

**THE REPLEVIN PROCESS IN GOVERNMENT ARCHIVES:
RECOVERY AND THE CONTENTIOUS QUESTION OF OWNERSHIP**

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To an attorney practicing law in the common law system, the term “replevin” describes a legal remedy for recovering personal property held by another party. In this civil procedure, the determination of rightful ownership falls to the court. Archivists and manuscript collectors have appropriated this same term to describe any effort by a government archives to recover public records in private hands, whether these efforts involve the courts or are carried out informally through discussions and negotiations with private parties. The number of “true” replevin cases involving disputed public records is small and existing commentary in the archival literature focus on these judicial decisions. This dissertation examines the quieter cases, developing a sharper understanding of what replevin means to individuals who are charged with preserving records and to those who are personally driven to collect. Three state archives serve as case studies and semi-structured interviews with institutional employees, archival records, active records, statute and case law as data sources.

A consistent message emerging from discussions with government officials is that each replevin case is singular in the manner in which it is resolved. Still, there is an apparent pattern to the replevin of public records, conceptualized in this dissertation as a six-stage process. Each case begins with the discovery of the alienated record and results in a custody determination favoring either the government or the private party. This dissertation determines that variances in statute, case law, and the involvement of legal counsel strongly influence a government’s

decision to pursue, the shape of negotiations, and the state's ultimate ability to recover the targeted record.

The issue of replevin is one that has provoked friction between the community of government archivists and some members of the collecting community, a friction largely stemming from an ambiguous understanding of the nature of a "public record" and disagreement as to whether an archives should lay claim to records that never have been in its possession. This study probes the motivations of public officials pursuing public records and argues that it is in the public interest for public archives to have an active replevin agenda.

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PREFACE

In the fall of 2010, Dr. Bernadette Callery lent me a book. My readers who were fortunate to know Bernadette likely remember a book or two – or many more – that she directed their way. This particular recommendation was journalist David Howard’s *Lost Rights*, his 2010 account of the State of North Carolina’s recovery of its original copy of the Bill of Rights. Recognizing my interests in issues of ownership and repatriation, Bernadette, along with my equally supportive advisor Dr. Richard J. Cox, helped to position me on the path that resulted in this study on replevin. Often, as I wrote these pages, I thought of Bernadette. I like to think that she would have had as much fun reading this dissertation as I had learning from her.

To my dissertation committee members, I thank you. Dr. Richard J. Cox, thank you for deepening my appreciation for the tremendous societal impact that archivists are capable of yielding. Like Bernadette, your influence helped shape this document. Dr. Brian Beaton deserves my heartfelt thanks for providing consistent words of encouragement and for posing those fantastic questions that left me reflecting for days. I am fortunate that I had a “legal team” in Dr. Kip Currier and Dr. Tomas Lipinski. One of the most meaningful compliments I’ve ever received is your affirmation that I would have done well in a law school property class. For your involvement in this project, my sincere thanks.

There are many information professionals and scholars who supported me during the development of this work. My sincere thanks to Dr. Roland Baumann, Attorney Karen Blum,

Sarah Buffington, Dr. Kevin Cherry, Dr. Elizabeth Dow, Lyndon Hart, Dr. David Haury, Sarah Koonts, Linda Ries, and the archivists at the State Archives of North Carolina, the Pennsylvania State Archives, and the Library of Virginia. Since 2010, the ARMA International Educational Foundation, the members of the Pittsburgh Chapter of ARMA International, and Preston Shimer have honored me with their interest and support of this work. My sincere thanks to you.

I am fortunate for the community I found at the School of Information Sciences at the University of Pittsburgh and in this city. To the faculty, staff, and students at the University, thank you for your guidance and assistance throughout the years. Special thanks to Dr. Joel Blanco, Dr. Leanne Bowler, Dr. Sheila Corral, Debbie Day, James King, Alison Langmead, Lindsay Mattock, and Tonia Sutherland.

Finally, to Kristy Borza, Andrew Brown, Cassie Rubino, Justine Rubino, Philip Toney, and Matt Zuwaila: you made Pittsburgh a home to me. All my love to my parents, Hap and Mary Mattern; to my sisters, Tess, Kate, and Libby Mattern; and to my brother, Neil Mattern. This one's for you.

“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹

-- William Blackstone

¹ William Blackstone, “Of Property in General” in *Commentaries on the Laws of England Book the Second*, 1765–1769, reprinted by the Avalon Project, Yale Law School, accessed January 3, 2014, http://avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp.

I. THE RESEARCH PROBLEM

The purpose of this research is to examine the replevin process in the archival field in the United States, a process that is largely distinct from the codified legal procedure that occurs in the American judicial system. Attorneys practicing in the United States likely first encounter a discussion about replevin in a first-year property course in law school. They understand replevin to be a common law writ that initiates a civil proceeding to determine ownership of personal property that a plaintiff argues is unlawfully held by another party. Archivists, on the other hand, generally use the term to describe any governmental effort to recover public records in private hands, whether these efforts involve the courts or are carried out informally through discussions and negotiations with private parties.

As a common law remedy, replevin has a long legal history, but the archival literature and a review of case law reveals that there are relatively few court decisions in which the disputed property was a public record. In 1939, Randolph G. Adams of the National Archives and Records Administration (NARA) pointed to this scarcity. In describing NARA's attempts to obtain information from the United States Department of Justice and the University of Michigan Law School about replevin cases involving public records, Adams reports that the Attorney General's Office was unable to locate any such cases and that the University of Michigan's law

librarian identified very few.² The challenge encountered by Adams and his colleagues continues to persist today. While some discussion in the literature exists on these cases, namely on *United States of America v. First Trust Company of Saint Paul* and *State of North Carolina v. B.C. West, Jr.*, the informal nature that typically characterizes replevin actions in the archival field has resulted in little presence on the topic in the literature. A survey of the websites of government archives, however, reveals that institutions are disseminating information to the public about the nature of public records and governmental efforts to recover alienated public records with archival value. NARA has attempted to publicize its recovery agenda both through information available on the Internet and through media outlets like CBS's *60 Minutes*. State archives, including California, Maine, and Tennessee, make explicit mention of replevin policies and pertinent laws on their websites.³ There have not, however, been court cases dealing with replevin of records in all states that have publicized their replevin efforts, suggesting, again, that this term is used more generally to describe government efforts to recover public records.

There is a challenge in developing a composite portrait of replevin of public records. Because the judicial system in the United States, with the exception of Louisiana, is based on the English common law tradition, replevin exists in all states as a tool for individuals seeking the recovery of personal property. There are, however, variances among states that have a bearing on the practice of recovering public records. The consequences of these variances are demonstrated through the case studies. North Carolina has a stringent statute in place that outlines the government's ability to recover public records and case law precedent in the form of *State of*

² Randolph G. Adams, "The Character and Extent of Fugitive Archival Material," *American Archivist* 2, no. 1 (January 1939), 90-91.

³ See "Recovering Public Records through California's Replevin Law," California Secretary of State, accessed September 15, 2012, <http://www.sos.ca.gov/archives/laws/replevin.htm>; "Involved in the Purchase or Sale of Government Records? It's Illegal! Please Consider the Following," Maine State Archives, last modified May 3, 2006, <http://www.maine.gov/sos/arc/replvnot.htm>; "Recovering Lost or Stolen Public Records," Tennessee State Library and Archives, accessed September 15, 2012, <http://www.tennessee.gov/tsla/aps/replevin/replevin.htm>.

North Carolina v. B.C. West, Jr. The Library of Virginia has a replevin statute and two court opinions, one that favored the Commonwealth of Virginia and the other that was a divided success for the state and the private party. Pennsylvania lacks both. This dissertation does not trace a process that is consistent from state to state. Instead, this dissertation examines how the legal framework shapes the general processes of replevin of public records. Moreover, I consider the implications that the legal framework of statutes and case law has for providing definition to the meaning of “public record” and for understanding the separating line between public versus private ownership of property.

I.A. SIGNIFICANCE OF STUDY

The significance of this study is that it brings into view a process that has largely been internal to archival institutions. The Library of Virginia, for example, disseminates information about its program to gain custody of alienated documents on its website, but this information does little to contribute to an understanding of how the Commonwealth learns of the alienated records and the steps that follow.⁴ By examining cases in which state repositories recovered public records through negotiations and agreements with private parties, this dissertation brings the replevin process in the archival field to the foreground and considers whether an understanding of these cases transforms our understanding of replevin. The most basic contribution of this dissertation is that it builds upon the sparse writing concerning the archival understanding of the term “replevin” and interprets the processes for recovery that occur within state archives.

⁴ “The Sale of Government Records Is Illegal!,” Library of Virginia, accessed February 16, 2014, <http://www.lva.virginia.gov/public/replevin.htm>

This research is intended to inform both the archival community and the collecting community, two distinct groups with an interest in ownership issues as they pertain to public records. There is a practical significance of this study for collectors and archival professionals alike. If a government archives identifies a record that is in the possession of a private party or in a non-government archives as a “public” record, the individual or institution may be mandated to transfer physical custody and ownership to the government. The reasoning behind the government’s ability to claim these records will be outlined in the literature review below, but it is a consequence of the “inalienability” of public records and the records retention schedules codified in federal and state law.

It may be the case, however, that archival practitioners and private collectors are unaware of how to recognize whether a record in their collection indeed belongs to the government. Oliver H. Holmes alludes to this in his 1960 article “‘Public Records’ – Who Knows What They Are?” in *American Archivist*. He writes, “In connection with efforts to replevin public records that somehow have escaped from public custody, uncertainty exists on both sides because of conflicting views and definitions of public records.”⁵ Research that identifies how both the repositories on the state level characterize records that they deem to be their rightful property would be valuable to both archival practitioners and members of the collecting community. In addition, because of the absence of discussion about replevin in the literature, there are limited means through which government repositories can learn from one another about replevin efforts. With this research, there is an opportunity to inform the government archival community of activities and policies related to the identification and recovery of public records that are occurring in a sample set of states.

⁵ Oliver W. Holmes, “‘Public Records’ – Who Knows What They Are?” *American Archivist* 23, no. 1 (January 1960): 4-5.

This study, through a perhaps somewhat unexpected lens, contributes to an understanding of appraisal decisions by government repositories. Appraisal entails decision-making on the part of the archivist. Postmodern archival scholars have observed that this allows for subjectivity to creep into the stacks and governmental repositories are certainly not an exception. Public archivists necessarily limit the scope of the narrative through the appraisal function. David Haury, State Archivist of Pennsylvania, has stated that government repositories generally select only 2.5-3% of public records to be accessioned.⁶ David S. Ferriero, Archivist of the United States, offers a similar estimate in NARA's "Performance and Accountability Report" for the 2011 fiscal year, approximating that 2-3% of federal records are preserved by the federal repository.⁷ By initiating a replevin action, a government archives signals that the record in question is one that has archival value, falling within this small percentage of records that are chosen to be preserved indefinitely. Not all public records that are in private hands are pursued. Instead, there is a selection process at work here, which this dissertation addresses through replevin cases in three states.

