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BOOKMAN'S WEEKLY

FOR THE SPECIALIST BOOK WORLD

A popular and fairly orthodox opinion concerning book-collectors is that their vices are many, their virtues of a negative sort, and their ways altogether past finding out. Yet the most hostile critic is bound to admit that the fraternity of bibliophiles is eminently picturesque. If their doings are inscrutable, they are also romantic; if their vices are numerous, the heinousness of those vices is mitigated by the fact that it is possible to sin humorously. Regard him how you will, the sayings and doings of the collector give life and color to the pages of those books which treat of books.

— *Leon H. Vincent*

A Problem For Dealers

Ownership of Papers of Public Officials

Ownership of Papers of Public Officials

By Kenneth W. Rendell

[Ken Rendell, a prominent dealer in autographs, manuscripts and rare books, in Newton, Mass., is a frequent contributor to *AB*. The following article is based on a paper delivered at the most recent Annual Meeting of the Western History Association in St. Paul, Minn. — JLC]

The question of title, along with that of authentication, is the most important and potentially troublesome one facing dealers in historical manuscripts and documents. In this article, I will consider the question of the title to papers created by persons employed by the government or other public institutions, and also the title to papers created by or for employees of private companies or institutions. While great publicity has been given to replevin cases involving public institutions, similar questions of ownership rights have been raised in the private sector as well.

I will begin with public or government papers, the area in which, it seems to me, the greatest inequities are found. Papers which were created at public expense, by employees of the public, and are of significant historial value to the public are routinely considered to be the personal property of public officials. Public records with little, if any, historical or commercial importance have been the subject of laws concerning public ownership and therefore the focus of replevin cases. These routine papers have very frequently been discarded by well intentioned public officials seeking additional storage space, only to have the person saving the papers from the incinerator or land-fill threatened with legal action unless the papers are returned to a different public institution.

It is frequently argued that public officials own the records they and their subordinates create because historically it has been accepted that they would remove the records of their office when they left it. There can be no question of the importance of this "tradition" before the establishment of the National and State Archives. If the public official did not take his papers with him his successor almost certainly would have discarded them. Because the papers were of importance to the creator, and later to his descendants, they were preserved and usually have been donated to public institutions. Those that have been scattered through commercial sales, and thus partially or substantially lost to research, are only a small percentage of those available to scholars in public institutions.

I do not believe that the papers of public officials created after the establishment of respective state archival systems, or the National Archives, are the property of these institutions. On the contrary: these papers have very frequently been saved from destruction only by the interest and concern of the family or descendants. What I do intend to state is that intelligent legislation should have been created, once the archival systems were available, to define what papers the government is entitled to in consideration of having paid for their creation. In the absence of such specific legislation, these papers, even though they may be of clearly a public nature, are the property of the persons creating them and their descendants.

THE OTTO KERNER PAPERS

The government in the case of Otto Kerner had intended both to challenge the accuracy of the fair market value of his papers and, more interestingly, to challenge his legal right to the title of the majority of them. Kerner's archive was almost completely created as Governor of Illinois, and a significant percentage of the papers were reports and memoranda created by other state employees at the request of Kerner in the furtherance of his official duties. Additionally, there were extensive records which had little if anything to do with the functioning of Kerner's office, but rather with the operations

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OWNERSHIP OF PAPERS

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of the State of Illinois.

Initially, at least in discussions with me, the government prosecutor was not considering challenging Kerner's title to anything which he created, but only his right to give away the papers of other state employees. Despite a search of Illinois statutes, the government was able to locate only a definition of very specific gubernatorial records which, by statute, had to be sent to the Secretary of State. For the most part this had been routinely done by the Kerner Administration. While it was illogical that Kerner should own those papers created by state employees for the state government, the government prosecutor did not believe he could successfully challenge this in court.

Kerner was very astute in virtually shipping the records of his administration from the Governor's office to that of the State Historical Society, claiming them as his personal property and obtaining a tax appraisal for them. This is not, however, what invariably has happened in the absence of an organized definition of public records. When Frederick M. Vinson, the Chief Justice of the United States, died in 1953 all of the records of his office, with the exception of cases then being decided, notably Brown vs. the Board of Education, were packed up and stored in the basement of the Supreme Court Building. The files contained many of his papers as Secretary of the Treasury and virtually all of the papers created by Vinson and other member of the Court during his tenure as Chief Justice. Those papers sat in the basement of the Supreme Court for more than 20 years until the late Chief Justice's family was finally told that they must remove them because the space was needed for other storage.

What would have happened if Vinson's son had no interest in the papers and refused to take them away? Would they have been discarded? Or what if the son removed them, as repeatedly asked to do, had no storage space of his own, and discarded them? Fortunately, neither eventuality occurred. The son made intelligent

inquiries and donated his father's papers to an institution.

I have often thought that Congress, when it enacted the section of the Tax Reform Act of 1969 disallowing the tax deductibility of self-created papers, would have more directly accomplished its intentions by simply defining what papers of public officials belong to the public. It was widely believed at that time that the tax deduction about to be claimed by Lyndon Johnson for the donation of his papers to the University of Texas prompted this provision because of the extent of the papers he claimed as his personal property and the enormous value placed on them.

