Wigmore on Evidence*, Sec. 2158.

but also that the original was the genuine one it purported to be."[3]

It would be profitable and interesting, if time permitted, to compare the lawyer's methods of appraising the veracity of the contents of documents with the historian's. One of my friends who is noted for his critical acumen as an historian once told me that he had learned more historical methodology while acting as secretary of a local historical society under the presidency of an able attorney, than in all his graduate courses in history. "He not only made me document every sentence I wrote, but he taught me how to evaluate those documents." We archivists cannot assume that the court will tolerate careless handling of records on our part if that handling impairs their legal status in any way.

Time does not permit a discussion of other phases of legal aspects of archives, such as laws which permit the archivist to exercise a salutary supervision over papers, ink, vaults and safes, or various other phases of record making and preservation. What I have tried to show is that there is still much room for study along these lines, not only by our committee on legislation, but by each of us archivists as individuals.

MARGARET CROSS NORTON

Illinois State Library

[3] *Wigmore on Evidence*, Sec. 2158.