There is a theoretical and legal significance to this study as well. This dissertation draws upon the legal literature on property and contributes to the corpus of scholarship that focuses on the distinctions between public and private ownership. In particular, this study situates the replevin of public records within the context of government "takings." Eminent domain is the most familiar illustration of the government's seizure of property owned by a private party. At first blush, there appears to be a definite contrast between the notion of eminent domain and

⁶ Elizabeth H. Dow, *Archivists, Collectors, Dealers, and Replevin: Case Studies on Private Ownership of Public Documents* (Lanham, MD: Scarecrow Press, Inc., 2012), 1.

⁷ David S. Ferriero, "A Message from the Archivist of the United States," in National Archives and Records Administration, *Preserving the Past to Protect the Future, Summary: 2011 Performance and Accountability Report*, iii, accessed September 15, 2012, <http://www.archives.gov/about/plans-reports/performance-accountability/2011/index.html>.

government's replevin of public records. Eminent domain, as defined by *Black's Law Dictionary*, is "the inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking."⁸ The power of eminent domain works in concert with the fifth amendment of the United States Constitution to require just compensation for seized private property. When a government archives seeks the recovery of a public record from a private individual or institution, it is doing so because the record is perceived to be public, and not private, property. Therefore the position of public officials may be that no compensation is required to the private party. A government archives classifies this practice as replevin, as the archives is claiming records that it considers the government's property. The dividing line between replevin of public records and eminent domain becomes blurred, however, if there is ambiguity or disagreement surrounding whether the record in question is indeed "public." If a collector does not acknowledge that the record is public property and instead perceives it to be private property that is now being taken for public use, he or she might argue that, under the Constitution of the United States, the government must provide compensation for the seizure of the record. The recovery of public records is situated within the concepts of *replevin* and *takings* as a way to illustrate the competing perceptions of the practice – the perceptions of the government archives and the perceptions of many in the collecting community.

⁸ Black's Law Dictionary 601 (9th ed. 2009).

I.B. RESEARCH QUESTIONS

This dissertation addresses two research questions:

Question 1: What do replevin cases settled by state archives and private parties reveal about the government's process for the recovery of public records in private hands?

Question 2: How do these cases transform, if they do, our understanding of replevin and the distinguishing line between private and public ownership?

I.C. CORE CONCEPTS TO STUDY

Replevin

Black's Law Dictionary, a principal reference text for the legal profession that is now in its ninth printing, defines replevin as “an action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.”⁹ It is, as Behrnd-Klodt describes, a remedy that a party can employ in order to regain personal property “from one who has taken it wrongfully or holds it unlawfully.”¹⁰ Peterson and Peterson explain that an archival repository technically exercises a replevin action when it sues another party for the return of a document.¹¹

⁹ *Black's Law Dictionary* 1413 (9th ed. 2009).

¹⁰ Menzi L. Behrnd-Klodt, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008), 168.

¹¹ Gary M. Peterson and Trudy Huskamp Peterson, *Archives and Manuscripts: Law* (Society of American Archivists, 1985): 91.

The archival community's understanding of replevin does not depart fully from its meaning in the legal field. However, archivists have expanded its definition to describe the transfer (or attempts for transfer) of public records in the possession of private parties to a government repository. The glossary of the Society of American Archivists (hereafter "SAA") defines replevin as "an action to recover property that has been improperly or illegally taken," but the note that follows this description captures the reality of how the archival community often interprets the term. Glossary author Richard Pearce-Moses writes, "Replevin is frequently used to describe efforts to recover public records that are in private hands."¹² The archival community's broader use of the term, as Peterson and Peterson note in their *Archives and Manuscripts: Law*, is not always technically faithful to the legal understanding of replevin.¹³

Public Records

As the literature review addresses, there is ambiguity surrounding the definition of "public records" in the United States. This ambiguity may be the consequence of variances in the definitions that are embedded in public records laws and the synonymous use of the term to describe records that are created by government agencies and records that are open for the public's access. The latter issue is reflected in SAA's *Glossary of Archive and Records Terminology*, which provides multiple meanings of the term. The first definition describes public records as "[d]ata or information in a fixed format that was created or received by a government agency in the course of business and that is preserved for future reference."¹⁴ However, the glossary also provides a description of public records as "[g]overnment records that are not

¹² Richard Pearce-Moses, *A Glossary of Archival & Records Terminology*, *Archival Fundamentals Series II* (Chicago: Society of American Archivists, 2005), 342.

¹³ Peterson and Peterson, *Archives and Manuscripts: Law*, 91.

¹⁴ Pearce-Moses, *A Glossary of Archival & Records Terminology*, 320.

restricted and are accessible to the public.”¹⁵ For the purpose of this dissertation, the label of “public record” is understood as pertaining to records that fall within the parameters of the first definition that Pearce-Moses identifies.

Takings

An understanding of the concept of *takings* begins with a reading of the Fifth Amendment of the United States Constitution. Commonly referred to as the “Takings Clause,” the final line in the Fifth Amendment states, “Nor shall private property be taken for public use, without just compensation.”¹⁶ The Takings Clause extends to the government the power to appropriate property that is owned by a private party, but protects citizens by requiring fair payment in return. A government *takings* is, when used in this dissertation, referring to a governmental seizure of personal property for a public purpose. The constitutionality of a taking rests in whether the government provides the “just compensation” to the previous owner.

I.D. CASE STUDIES

Three state archives serve as case studies in this study of replevin. This section serves as an overview of these government archival programs and addresses factors that are particularly relevant to the dissertation research: the year of establishment of the archives, relevant public records statutes, and case law precedent related to replevin of public records.¹⁷ Public records

¹⁵ Pearce-Moses, *A Glossary of Archival & Records Terminology*, 320.

¹⁶ U.S. CONST. amend. V.

¹⁷ This dissertation follows the Chicago style for citations. For legal publications, however, *The Chicago Manual of Style* recommends that writers employ one of two citation styles that are commonly used in the legal profession: *The Bluebook: A Uniform System of Citation* the *ALWD Citation Manual: A Professional System of Citation*. The legal citations in this proposal follow *Bluebook* style. In keeping with this style, the legal citations for court cases include abbreviations for court names, court reporters (a publication reporting a court decision), title of state code, and governmental body. These are outlined in the *Bluebook* style manual.

that were created prior to the origin of the archives and that otherwise would have been selected as archival may today be in the hands of private individuals. Efforts of government archives to recover public records that were never in the custody of the public archives call attention to the tensions between private and public ownership and individual versus government property rights. The year of establishment of the archival programs is of note in discovering whether law and institutional policy allow for the recovery of records that predated the origin of the archives.

This introductory section identifies the statutes and case law in the jurisdictions, as these facets may have direct bearing on the government's ability to recover public records. Public records laws define the nature of public records and, thus, the materials that may be subject to a replevin claim by a government archives. Government archives also draw upon relevant statutes that codify disposal processes and specifically statutes that address replevin of public records when substantiating a claim to records in private hands. Finally, existing case law is a meaningful element in the study of three states. Given that the American legal system is of the common law tradition, described in the literature review below, government archives can cite court precedent related to replevin of public records when making a claim for ownership of a record in private hands. Moreover, if a replevin case reaches the courts, the judge will look to precedent in cases that bear similarities to the one he or she is adjudicating and shape a decision with the precedent in mind.

This study originally proposed NARA as a case study in order to learn about federal efforts to recover records in private hands. In August of 2013, I visited Archives II in College Park, Maryland, which houses military record collections and the records of federal agencies. There, I planned to spend time with Record Group 64, the records of NARA, and, in particular the series of the Records of the Office of the Archivist of the United States. This proved more

difficult than expected, as there are large gaps in what has been processed of the administrative records beyond the 1960s. While it was possible to access records related to NARA's pursuit of the Clark journals, it was not possible to appreciate the shape of the more common replevin cases, those that are resolved between the archives and private parties, from the archival evidence. Because of the importance of archival records to this study, the case of NARA was necessarily abandoned. The time did not allow for a project that would hinge on access through FOIA requests alone. One NARA archivist was apologetic about the unavailability of records, applying the adage of "cobbler's children have no shoes" to the situation involving his agency's processing backlog and its own records.

North Carolina

The year 1964 saw the publication of Ernst Posner's *American State Archives*, a work that Lester J. Cappon posited would "become at once a landmark in the field of American archives, indispensable to the archivist and valuable to the historian in many ways he might not suspect from the title."¹⁸ For the purposes of this study, Posner's work is beneficial in tracing the origin of the State Archives of North Carolina, the Pennsylvania State Archives, and the Library of Virginia, as well as for locating relevant public records statutes in these states.

Posner's history of the State Archives of North Carolina stretches back to January of 1903, with the passage of *Chapter 767, Public Laws of 1903* and the subsequent establishment of the North Carolina Historical Commission as a collecting body for the state. It was in 1935, however, that "the commission's authority was dramatically strengthened by the Public Records Act of 1935," which extended to the commission the power to oversee the disposal of state and

¹⁸ Lester J. Cappon, Review of *American State Archives*, by Ernst Posner, *William and Mary Quarterly* 22, no. 4 (1965): 678.

local records in North Carolina.¹⁹ Multiple reorganizations of the state archival program have occurred since 1935, including the transformation of the commission into the larger Department of Archives and History in 1943. In the 1940s, this department was segmented into multiple divisions, one of which was the Division of Archives and Manuscripts.²⁰

Today, the State Archives of North Carolina is part of the Division of Archives and Records of North Carolina, an entity within the Department of Cultural Resources.²¹ The duties and authority of the Department of Cultural Resources are codified in Chapter 121 of the North Carolina General Statutes.²² The same chapter serves to define the State Archives as the official repository for public records and relevant documentation that the state archivist deems to have “sufficient historical or other value to warrant their continued preservation.”²³ The original North Carolina Historical Commission remains intact as a 12-member policymaking body that nominates the Deputy Secretary of the Office of Archives and History.²⁴ Like the Pennsylvania Historical and Museum Commission, the North Carolina Department of Cultural Resources encompasses a number of parts and Figure 1 represents its contemporary structural organization.

The Public Records Act of 1935 is integrated within Chapter 132 of the North Carolina General Statutes.²⁵ The chapter provides a definition for public records in North Carolina, explaining that it includes all record types – both analog and digital in nature – that were “made or received pursuant to law or ordinance in connection with the transaction of public business by

¹⁹ Ernst Posner, *American State Archives* (Chicago: The University of Chicago Press, 1964), 202.

²⁰ Posner, *American State Archives*, 203.

²¹ “About the State Archives of North Carolina,” The State Archives of North Carolina, accessed October 4, 2012, <http://www.archives.ncdcr.gov/about.htm>.

²² N.C. Gen. Stat. § 121-4.

²³ N.C. Gen. Stat. § 121-2.

²⁴ H.G. Jones, “Historical Commission,” NCPedia, last modified in 2006, accessed March 25, 2014, <http://ncpedia.org/historical-commission>.