It is my understanding from discussions with a former Chief of Staff of the White House that recent Presidents have ordered everyone in their Administrations to turn over to the Presidential Libraries all of their files and that none were to be considered personal papers. I do know of several cases where these orders have raised the question of the definition of public papers. If the then public official was an unpaid campaign worker, do his papers from that period also belong to the public?

It does not appear to be an insurmountable task to define what types of papers should be considered public records. There should be a distinction between what is created by the public official and by publicly paid subordinates. For example, when White House speech writers create a text for a Presidential speech of a non-campaign nature, it seems reasonable that the drafts of the speech belong to the public. A campaign speech, however, should be considered differently. Reports to an official on the functioning of the government are certainly public records as are official correspondence. If this person writes seven drafts of a speech himself it could certainly be argued that only the final delivery copy is public property; his position required him to make the speech but the thought process that went into its creation was his own.

The area of public papers which are frequently defined by statute as public property and over which replevin actions have been frequently threatened or initiated are routine documents recording vari-

ous legal transactions. These have also been, perhaps, the most commonly disposed of public records. Governments have maintained that such records, even if discarded when a building was torn down, with no provision for preserving the papers, are still, nevertheless, public property because according to the law no official was authorized to dispose of them.

It would seem that a strong defense could be presented in these cases on the basis of the documents having been abandoned property. When Henry Kissinger put his trash out onto his sidewalk in front of his home in Georgetown and a journalist removed it, Kissinger was unable to prevent publication of the contents of his trash bags because a judge ruled he had abandoned them. Certainly a state official discarding no longer current or useful state records, of no apparent historical or commercial value, at the time, was abandoning the property whether or not the law authorized him to do so.

THE DEALER'S PROBLEM

From a dealer's standpoint, this area can be the most frustrating, because you can never be certain that a state archivist will not initiate legal action against you to replevin documents which were discarded in good faith by state officials many years ago. No reputable dealer will acquire material which may have been taken from state or federal archives; this was illustrated by the case several years ago in which recent Presidential material, obviously of a very official nature, was offered to virtually every dealer and auction house. Everyone questioned the title to the material, and even after being told a plausible story about its being discarded after microfilming, expressed no interest in its acquisition. Reputable dealers have, however, been threatened with lawsuits if they did not return routine documents of no historical significance to a state archive that admitted that the documents were probably disposed of by state officials many years before.

Fortunately, most of these situations have been resolved without expensive and pointless law suits. Either the dealer readily capitulated, which was not usually the case, or the archivist could not interest the state's legal staff to undertake a lawsuit for unimportant documents. The most recent case in which the state was all too willing to use taxpayer's funds in such a pursuit was B. C. West vs. the State of North Carolina. This case involved several documents signed by William Hooper, a historically unimportant delegate to the Continental Congress who signed the Declaration of Independence. These documents had a retail value of approximately $1,000 each, were dated well before the American Revolution, and concerned local legal issues of no significance.

The state Archivist argued that they were the property of the State of North Carolina, even though they were executed under British rule, because the State assumed the legal responsibilities of England at the conclusion of the American Revolution and therefore had the legal right to these records. It was apparently agreed by all parties that they had been discarded many years ago because they had no relevance or use to the State and that it was most fortuitous that someone had retrieved them and that collectors had preserved them. The judge who heard the case ruled in favor of Dr. West and the private ownership of the documents; the State Archivist appealed and the appeals court ruled that technically they did still belong to the state; West, and those supporting him, decided that the cost of continuing the appeal to the Supreme Court of North Carolina was disproportionate to the importance and value of the documents.

What the State Archivist accomplished in this case was to have these several documents returned to state custody where no one will ever use them for research or exhibition, but more importantly, he

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assured that material of North Carolina which may be of great importance to the history of the state will never come to light. I, like most dealers, simply inform anyone offering material which might at one time have been in the possession of the Colony or State of North Carolina that we will not purchase it or accept it on consignment. What that person possessing a group of early North Carlina papers does with them when no dealer will purchase them is fairly obvious: they are either put back in the attic or basement or they are thrown away.

The attitude of an Eastern state archivist many years ago resulted in his state not losing several major printed works which had been thrown out to create more storage space. The head janitor of the capitol used to augment his salary by selling documents discarded by various government departments. Most of the documents he acquired were of little commercial value but occasionally a group of Franklin Roosevelt Senate Bills would turn up and he would earn a reasonable amount for his diligence. I was talking about this with the State Archivist one day, who told me that the janitor turned everything of historical importance over to him and that he had recently recovered a set of Audubon from a trash heap. The State Archivist was unaware of the existence of the set and his reasonable attitude towards the hard work of the janitor in monitoring what was disposed of certainly was rewarded when he presented these volumes to the archives.

It would seem that the private sector should offer more readily definitive situations, and to a degree this is true. Few companies will knowingly allow an employee to leave the company with the records of their work there. A number of years ago, in appraising the archives of a major New York publishing house it became apparent that some of the editors had considered their correspondence with authors to be their property and had taken all of these files with them when they left the company. Their actions were not only understandable but commendable as well; the company was simply dumping all of the files of former editors into basement storage, inaccessible to anyone and with-