²⁵ N.C. Gen. Stat. § 132-1; N.C. Gen. Stat. § 132-3.

any agency of North Carolina government or its subdivisions.”²⁶ The sale, loan, defacement, and destruction of public records are actions that are expressly forbidden by North Carolina law without the permission of the Department of Cultural Resources, the umbrella agency for the State Archives of North Carolina.²⁷

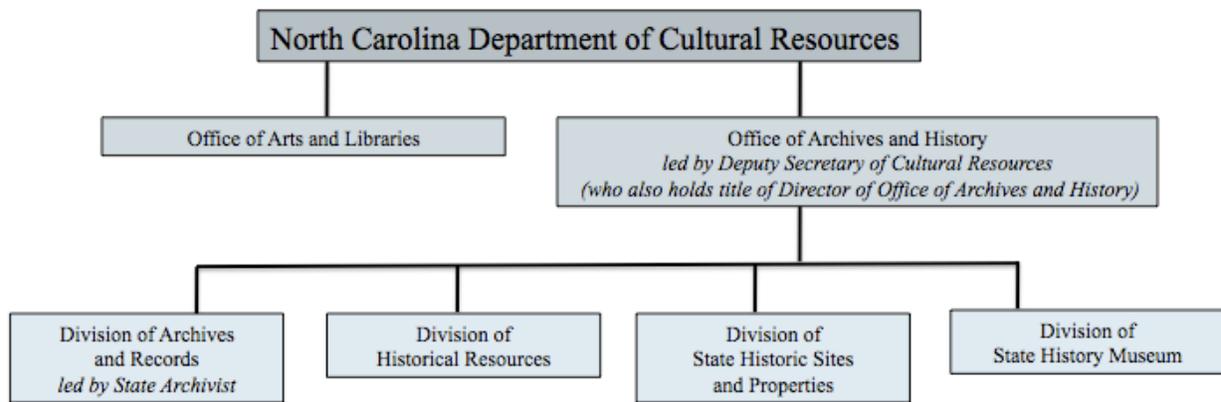


Figure 1: Organizational Structure of the North Carolina Department of Cultural Resources, adapted from interview with Dr. Kevin Cherry.

Two sections in Chapter 132 are of particular significance to this study and are notable for their explicit and stringent parameters regarding the custody of public records. Coupled, the sections provide for criminal and civil consequences for a party that is non-compliant in transferring a public record to the state. The first is section 132-5, titled “Demanding Custody,” which states:

²⁶ N.C. Gen. Stat. § 132-1.

²⁷ N.C. Gen. Stat. § 132-3.

Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for 10 days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a Class 1 misdemeanor.²⁸

The law is clear: the state has the power to order the transfer of state records that are in the possession of a private party. If the individual refuses to turn over the records to the state following a formal request, they are committing a criminal infraction that may result in a misdemeanor charge.

The section immediately following, section 132-5.1, is titled “Regaining custody; civil remedies.” It identifies the civil procedure for recovering a public record in North Carolina. If an unauthorized party is in possession of a public record, the Department of Cultural Resources or a public official who is the rightful custodian of the public record may initiate the court’s intervention. A petition is filed with the superior court in the county where the individual in possession of the record resides. If the judge determines that the record in question is indeed “public” in nature and that the person in possession of the record does not have the legal or authorized right to it, he or she will order that the record be delivered to the petitioning party. If the order is not fulfilled, the court may hold the noncompliant party in *civil contempt*, which is defined by *Black’s Law Dictionary* as the “failure to obey a court order that was issued for another party’s benefit.”²⁹

Section 132-5.1 governs custody of public records in the state of North Carolina; the county superior courts do not have the jurisdiction when the public records in question are in the possession of an individual residing in another state. Records, of course, can easily move outside

²⁸ N.C. Gen. Stat. § 132-5.

²⁹ N.C. Gen. Stat. § 132-5.1; *Black’s Law Dictionary* 360 (9th ed. 2009).

the borders of the state of North Carolina via Internet retailers like eBay. If the petitioning public official fears that a public record in private hands is poised to leave the state, he or she may react by filing an *ex parte* petition with the court, which is a petition that is “taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.”³⁰ This allows for more immediate action for the petitioner. There are two potential remedies that the court may issue under section 132.5-1: the judge may direct the county sheriff to seize the records that are in question and deliver them to the court or the judge may file an injunction that prevents the “sale, removal, disposal, or destruction of or damage to” the public record.³¹

Court precedent in North Carolina has contributed to the state’s ability to reclaim public records. Much of the archival writing related to replevin makes reference to the 1970s case of *State of North Carolina v. B.C. West, Jr.* While the above statute related to recovery was enacted in 1975, this court case, in which North Carolina was victorious, “turned on common law” alone; the statute was not employed as ammunition in North Carolina’s claim.³² North Carolina was again successful thirty years after the ruling in *State of North Carolina v. B.C. West, Jr.* with the state’s recovery of one of the original fourteen copies of the Bill of Rights. The circumstances surrounding both of these notable cases will be outlined in the literature review.

Pennsylvania

Writings on the development of the Pennsylvania State Archives, namely the accounts written by Posner, Frank B. Evans, and Louis M. Waddell, begin with a discussion of the 19th century custom of publishing state records. Archival “preservation,” at this time, was carried out through

³⁰ *Black's Law Dictionary* 576 (6th ed. 1990).

³¹ N.C. Gen. Stat. § 132-5.1

³² William S. Price, Jr., “N.C. v. B.C. West, Jr.,” *American Archivist* 41, no. 1 (January 1978): 23.

an act of copying, with designated documents selected for publication in *Colonial Records* and *Pennsylvania Archives*. This practice, as Evans explains, in reality did little to *preserve* the records. Original records were altered and mishandled by printers and there was no final home for the published and unpublished records.³³

Like North Carolina, Pennsylvania's state archives originated in 1903, with the establishment of the Division of Public Records as an entity within Pennsylvania's State Library.³⁴ The Division of Public Records was initially given authority over records that predated 1750, meaning that the body did not have the ability to "demand" custody of records that were created after this date. It was a restriction that was soon eradicated in 1911 and, as Waddell tells it, had little impact on the actual collecting practices in the institution's earliest years.³⁵

Today, the Pennsylvania State Archives is located within a changed organizational structure, which is illustrated in Figure 2. Title 37 in the Pennsylvania Consolidated Statutes, generally referred to as Pennsylvania's History Code, establishes the role and authority of the Pennsylvania Historical and Museum Commission (PHMC). The PHMC is the governmental agency that is charged with "the conservation of Pennsylvania's historic and natural heritage and the preservation of public records, historic documents and objects of historic interest, and the identification, restoration, and preservation of architecturally and historically significant sites and structures."³⁶ While not mentioned in the History Code, the PHMC encompasses the following entities: the State Museum of Pennsylvania, the Bureau of Historic Sites and Museums, the

³³ Frank B. Evans, "The Many Faces of the Pennsylvania Archives," *American Archivist* 27, no. 2 (April 1964): 269-270.

³⁴ Posner, *American State Archives*, 231; Louis M. Waddell, "The Emergence of an Archives for Pennsylvania," *Pennsylvania History* 73, no. 2 (Spring 2006): 198.

³⁵ Posner, *American State Archives*, 231; Waddell, "The Emergence of an Archives for Pennsylvania," 228.

³⁶ 37 Pa C.S.A. § 102.

Pennsylvania Trails of History, the Bureau for Historic Preservation, the Bureau of Management Services and, pertinent to this study, the Pennsylvania State Archives.³⁷

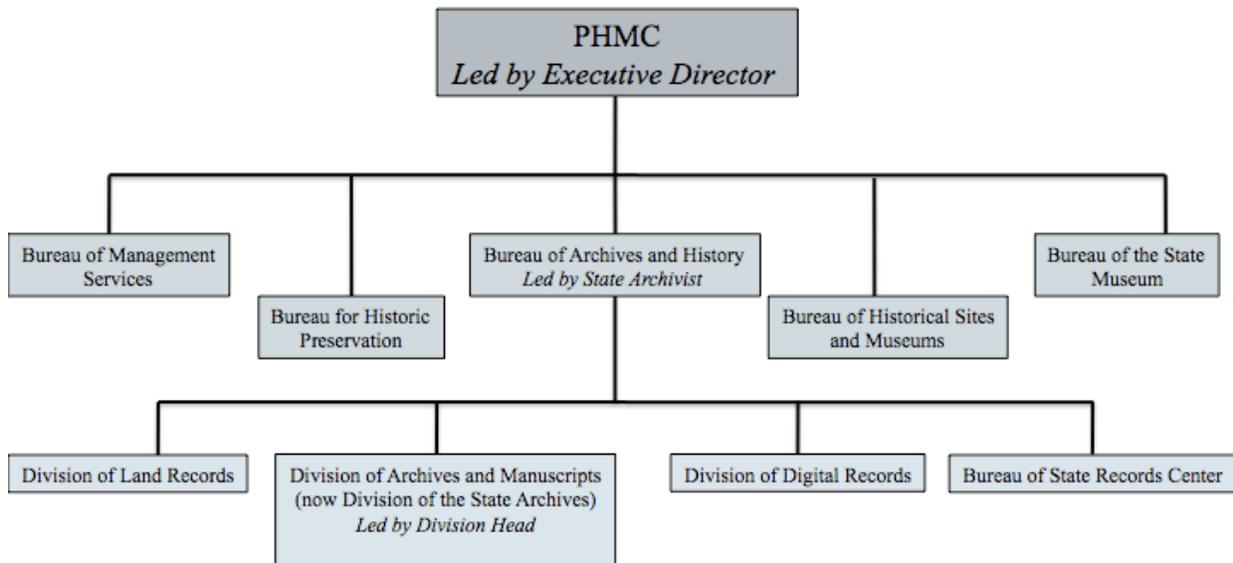


Figure 2: Organizational Structure of the PHMC; adapted from description on “About the PHMC,” PHMC, accessed March 18, 2014, http://www.portal.state.pa.us/portal/server.pt/community/about_the_phmc/1579.

Section 305 of the History Code outlines the PHMC’s authority in relation to public records. The law stipulates that it is the responsibility of the PHMC to preserve inactive public records of historic value. It states the agency shall be “the legal custodian of any public records transferred to it by any Commonwealth agency or political subdivision.”³⁸ However, Pennsylvania’s state laws regarding its public records may be characterized as muted and even weak in comparison to those on the books in other states. It is interesting to note that there is no

³⁷ “About the PHMC,” Pennsylvania Historical & Museum Commission, accessed October 3, 2012, http://www.portal.state.pa.us/portal/server.pt/community/about_the_phmc/1579.

³⁸ 37 Pa. C.S.A. § 305.

mention of the Pennsylvania State Archives in the language of the History Code itself. David Haury, State Archivist of Pennsylvania, maintains that this omission is to the detriment of the State Archives. He writes, “Almost all state archival programs are subdivisions of agencies with broader responsibilities, but the failure specifically to identify the Pennsylvania State Archives and its role in Pennsylvania’s statutes tends to dilute its identity and authority.”³⁹ The consequence of the State Archives’ absence in the legislation on its ability to replay public records will be examined in this dissertation.

The History Code both references and builds upon another piece of legislation. Haury points to the Administrative Code of 1929 as establishing a records management program in the state, with Section 524 focusing on the “Disposition of Useless Records.” When state government bodies identify records that are older than four years and that are no longer necessary for their current and future functioning, the Administrative Code stipulates that the heads of government entities will “submit to the Executive Board and to the Pennsylvania Historical and Museum Commission a report of that fact, accompanied by a concise statement of the condition, quantity and character of such papers.”⁴⁰ The Executive Board is defined in Section 204 of the Administrative Code of 1929 as a group composed of the Governor of Pennsylvania and six agency heads who are appointees of the Governor.⁴¹ If the Executive Board confirms that the records are no longer needed for active use by the government and if the PHMC determines that the records do not have long-term historical and informational value, state agencies may transfer the records to the Department of Property and Supplies. Under

³⁹ David Haury, “A Message from State Archivist David Haury,” *Access Archives: The Newsletter of the Pennsylvania State Archives* 11 (Winter 2012), accessed August 3, 2012, http://www.portal.state.pa.us/portal/server.pt/community/access_archives_newsletter/20578/volume_11,_winter_2012/1060471#State%20Archivist%27s%20Message.

⁴⁰ 71 P.S. § 524.

⁴¹ 71 P.S. § 204.

Section 524, this department has the authority to then discard records as they would “waste paper.”⁴² Of course, there is an alternate route that the records may take. The Executive Board, in conjunction with the PHMC, may direct that the records be transferred to the custody of the PHMC.⁴³ According to Haury, there have been changes proposed regarding the Executive Board’s role in approving every records retention and disposition schedule. However, the shared responsibility remains as dictated by the Administrative Code of 1929, legislation that has remained relatively stagnant since its enactment.⁴⁴

Importantly, unlike North Carolina, there is no codified statute related to replevin of public records. This is not to say that the Pennsylvania State Archives is unable to use the common law remedy for the recovery of public records. The procedure through which a party may recover property exists in the Pennsylvania Rules of Civil Procedure. However, the case study of Pennsylvania serves as a foil to North Carolina, a state that is armed with a strong law and a strong court precedent in this area. Pennsylvania has neither, the implications of which will be explored in this dissertation.

Virginia

Before a formal records management program in Virginia existed, there was war. Ernst Posner, in his *American State Archives*, argues that Virginia’s colonial and records predating 1865 “were practically annihilated as a result of frequent fires and relocations of the capital, destruction during the Revolutionary War, and finally the burning of Richmond by the Confederates before

⁴² 71 P.S. § 524.

⁴³ 71 P.S. § 524.

⁴⁴ David Haury, e-mail message to author, October 4, 2012.

their evacuation and the pillage of the Union troops.”⁴⁵ War’s effects on Virginia’s records is a theme that weaves through Chapter 6, with a number of the replevin cases beginning with the government’s loss of custody during periods of unrest.

Virginia’s state library has nearly 200-year history, originating in 1823 as a creation of the Virginia General Assembly.⁴⁶ The Library of Virginia (originally called the Virginia State Library) was not, however, the initial custodian of Commonwealth records in the 19th century. The governor gave that authority to the Secretary of the Commonwealth in 1832.⁴⁷ Still, the library administration worked to regain custody of the alienated records by securing copies of what was in the English repositories, a practice that other states engaged in as well in the 19th century.⁴⁸ At the turn of the 20th century, there was a shift in authority, with the State Library, led by the State Librarian and State Librarian Board, becoming the custodian of the records of the Commonwealth.⁴⁹ As the century advanced, the Library’s role and authority as record keepers of the Commonwealth grew and culminated with the passage of the modern Virginia Public Records Act in 1976.⁵⁰ The current organizational structure of the Library of Virginia is illustrated in Figure 3.

The Virginia Public Records Act, found in sections 42.1-76 to 42.1-91 of the Code of Virginia, is relevant to this study in a number of ways. First, Chapter 6 of this dissertation considers the definitions of “public record” and “private record” and what these definitions mean

⁴⁵ Posner, *American State Archives*, 278-279.

⁴⁶ “About Us,” The Library of Virginia, accessed February 10, 2014, <http://www.lva.virginia.gov/about/default.asp>.

⁴⁷ Library of Virginia, *The History of the Library of Virginia* (Richmond: Library of Virginia, 2006), accessed February 14, 2014,

http://digitool1.lva.lib.va.us:8881/R/BIJDUPFHI8BLRMFDIIMLT8J6CADP9Q4T5B9B4436EX8BMN61EM-03873?func=results-jump-full&set_entry=000002&set_number=006311&base=GEN01.

⁴⁸ Posner, *American State Archives*, 279; Nicholas Falco, “The Empire State’s Search in European Archives,” 109-110.

⁴⁹ William G. Stanard, “The Virginia Archives,” in *Annual Report of the American Historical Association for the Year 1903* (Washington: Government Printing Office, 1904): 645.

⁵⁰ Posner, *American State Archives*, 279-280.

for replevin efforts. Second, the Virginia Public Records Act codifies the authority of the Library of Virginia as administrator of the Commonwealth’s records management program and requires that all Commonwealth agencies abide by the established records retention and disposition schedules.⁵¹ Third, section 42.1-88 makes it illegal for a Commonwealth employee to retain the public records created or received during his or her employment or term in an elected office upon departure from a position.⁵² This stipulation is at the crux of a recent replevin case involving the papers of a former Governor of Virginia, discussed in Chapter Six.

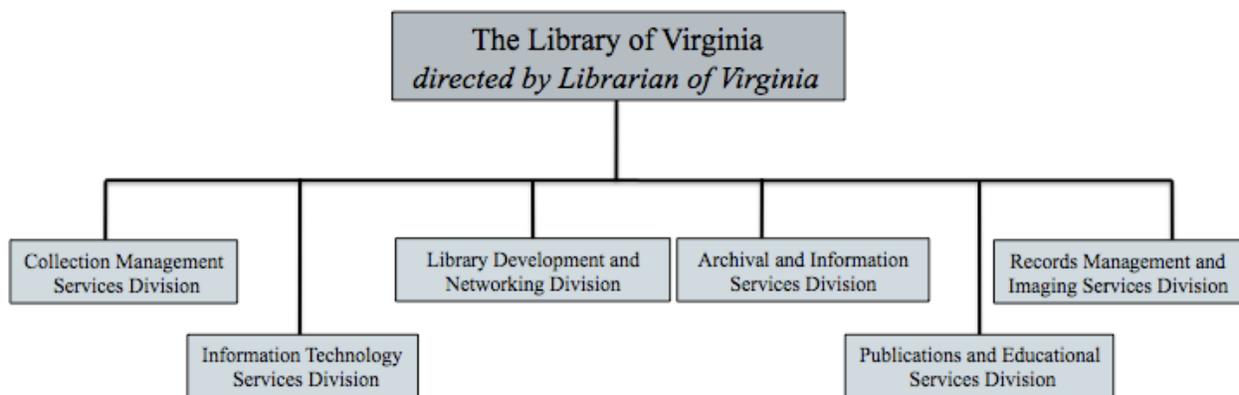


Figure 3: Organizational Structure of the Library of Virginia, adapted from organizational structure described in Ida R. Patton, *Virginia Public Library Trustee Handbook*, 3rd edition (Richmond: The Library of Virginia, 2005), <http://www.lva.virginia.gov/lib-edu/ldnd/trustee/2005Handbook/2005Handbook.pdf>

There is a collection of public officials in Virginia who have prominent roles to play in the management and preservation of public records on the local level: circuit court clerks. The office of the court clerk has a long history in Virginia, one tracing back to the colony and is

⁵¹ Code of Virginia § 42.1-79.

⁵² Code of Virginia § 42.1-88.

today an elected county position.⁵³ They are the stewards of local county and city court records.⁵⁴ The Virginia Public Records Act addresses the relationship between the Library of Virginia and these local records custodians. The statute allows for archival county, city, and town records to be preserved at either the Library of Virginia or the locality. If the records are stored at the Library of Virginia, the local official retains the right to request their return.⁵⁵ As the Director of Description Services at the Library of Virginia explains, “We have always collected local records but one of the anomalies of Virginia is that local records always remain the property of the circuit court clerk. So we have them here and we make them accessible so people can use them. But if a clerk were to come in and say, ‘We’d like those back,’ we’d have to give them back. That happens very rarely because they take up a lot of space but occasionally there will be a clerk [who requests them]. And occasionally there will be local pressure for the clerk not to get rid of them.”⁵⁶

The Virginia Public Records Act’s handling of replevin is markedly similar to what is codified by the North Carolina General Statutes. In Bain’s 1983 analysis of state public records laws, Virginia was among the states that he scored as having a “detailed and explicit” replevin law.⁵⁷ Two sections explicitly address the process for recovery, should the more common negotiations with the party in possession of the record or records fail: section 42.1-89, titled “Petition and court order for return of public records not in authorized possession,” and section

⁵³ For a discussion about the early judicial system in Virginia, see Warren M. Billings, “Justices, Books, Laws, and Courts in Seventeenth-Century Virginia,” *Law Library Journal* 85 (1993): 277-296.

⁵⁴ The Library of Virginia identifies eighteen categories of local record types found in the collections of localities, among them: court records, election records, fiduciary records, land records, tax and fiscal records, and wills. See Robert Young Clay and J. Christian Kolbe, *Using County and City Court Records* (Richmond: Library of Virginia, 2008), accessed February 10, 2014, <http://www.lva.virginia.gov/public/virginia.asp>.

⁵⁵ Code of Virginia § 42.1-87.

⁵⁶ Lyndon H. Hart, III, Director of Description Services at the Library of Virginia, interview with author, December 17, 2013, Library of Virginia, Richmond, VA

⁵⁷ George W. Bain, State Archival Law: A Content Analysis,” *American Archivist* 46, no. 2 (Spring 1983): 164, 167.

42.1-90, titled “Seizure of public records not in authorized possession.” Both sections were revised in 1975 and 1976, a period of activity in other states, like North Carolina, where similar replevin statutes were being codified.

Section 42.1-89, firstly, defines the parties who have powers to petition the circuit courts for the return of records. The Librarian of Virginia, who is the agency head of the Library of Virginia, has authority under the statute, along with designated representatives of the Librarian, like the State Archivist or Deputy Librarian. County clerks, the record keepers for the county, and “any [other] public official who is the custodian of public records” are empowered by this statute to petition the court for recovery if there are records of his or her county or agency in private hands.⁵⁸ The court will expect that the petitioner can demonstrate that he or she is the rightful custodian of the records and that he or she did not transfer the records or give authorization to the party in possession of them.

Under section 42.1-89, these public officials can file a petition with the circuit court in the county where the individual in possession of the records resides or the county where some or all of the records are held. The section states, “The court shall order such public records be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records.” This sentence actually describes a series of activities, activities that may not be apparent to a non-legal professional who reads the statute. Virginia’s *Rules of Supreme Court of Virginia* provides insight into what this process involves for the petitioner (the public official), the respondent (the private party in possession of the disputed records), and the court (the judge).

A “petition” is a complaint that is filed with the circuit court clerk in, according to section

⁵⁸ Code of Virginia. § 42.1-89.

42.1-89, the county where the party in possession of the records or the records themselves reside.⁵⁹ The clerk informs the party in possession of the records of the filed complaint and the party's right to file a response to the petition with the clerk's office.⁶⁰ Before the trial commences and court makes a finding on the issue of ownership, both the petitioner and the respondent may "obtain discovery" of evidence through, for example, depositions and receipt of documentation.⁶¹ If the judge finds "the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records," this will occur only after both parties present evidence at a hearing.⁶²

The challenge that public officials have in working with the confines of the VPRA is that, like the North Carolina law, the statute is silent on the matter of Virginia records that are outside of state borders. Section 42.1-90, however, does provide a path of action that the Librarian of Virginia, a county clerk, or a designated public official may take if there is fear that a record currently in the Commonwealth will escape through sale or some other means. Either at the time of the petition filing or after, the public official can submit an *ex parte* request to have a sheriff seize the records.⁶³ The judge will decide whether to grant the seizure "upon receipt of an affidavit from the petitioner which alleges that the material at issue may be sold, secreted, removed out of this Commonwealth ... or that such property may be destroyed or materially damaged or injured if permitted to remain out of the petitioner's possession."⁶⁴ If the judge orders the seizure, the court will not notify the party in possession of the records prior to their

⁵⁹ Rules of Supreme Court of Virginia, Rule 3:2. Commencement of Civil Actions.

⁶⁰ Rules of Supreme Court of Virginia, Rule 3:5. The Summons.

⁶¹ Rules of Supreme Court of Virginia, Rule 4:1. General Provisions Governing Discovery.

⁶² Rules of Supreme Court of Virginia, Rule 4:15. Motions Practice; Code of Virginia. § 42.1-89.

⁶³ *Black's Law Dictionary* defines an *ex parte* petition as a petition that is "taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." *Black's Law Dictionary* 576 (6th ed. 1990).

⁶⁴ Code of Virginia. § 42.1-90.

seizure, presumably to ensure that the records are not subject to any of the risks outlined in the affidavit.⁶⁵

A search for court opinions related to public records and ownership produces a small number of cases that involved the court system in some capacity but that were ultimately settled between parties. The earliest example of such a case involved a First Lady, Union soldier and a financial mogul. In 1915, the Commonwealth of Virginia and Fairfax County successfully recovered Martha Washington's last will and testament. Wills are county records and statutory requirements have, since the Colonial period, required clerks to permanently retain them. As a resident of Mount Vernon in Fairfax County, Virginia, the First Lady's will was housed in the Fairfax County Courthouse from June 21, 1802 until 1862, when a Union soldier took custody of it. The soldier's daughter, in turn sold the will to finance mogul J. Pierpont Morgan, Sr. Upon Morgan's death, the Commonwealth learned that the record was part of his estate. When Fairfax county officials were unsuccessful in securing the return of the will from the family, the General Assembly of Virginia filed suit. Before the hearing commenced, however, J. Pierpont Morgan, Jr. turned the record over to the state. It remains in the custody of the circuit court of Fairfax County today.⁶⁶ This dissertation located two relevant disputes in which a judge's opinion resolved the matter of ownership of Virginia records: *Howard J. Holton v. Samuel Yudkin* (1977) and *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store* (1992). Both cases focused on ownership of local records and both involved Louis H. Manarin, former State Archivist of Virginia. One was a success for the government, the other simultaneously a win and a loss. They are discussed in Chapter Two and Chapter Six

⁶⁵ Code of Virginia. § 42.1-90.

⁶⁶ Nathan Newby, "Martha Washington's Last Will and Testament," *American Bar Association Journal* 36 (December 1950): 1043, 1049; John T. Frey, "Last Will and Testament of George and Martha Washington," Fairfax County, accessed February 1, 2014, <http://www.fairfaxcounty.gov/courts/circuit/washington.htm>.

II. REVIEW OF THE LITERATURE

This dissertation places the practice of replevin in the broader literature on property and ownership. With this framework in mind, the literature review begins with a discussion of the meaning of property and the concept of government takings. Given that the focus of this research is the recovery of *public records*, corpus of literature that defines this category of documentation is examined. Readers are oriented to the concept of replevin as it is understood and viewed by the legal community, the archival community, and the collecting community. Because of the inconsistency between the legal understanding of the term *replevin* and the archival community's use of the descriptor, the literature review identifies the traditional legal meaning of replevin and subsequently turn its to the discussion that comes forth in the archival literature and the writings by members of the collecting community. It is necessary to note that, for the purpose of this review, both statute and case law are treated as literature. Both are published evidence of how the courts and legislature have responded to the issue of ownership of public records.⁶⁷

⁶⁷ A “case” in the legal field is both a term that generally describes a legal proceeding or action and the written summary, court opinion, and order that can be accessed through legal databases like LexisNexis Academic.

II.A. PROPERTY AND OWNERSHIP

The corpus of literature on property is extensive and spans disciplines, with a particularly substantial presence in the legal, political science, and philosophy fields. The meaning of “property” is, as political scientist C.B. MacPherson suggests, a changeable construct that is defined by societal forces.⁶⁸ For this reason, it is a term that MacPherson and many others identify as having eluded a stable definition. Wesley Newcomb Hohfeld, in his highly cited essay “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” observes that individuals both within and outside the legal profession struggle to find consistent meaning in the word “property,” though it is a word that is deeply embedded in everyday vocabulary.⁶⁹ Legal scholar John Edward Cribbet suggests that it is simply not possible to resolve on one unified definition to the term. He writes, “The question [of what is ‘property’] is unanswerable because the meaning of the chameleon-like word property constantly changes in time and space.” However, MacPherson identifies two distinct usages of the term. In common parlance, he explains, property is viewed as synonymous with “things.” In the legal field, however, property refers to “not things but *rights*, rights in or to things.”⁷⁰ Because this is not a study for a legal publication, both the layman’s and the attorney’s usages of the term are employed in this dissertation, with “property” describing both the object that is owned and the rights associated with the ownership of the property.

⁶⁸ C.B. MacPherson, “The Meaning of Property,” in *Property: Mainstream and Critical Positions*, ed. C.B. MacPherson (Toronto: University of Toronto Press, 1978), 2.

⁶⁹ Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal* 23, no. 1 (1913): 22.

⁷⁰ C.B. MacPherson, “The Meaning of Property,” in *Property: Mainstream and Critical Positions*, ed. C.B. MacPherson (Toronto: University of Toronto Press, 1978), 2.

An early understanding of property in the United States was based on the English legal scholar William Blackstone's writing. Blackstone conceived of property as a party's "sole and despotic dominion which one man claims and exercises over the external things of the world."⁷¹ Contemporary legal scholars cite how, by the nineteenth century, Blackstone's understanding of property was "outdated."⁷² Today, the "mainstream Anglo-American perception of property is best understood as a 'bundle of rights,'" an understanding that was greatly shaped by the work of Wesley Hohfeld and A. M. Honoré.⁷³ Hohfeld, in his aforementioned essay, theorizes that ownership is less about the relationship between a person and a thing and more about the rights that the owner has over those of others in relation to that object. Nearly fifty years later, Honoré, in his classic essay titled "Ownership," uses the term "incidents" to describe the legal rights associated with ownership.

Honoré outlines eleven incidents, including "the right to possess, the right to use, the right to manage, the right to the income of the thing, [and] the right to the capital."⁷⁴ Philosopher Hugh Breakey, in his review of property theory literature, maintains that contemporary property theorists more commonly adapt Honoré's eleven incidents by approaching property as set of three rights: the right to use the thing, the right to exclude others from the use of the thing, and the right to manage and alienate the object.⁷⁵ While legal scholars such as J.E. Penner, Thomas W. Merrill and Henry E. Smith have challenged the usefulness of interpreting property as a bundle of rights, it remains the dominant paradigm for approaching the concept of property in

⁷¹ William Blackstone, "Of Property in General" in *Commentaries on the Laws of England Book the Second*, 1765–1769, reprinted by the Avalon Project, Yale Law School, accessed January 3, 2014, http://avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp.

⁷² For a discussion of the challenges to the Blackstonian understanding of property, see: Denise Johnson, "Reflections on the Bundle of Rights," *Vermont Law Review* 32 (2007): 250-251.

⁷³ J.E. Penner, "The 'Bundle of Rights' Picture of Property," 43 U.C.L.A. L. REV. 711 (1996): 712.

⁷⁴ A. M. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (London: Oxford University Press, 1961), 113.

⁷⁵ Hugh Breakey, "Property Concepts," in *Internet Encyclopedia of Philosophy*, n.d., accessed October 13, 2013, <http://www.iep.utm.edu/prop-con/>.

United States today.⁷⁶ The bundle of rights that are central to the legal use of the term are relevant in building an understanding of what a rightful owner of a record, whether the owner is a private party or the public, has the ability to do with the object. The bundle of rights that are associated with ownership can be separated from one another and from the object itself. An owner, for example, can lease his or her boat to another party to use for the afternoon. This requires a formal transfer of the right; the owner must expressly grant this right to the party.

For J.E. Penner, there are two rights that are of particular importance to the idea of property. The first is *exclusivity*, the ability of the owner to use property as he or she desires.⁷⁷ Penner explains that the exclusive right over the use of the property is closely tied to a second right: the right to *alienate* property. He explains that alienability “includes the rights to abandon [property] ..., to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.”⁷⁸ This model for understanding property has relevant applications for this study. A government archives that challenges an individual’s right to sell a public record on eBay is questioning the legitimacy of the individual’s ownership of the record and the subsequent right to alienate the record through a sale.

In a seminal paper in *The American Economic Review*, economist Harold Demsetz advances a theory of property that is decidedly social in nature. The bundle of rights that is associated with owning property is socially determined and, in the absence of society, the enforceable claim over a thing would be absent of any meaning. He writes, “In the world of Robinson Crusoe[,] property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can

⁷⁶ Penner, The ‘Bundle of Rights’ Picture of Property,” 713; Thomas W. Merrill and Henry E. Smith, “What Happened to Property in Law and Economics?” *The Yale Law Journal* 111, no. 2 (2001): 357-398

⁷⁷ J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997), 72.

⁷⁸ Penner, *The Idea of Property in Law*, 103.

reasonably hold in his dealings with others. These expectations find expression in the laws, customs, and mores of a society.”⁷⁹ Margaret Davies suggests that property serves as a lens into a social order; there is much to learn, she proposes, from how a society chooses to use its resources.⁸⁰ Gregory S. Alexander and Eduardo M. Peñalver suggest that Demsetz and Davies are not alone in their focus on the social nature of property rights. At the heart of property theory, the Alexander and Peñalver explain, is a “central preoccupation” with the relationship between individuals and their communities.⁸¹ The distinct categorical forms of property further support the notion that property is about much more than individuals alone. Three property categories are generally identified in the literature: common property, private property, and public property.

Most readers are likely familiar with the theoretical discussions concerning common property, a category that M. Patricia Marchak characterizes as “things to which no one can make a property claim and, *ipso facto*, no one can be excluded from access or use.”⁸² Garrett Hardin warned against the effects that self-interested individuals pose to common property in his influential article *The Tragedy of the Commons*, published in *Science* in 1968.⁸³ Central to this study on replevin of public records, however, is the differentiation between the latter two property forms: private and public property. Richard A. Epstein defines *private property* as representing “the sum of the goods that the individual gets to keep outside of the control of the state.”⁸⁴ Private property as a property type has, as M. Patricia Marchak acknowledges, a long theoretical history, with writings by such notable and familiar philosophers as John Locke,

⁷⁹ Harold Demsetz, “Toward a Theory of Property Rights,” *American Economic Review* 57, no. 2 (1967): 347.

⁸⁰ Margaret Davies, *Property: Meanings, Histories, Theories* (Oxon, UK: Routledge-Cavendish, 2007), 2.

⁸¹ Gregory S. Alexander and Eduardo M. Peñalver, “Properties of Community,” *Theoretical Inquiries in Law* 10, no. 1 (2009): 128.

⁸² M. Patricia Marchak, “What Happens When Common Property Becomes Uncommon,” *BC Studies* 80 (1988-1989): 4.

⁸³ Garrett Hardin, “The Tragedy of the Commons,” *Science* 162 (1968): 1243–1248.

⁸⁴ Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985), 13.

Hegel, Jean-Jacques Rousseau, and Jeremy Bentham. Among the most oft-cited contributions is Locke's *Second Treatise of Government*. Locke expresses his belief that the right to hold property is a natural right that all individuals possess, not one that is granted by the government. It is through labor, in Locke's philosophical interpretation of property, that an individual secures ownership of an object.⁸⁵

While private property is characterized by the rights possessed by individuals to use and exclude others from objects, MacPherson maintains that public, or state, property "consists of rights which the state has not only created but has kept for itself or has taken over from private individuals or corporations."⁸⁶ Marchak suggests that there are two varieties of public property: public property that the government can exercise the right to exclude from being accessed and used by private individuals and public property that the government ensures can be equally accessed and used by private individuals.⁸⁷ With these two varieties of state property in mind, public records may be classified as objects that the state is committed to making indiscriminately accessible to the general public.

In her 2003 monograph entitled *The Idea of Property: Its Meaning and Power*, Laura S. Underkuffler, professor of law at Cornell University and formerly at Duke Law School, identifies one historic source of tension in the division between private versus public property rights. The government's ability to shape the regulation of property has often, since the era of the Revolutionary War, "generated bitter rhetorical and political debate about the nature, extent, and sanctity of claimed individual rights to private property."⁸⁸ Underkuffler explains that in the modern-day United States, "private property systems have recently triumphed" over systems that

⁸⁵ John Locke, *Two Treatises of Government* (London: C. and J. Rivington, 1824), 149.

⁸⁶ MacPherson, "The Meaning of Property," 5.

⁸⁷ Marchak, "What Happens When Common Property Becomes Uncommon," 4.

⁸⁸ Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003), 2.

favor governmental sovereignty over property. She, however, usefully points to the nature of regulation in relation to certain types of property, citing cultural property law as representative of an area in which private ownership is not always privileged.⁸⁹ Protection and public ownership of cultural property gained traction internationally in the latter half of the twentieth century, with the development of the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in 1970 and the subsequent passage of domestic legislation sparking repatriation efforts and attempts to protect and recover objects of cultural heritage. Like government archival repositories that recover public records so that they remain accessible and preserved, national governments have passed legislation that allows them to recover objects that are perceived to be of cultural significance to the state.

As MacPherson and others have acknowledged, property is a complex concept.⁹⁰ Underkuffler describes a "visceral" and innate pull toward property ownership. It is this connection to property, she argues, that sparks an emotional response when ownership is threatened.⁹¹ She draws upon the writings of legal scholar Kevin Gray, who observes that a possessive concern for material goods is perceptible in children with their toys on playgrounds.⁹² Law professor Margaret Jane Radin, in her seminal article "Property and Personhood," speaks to this notion but describes the import that individuals place on certain objects in their lives. She writes, "Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with the personhood because they are part of the way we constitute ourselves as personal entities in the world...One may gauge the strength or significance of

⁸⁹ Underkuffler, *The Idea of Property*, 3.

⁹⁰ MacPherson, "The Meaning of Property," 11.

⁹¹ Underkuffler, *The Idea of Property*, 1.

⁹² Kevin Gray, "Equitable Property," *Current Legal Problems* 47, no. 2 (1994): 159.

someone's relationship with an object by the kind of pain that would be occasioned by its loss."⁹³ The intimate connection to objects, coupled with Locke's theory on the relationship between labor and property, may provide insight into the responses to replevin from members of the collecting community. These individuals may have an attachment to a record and believe that their possession of it was the product of their labor. This mindset may contribute to their objections to the government's claims of ownership.

In reflecting on this innate urge to collect and the value that individuals place in certain objects, it is not difficult to consider the emotional reaction that might occur when property is lost or taken. Replevin cases may become controversial when the individual in possession of a record views the government's claim to ownership as illegitimate or when the record has meaning and value to the owner. In the view of this collector, the government is not recovering public property, but rather seeking custody of the collector's private property, property that the collector may view as a potential source of profit or notoriety. For the archives, the recovery of public records may be characterized as "replevin" in that it is done to repossess the government's personal property that another party holds unlawfully. For the protesting collector, however, the government's claim may be more fittingly described as "a taking."

As described above, the term "takings" is most commonly associated with eminent domain. Through the power of eminent domain, the government has the authority to take private property if the property will be converted for public use and the holder is compensated for the taking.⁹⁴ Eminent domain generally refers to the seizure of real property, or land, but Daniel J. Hurtado explains that government takings do not only take on the form of direct appropriation of physical property. The Supreme Court has decided that government regulations that strip an

⁹³ Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34, no. 5 (1982): 959.

⁹⁴ 6 Summ of Pa Jur 2d § 11:20 (1992).

owner of the ability to use his or her property in an economically viable way are a taking.⁹⁵ Of particular relevance to this study, however, are the implications of eminent domain for forms of property other than land. Frank L. Childs and others, however, point to case precedent that reveal that the government can exercise eminent domain to acquire other forms of property, including “chattels,” or movable articles of personal property.⁹⁶ Childs writes, “All kinds of property and every variety and degree of interest therein may be taken under the power of eminent domain; and while it most often is exercised in acquiring real property it is not restricted thereto, but personal property...can be taken thereunder.”⁹⁷ Epstein suggests that one possible impetus for the inclusion of the takings clause was to protect chattels, such as food and artillery, from being appropriated by government troops.⁹⁸ With the understanding that the concept of government takings is not solely tied to real property, eminent domain becomes relevant when considering the government’s recovery of public records and the collecting community’s perception of these actions.

A collector who questions the public nature of a record and who is not compensated for the transfer of custody may view the government as in violation of the Fifth Amendment. For these individuals, they may perceive the government’s actions as being akin to a government takings, with their personal property removed from their custody to satisfy a public use. The relationship between eminent domain and replevin in the archival field is one that Elizabeth H. Dow of the Louisiana State University’s School of Library and Information Science program

⁹⁵ Daniel J. Hurtado, “Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional ‘Taking?’,” *Hofstra Property Law Journal* 6, no. 1 (1993): 8.

⁹⁶ See Frank L. Childs, *Principles of the Law of Personal Property, Chattels and Choses: Including Sales of Goods, Sales on Execution, Chattel Mortgages, Gifts, Lost Property, Insurance, Patents, Copyrights, Trademarks, Limitations of Actions, etc.* (Chicago: Callaghan & Company, 1914), 357; Tom W. Bell, “‘Property’ in the Constitution: The View From the Third Amendment,” *William & Mary Bill of Rights Journal* 20, no. 4 (2012): 1249; Joshua I. Miller, “28 U.S.C. § 1498(A) and the Unconstitutional Taking of Patents,” *Yale Journal of Law and Technology* 13 (2010): 7.

⁹⁷ Childs, *Principles of the Law of Personal Property*, 357.

⁹⁸ Epstein, *Takings*, 27.

makes a brief reference to in her recently published monograph on the issues surrounding the ownership of public records. She writes, “Collectors argue that when the state demands the return of a document, the state has exercised eminent domain but without compensation, making it theft. Archivists argue that they are not stealing someone else’ property – merely reclaiming their own.”⁹⁹ Because of eminent domain’s link to the Fifth Amendment, this dissertation prefers to characterize a dissenting view of the replevin practice as “unconstitutional” rather than an act of theft. In either case, however, a consideration of the property literature on takings is relevant in approaching the data collection and analysis. This dissertation examines whether government archives appear mindful of mitigating a negative association between the recovery of public records and unconstitutional takings through the information that is disseminated to the public regarding public records, interviews with individuals involved in replevin efforts, and documentation that provides insight into the negotiations with the private parties in possession of public records.

II.B. THE NATURE OF PUBLIC RECORDS

In an *American Archivist* article published in 1960, Oliver W. Holmes highlights a self-evident, but important, distinction regarding the nature of records: records may be classified as either “public” or “private.” Despite statutory definitions of “public records,” Holmes argues that this dichotomy is often a hazy one. This ambiguity has direct implications for the replevin of public records.¹⁰⁰ He explains, “In connection with efforts to replevin public records that somehow have escaped from public custody, uncertainty exists on both sides because of conflicting views

⁹⁹ Dow, *Archivists, Collectors, Dealers, and Replevin*, 67.

¹⁰⁰ Holmes, “ ‘Public Records,’ ” 4.

and definitions of public records.”¹⁰¹ Like Holmes, archivist Harold T. Pinkett acknowledges that a “public record” has been defined in inconsistent ways. Pinkett, however, identifies a thread that links varying interpretations of the term. Public records may have varying physical characteristics and formats, but are either created or received by a government office as part of a government transaction.¹⁰²

Law enters the archival field through statutes and court decisions. A literature review about replevin of public records must necessarily examine relevant instances of both. Statutes on a federal and state level define the elements of a public record. Importantly, technology has broadened the meaning of “public record.” While Holmes, writing in 1960, maintained that “few” states had legislation relating to public records, attorney Roger A. Nowadzky’s analysis of public records statutes reveals that the 1966 passage of the *Federal Freedom of Information Act* (FOIA) spurred open records laws on a state level, which, in turn, codified definitions of public records.¹⁰³ Nowadzky remarks that a notable development in more recent definitions of “public record” is the explicit inclusion of computerized information produced during the course of a government transaction as a public record.¹⁰⁴

In understanding the nature of public records that are deemed archival, it is useful to assess what record types government archivists characterize as *outside* the boundaries of the archival collections they oversee. Elizabeth H. Dow references comments made by David Haury, state archivist of Pennsylvania, at a 2009 meeting of the Manuscript Society’s board of trustees. He explained that records that are created with the intention for distribution to individuals or organizations are not archival. For example, licenses, along with letters or materials that a

¹⁰¹ Holmes, “ ‘Public Records,’ ” 4-5.

¹⁰² Harold T. Pinkett, “Accessioning Public Records: Anglo-American Practices and Possible Improvements,” *American Archivist* 41, no. 4 (October 1978): 413-414.

¹⁰³ Roger A. Nowadzky, “A Comparative Analysis of Public Records Statutes,” *Urban Lawyer* 28 (1996): 65.

¹⁰⁴ Nowadzky, “A Comparative Analysis,” 70.

government official sends to a private party, would not be deemed archival. Instead, “archival records include records documenting the granting of licenses, in-coming letters, indexes to deeds, records of commissions granted, and other documents created by a government body and intended for its own keeping.”¹⁰⁵ The exclusions are important in understanding the nature of replevin. As Dow goes on to explain, NARA does not consider any record that the government creates with the intent of disseminating it to a private party to be a federal record.¹⁰⁶ Because they are not archival, these outgoing records would, consequently, not be subject to a replevin action.

There is a unique characteristic of public records that is the root behind government archives' replevin activities. Public records are often “inalienable” by law, a characteristic that Dutch archival scholar Eric Ketelaar describes in a 1985 UNESCO RAMP study.¹⁰⁷ Ketelaar explains, “Inalienability may be defined as the quality of public archives deriving from their relationship to the sovereignty of a state or the legal authority of any other body, which prevents their removal or abandonment.”¹⁰⁸ Because of the inalienability of public records, there is no statute of limitations that restricts when a government may seek replevin.¹⁰⁹ Richard Pearce-Moses describes this absence of a statute of limitations as “imprescriptibility,” a term that means public records “remain permanently subject to replevin because they are inalienable public property.”¹¹⁰ Douglas Cox contributes to this discussion of archival inalienability and its

¹⁰⁵ Dow, *Archivists, Collectors, Dealers, and Replevin*, 1.

¹⁰⁶ Dow, *Archivists, Collectors, Dealers, and Replevin*, 2.

¹⁰⁷ The acronym “RAMP” stands for “Records and Archives Management Programme.”

¹⁰⁸ Eric Ketelaar, *Archival and Records Management Legislation and Regulations: A RAMP Study with Guidelines* (Paris: UNESCO, 1985), 22.

¹⁰⁹ Ketelaar, *Archival and Records Management*, 22.

¹¹⁰ Pearce-Moses, *Glossary of Archival and Records Terminology*, 199.

relationship to replevin, explaining that, under many governments, it is necessary to obtain explicit permission to transfer custody of a public record.¹¹¹

Moreover, the disposal of public records must occur in adherence to federal and state statutes. However, the literature does indicate that there is a loophole that allows for the private ownership of public records. In his law review article “A Resolution of Title to WPA Prints,” Tobin A. Sparling outlines the complex issues surrounding the ownership of prints created by employees of the Federal Art Project of the Works Progress Administration (WPA). Sparling explains that, following the disbandment of the WPA in 1943, many of prints and the recordkeeping for the Federal Art Project were in a state of neglect.¹¹² He writes that it was “rumored that many of the prints were simply going to be destroyed. In the intervening years, reports of finding WPA prints in derelict federal buildings, wastebaskets, and trash piles have not been uncommon.”¹¹³ In spite of this, at the time of his writing in 1983, Sparling indicates that the federal government was making a concerted effort to recover the WPA prints and demonstrated a renewed interest in the works of art.¹¹⁴ The question of whether the government abandoned the WPA prints has therefore become an issue in the cases of replevin of the works of art. If the government did indeed throw out the WPA prints, this act of abandonment could be used as evidence to prove that the state relinquished its title.¹¹⁵ Sparling’s discussion of the case of the WPA prints introduces the idea that if a private individual is able to prove that the state abandoned the record and thus abandoned the title, he or she may be able to use this evidence to counter a replevin action.

¹¹¹ Douglas Cox, “National Archives and International Conflicts: The Society of American Archivists and War,” *American Archivist* 74 (Fall/Winter 2011): 458-459.

¹¹² Tobin A. Sparling, “The Resolution of Title to WPA Prints,” *Columbia –VLA Journal of Law & the Arts* 12 (1987-1988):131.

¹¹³ Sparling, “The Resolution of Title to WPA Prints,” 138.

¹¹⁴ Sparling, “The Resolution of Title to WPA Prints,” 133.

¹¹⁵ Sparling, “The Resolution of Title to WPA Prints,” 138-139.

There is a clear contrast between the ownership of the tangible public records and the ownership of the intellectual rights to this property. While the federal government is the legal owner of the physical records, federal records are public domain works under the Copyright Act of 1976. Section 105 of the law is brief in its reference in what it refers to as “United States Government works,” but clearly states that the federal government is unable to hold copyright to these works. This means that while a private individual may not be able to own a record, he or she is able to reproduce, distribute, perform, and display the record, as well as create derivative works from it.

II.C. REPLEVIN AS A LEGAL CONCEPT

The legal system in the United States is that of the common law tradition, which originated in the medieval courts of England, and is rooted in the principle of *stare decisis*. While the system of civil law in countries such as France and Germany firmly adheres to codified statute, common law, as Lawrence M. Friedman describes it, is “judge-made law – molded, refined, examined, and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases.”¹¹⁶ Of course, legislative statutes exist and are central to the legal system in the United States. The common law tradition, however, places court precedent in a role of fundamental importance to the judicial system.

Replevin is a common law writ and, in medieval England, the writ system was the basis of the legal system. As George Spence explains, “no action in the King’s Courts could be commenced without a writ,” which he goes on to define as a:

mandate from the King, under the great seal, addressed to the sheriff

¹¹⁶ Lawrence M. Friedman, *A History of American Law* (New York: Touchstone, 2005), xiv.

of the county in which the cause of action arose or where the defendant resided, commanding him to cause the party complained of to appear in the King's Court at a certain day, to answer the complaint.¹¹⁷

In his account of the development of common law, historian Arthur R. Hogue describes the significance of the “writ system” in the Middle Ages. In the centuries before the existence of parliamentary legislation, Arthur R. Hogue remarks that judges would “find the common law” in writs, the number of which grew at a rapid rate in the thirteenth century.¹¹⁸ While there were thirty-nine writs in 1189, they numbered more than four hundred a century later, with the writ of replevin among them.¹¹⁹

Theodore F. T. Plunkett, a British historian of law, chronicles the evolution of the common law system in his *A Concise History of the Common Law*, a text first printed in 1929. Plunkett's discussion of the writ of replevin provides insight into the early use of the legal action. In his illustration of the use of the action of replevin in the thirteenth century, Plunkett explains that replevin was most commonly employed to settle a property disagreement between a tenant and his feudal lord. If a lord “distrained,” or seized, property in order to enforce rental fees or the fulfillment of services to be provided by the tenant, a tenant who disputes the obligation to provide these services may seek the recovery of the property through a writ of replevin. The tenant would post a bond for the recovery of the property by the sheriff and repossess the property until court would determine which party should have custody of it. According to Plunkett, the lord would respond to the action by either denying the seizure of the property or, more often, by justifying the seizure by identifying the rent or services that the tenant is obligated to provide. If the lord was successful in making his case, the court would decide that

¹¹⁷ George Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1 (Philadelphia: Lea and Blanchard, 1846), 225.

¹¹⁸ Arthur R. Hogue, *Origins of the Common Law* (Indianapolis, IN: Liberty Fund, 1986), 12.

¹¹⁹ Hogue, *Origins of the Common Law*, 13.

the property should be returned to the lord.¹²⁰ Replevin, in the English courts of the thirteenth century, was more commonly used to determine the legality of a property seizure than to settle a dispute in which two parties claim ownership of the same property.¹²¹

In a paper written for a presentation at the American Library Association's 1978 conference, James E. O'Neill, former deputy archivist of the United States, explains that the contemporary understanding of replevin is "the recovery of alienated personal property through a legal proceeding, usually modern rules of civil procedure rather than writ."¹²² The *Pennsylvania Rules of Civil Procedure (Pa. R.C.P.)*, which can be viewed as representative of state civil procedure, provides insight into these modern day rules that guide a replevin action. *Pa. R.C.P.* section 1073 specifies that the plaintiff, the party who seeks the recovery of personal property, initiates the replevin action with the filing of a complaint, or lawsuit, with the prothonotary.¹²³ In doing so, the plaintiff must include the description and value of the property to be seized, the location of the property at the time of filing, and the facts behind the plaintiff's claim.¹²⁴ At this time, the plaintiff may decide to request a writ of seizure from the court. This may be done even before the defendant receives notice of the complaint.¹²⁵ If the court agrees to grant the writ of seizure, the sheriff will seize the property from the defendant before a judgment is rendered on the complaint. This is not without price to the plaintiff. The court requires a bond to be paid by the plaintiff to seize the property before trial; under Pennsylvania's Rules of Civil Procedure, the plaintiff's bond will be double the value of the property that is seized.¹²⁶ In their article for *The*

¹²⁰ Theodore F.T. Plunkett, *A Concise History of the Common Law*, 5th ed. (Indianapolis, IN: Liberty Fund, 2010), 368.

¹²¹ Plunkett, *A Concise History*, 369.

¹²² James E. O'Neill, "Replevin: A Public Archivist's Perspective," *College & Research Libraries* 40, no. 1 (1979): 26.

¹²³ *Pennsylvania Rules of Civil Procedure Actions, Subchapter E.: Action in Replevin, Pa. R.C.P. § 1073* (2012).

¹²⁴ Pa. R.C.P. § 1073.1 (2012).

¹²⁵ Pa. R.C.P. § 1075.1 (2012).

¹²⁶ Pa. R.C.P. § 1075.3 (2012).

Florida Bar Journal, attorneys Patrick C. Barthet and Daniel Morman explain that a writ of seizure serves as a “vehicle to obtain possession [of personal property] on an expedited basis.”¹²⁷ For parties that do not want to wait until the trial to regain physical custody of their property, replevin may be a desirable path to take.

It is important to note that replevin “permits the owner to follow and reclaim the property at any point in the chain of possession.”¹²⁸ This means that if, for example, a record is stolen and sold to a bona fide purchaser, the original owner may still seek the recovery of the property. It is immaterial that the current possessor did not knowingly obtain stolen property; this party does not have good title to the object in question.¹²⁹ The literature reveals other characteristics of public records that impact replevin. In the 1868 case of *City of New York v. Lent*, which focused on the ownership of a letter written by George Washington, the court found that there could be no bona fide purchaser of a public record. William S. Price, Jr., in his article on the notable replevin case of *State of North Carolina v. B.C. West Jr.*, explains that this concept led to the court’s decision that the state of North Carolina should have custody of the records that were in question in this dispute.¹³⁰ Because of this, even an individual who exercises due diligence and purchases a public record in good faith does not have rightful ownership.

Because it is a common law remedy, both the federal and state governments can employ replevin to regain custody of public records. In *State of North Carolina v. B.C. West, Jr.*, a court decision in which the government was the successful party, the state’s case “turned on common law, not statute.”¹³¹ Some states, however, have codified the common law remedy in their

¹²⁷ Patrick C. Barthet and Daniel Morman, “With or Without Notice: Obtaining a Replevin Writ Prior to Final Judgment,” 76 *The Florida Bar Journal* 44 (December 2002): 44.

¹²⁸ Tobin A. Sparling, “The Resolution of Title to WPA Prints,” *Columbia-VLA Journal of Law & the Arts* 12 (1987-1988): 140.

¹²⁹ Sparling, “The Resolution of Title,” 140.

¹³⁰ Price, “N.C. v. B.C. West, Jr.,” 23.

¹³¹ Price, “N.C. v. B.C. West, Jr.,” 23.

statutes and have, even, specifically legislated for replevin of public records. The *Corpus Juris Secundum*, an encyclopedic resource for legal professionals, highlights the statutory nature of replevin actions. It reads, “It has been said that the action of replevin is not, strictly speaking, a common-law action, but it is now based on applicable statutes.”¹³² While North Carolina was victorious in the litigation against B.C. West, Jr., the state does not rely solely on its case law precedent for its replevin efforts; there is a 1975 statute that acts as another form of leverage for North Carolina. For states with statutes of replevin that relate to public records, Ernst Posner explains that “replevin authority is normally vested in the attorney general.”¹³³

Perhaps the most significant contribution in understanding state law as it pertains to replevin of public records is George W. Bain’s content analysis of public records statutes. Through his 1983 study, Bain addressed, among other things, “what states have the best provisions for replevin of public records out of public custody.”¹³⁴ Bain uses a scoring system to indicate the level of comprehensiveness of the state law, with a “0” indicating “no mention” to a “3” indicating “detailed and explicit coverage.”¹³⁵ In the discussion of his study, Bain cites Massachusetts, New Mexico, North Carolina, and Virginia as states with particularly notable legislation dealing with replevin and public records.¹³⁶ A review of Bain’s findings reveals that twenty-seven states had “no mention” of replevin of public records in state legislation.¹³⁷ There have not been updates to Bain’s findings in the thirty years since its publication, but this is a separate study from the one presented here. A preliminary exploration of the statutes reveals, however, that there have been developments in the area of replevin legislation. For example,

¹³² 77 C.J.S. *Replevin* §2 338-339 (2006).

¹³³ Posner, *American State Archives*, 311.

¹³⁴ George W. Bain, “State Archival Law: A Content Analysis,” *American Archivist* 46, no. 2 (Spring 1983): 159.

¹³⁵ Bain, “State Archival Law,” 164.

¹³⁶ Bain, “State Archival Law,” 173.

¹³⁷ Bain, “State Archival Law,” 164 and 166-167.

Tennessee and California, two states that were among those with no mention of replevin in the public records statutes in 1983, have statutes that would be scored a “3” on Bain’s scale in 2012.¹³⁸

There have been no changes in the replevin statutes in North Carolina, Pennsylvania, and Virginia since Bain’s study. North Carolina’s statute continues to be among the states with particularly “detailed and explicit coverage” of replevin of public records. Virginia, also rated a “3” by Bain, has statutory authority, but, as the dissertation reveals, employs it less often than its neighbor to the south. Pennsylvania remains among those states without a public records replevin statute. Dow addresses how archives in states with weak replevin statutes or states where the Attorney General’s office has little interest in recovering public records may seek the transfer of a copy as a substitute to the original.¹³⁹ This dissertation considers whether any of the states studied have pursued this alternate course, one that would depart very distinctively from the legal understanding of replevin.

II.D. REPLEVIN AS A CONCEPT IN THE ARCHIVAL FIELD

An 1890 publication entitled *A Practical Treatise on the Law of Replevin as Administered by the Courts of the United States* provides an early reference to the relationship between the common remedy of replevin and archival materials. John E. Cobbe comments on the attempted use of replevin to gain ownership of public documents under the care of a public official. Cobbe emphasizes that public records are the property of the United States government and maintains, “It will not lie to remove public records or documents from a public office. Such instruments are

¹³⁸ Tennessee Replevin Law, TCA § 39-16-504; California’s Replevin Law, California Government Code § 6204-6204.4.

¹³⁹ Dow, *Archivists, Collectors, Dealers, and Replevin*, 61

in the custody of the sovereign power, and the writ, if issued for their seizure, will be quashed when the facts appear to the court and the papers returned.”¹⁴⁰ This same idea is echoed by H.W. Wells in his 1907 publication, *A Treatise on the Law of Replevin as Administered in the Courts of the United States and England*.¹⁴¹

A review of literature related to archival history in the United States reveals that efforts to recover public records in fact have their origins in the early-nineteenth century. While a loose application of the term “replevin,” the practices of the nineteenth-century historical societies, organizations that Richard J. Cox characterizes as the predecessors to government archives, adopted the charge of collecting public records that were in the possession of private parties and, even, foreign repositories.¹⁴² While Bickford attributes the historical societies’ efforts to collect these materials to their concern that they would otherwise be “lost,” Cox describes these collecting practices as, in reality, damaging in that the public records were separated from their context as organizational records.¹⁴³ Nicholas Falco addresses these early 19th century state efforts to “seek pertinent records located in foreign archives,” revealing that replevin of public records, in this looser sense, can traverse the borders of the United States.¹⁴⁴ He highlights the New York Historical Society’s 1839 petition to the New York state government and the subsequent efforts of the latter party to regain custody of state records in Great Britain, France, and the Netherlands. Interestingly, Falco’s account of the government-sponsored mission, carried out by a man named John Romeyn Brodhead, reveals that Brodhead negotiated for the

¹⁴⁰ John E. Cobbey, *A Practical Treatise on the Law of Replevin as Administered by the Courts of the United States* (Chicago: Callaghan and Company, 1890): 47, accessed October 30, 2010 from <http://books.google.com/>.

¹⁴¹ H.W. Wells, *A Practical Treatise on the Law of Replevin as Administered by the Courts of the United States and England* (Albany: Banks and Company, 1907): 88-89, accessed October 30, 2010 from <http://books.google.com/>.

¹⁴² Richard J. Cox, “Archivists and Collecting,” in *Encyclopedia of Library and Information Sciences, Third Edition*, ed. Marcia J. Bates and Mary Niles Maaek (New York: Taylor & Francis, 2010), 209.

¹⁴³ Christopher P. Bickford, “Public Records and the Private Historical Society: A Connecticut Example.” *Government Publications Review* 8A (1981): 313.; Cox, “Archivists and Collecting,” 210.

¹⁴⁴ Nicholas Falco, “The Empire State’s Search in European Archives,” *American Archivist* 32, no. 2 (1969): 109.

transcription of New York state records in foreign repositories for a fee rather than transfer of original records themselves.¹⁴⁵

As private repositories, the historical societies' role as collectors of public records would be challenged in the close of the nineteenth century.¹⁴⁶ Bickford cites one case in which the Massachusetts state government requested the return of materials that had been previously given to the Massachusetts Historical Society in which had been a government-sanctioned "deposit." He describes this instance of replevin as resulting in "a long and difficult controversy," but one that ultimately concluded with the determination that the Commonwealth of Massachusetts had the legal title to the materials.¹⁴⁷ The development of government archives would, Bickford explains, create a "clear division of labor" in the archival field, with government archives collecting public records and private repositories collecting private papers.¹⁴⁸

The literature suggests that replevin was a topic of some interest in the American archival field at the time of the establishment of NARA and in the early years of the Society of American Archivists' existence. In a 1939 *American Archivist* article entitled "Character and Extent of Fugitive Archival Material," NARA's Randolph G. Adams speaks to the challenges that repositories face in recovering archival materials that have either strayed from the archives or that failed to reach the archives.¹⁴⁹

Like NARA, SAA's leadership was thinking about replevin and alienated records in the late 1930s. SAA collaborated with the National Conference of Commissioners on Uniform State Laws (NCCUSL) at this time in an effort to draft and put forth a uniform state law on public records. In his 1938 presidential address, SAA president Albert Ray Newsome cited a need for

¹⁴⁵ Falco, "The Empire State's Search in European Archives," 113.

¹⁴⁶ Falco, "The Empire State's Search," 110-123.

¹⁴⁷ Bickford, "Public Records and the Private Historical Society," 317.

¹⁴⁸ Bickford, "Public Records and the Private Historical Society," 317.

¹⁴⁹ Adams, "The Character and Extent of Fugitive Archival Material," 90-91.

uniformity in archival state legislation. The focus of Newsome's speech is public records; he stresses that there is a need for an accepted definition of public record and codification of the materials to be used during creation.¹⁵⁰ Pertinent to this literature review is Newsome's discussion of laws in place concerning abuses against public archives. He notes that while many states have regulations in place concerning "altering, defacing, mutilating, removing, stealing, falsifying, and destroying" public records, there should be a general law in place that addresses all potential abuses.¹⁵¹ There is no evidence that suggests that this discussion gained much traction, however, and the inconsistency in statutory law in this area persists.

While the dialogue about SAA's collaboration with NCCUSL ebbed soon after it began, there was another mention of replevin in the archival field in 1945. In Margaret Cross Norton's presidential address at SAA's annual meeting, she surveyed the legal concerns that faced the profession, including replevin of public records. Norton offers particular insight into the issue of alienated public records through her discussion of the role that government officials played in their disappearance at the time. Norton explains that while a replevin action is "useful in the recovery of deliberate thefts from the archives," it is rarely "successfully invoked in the case of records taken by officials going out of office." Norton cites this reality as the most common way that government records went missing during the WWII period. Her brief discussion of replevin underscores a theme that is a common thread in the literature: using replevin to retrieve custody of a record can be wrought with complications, regardless of how or why it disappeared. Ownership is not always readily apparent.¹⁵²

Peterson and Peterson's *Archives and Manuscripts: Law*, a text published by SAA in 1985, provides a useful overview of replevin as it is understood in the archival field and notable

¹⁵⁰ Albert Ray Newsome, "Uniform State Archival Legislation," *American Archivist* 2, no. 1 (January 1939): 8-9.

¹⁵¹ Newsome, "Uniform Archival Literature, 9-10.

¹⁵² Margaret Cross Norton, "Some Legal Aspects of Archives," *American Archivist* 8, no. 1 (January 1945): 11

court decisions. Perhaps the most notable contribution of Peterson and Peterson's text is the acknowledgment that the members of the archival community have appropriated the term and employ it in ways that stray from the technical legal meaning of the term. They suggest that the archival use of the term in fact conflates replevin with other common law remedies that relate to the recovery of personal property, namely with "detinue" and "trover." Detinue is, as the authors explain, a remedy to recover property that another party received lawfully but has improperly detained. Peterson and Peterson offer an illustration of this: if an archives loaned an item from its collection to another party and the borrower does not return it as was agreed upon, the lending archives may seek an action of detinue. Trover describes an action to recover the value of property that is unlawfully held by another party, rather than the property itself. One comment from Peterson and Peterson is particularly worthy of quoting here, as it captures the aforementioned statutory nature of replevin and emphasizes that the archival and legal meaning of replevin are often inconsistent with one another. They write,

All states have some legal method for the recovery of personal property. Most states (and the United States) have replaced these common law remedies with some form of statutory ones. All of these remedies, whether common law or statutory, whether replevin, detinue, or trover, have come to be called replevin by archivists, and for the purposes of this discussion will be referred to as such even though the term is not technically correct.¹⁵³

Peterson and Peterson's section on replevin is notable in a second way. The authors outline a set of criteria that a government archives may use to determine whether to pursue a replevin action. First, they advise archives to seek the recovery of any and all items that were stolen from the repository and that are now identified as in the custody of another party. Second, Peterson and Peterson stress that archives should "always" attempt to recover "significant documents" that are

¹⁵³ Peterson and Peterson, *Archives and Manuscripts: Law*, 91.

public in nature and that are outside of the custody of the archives.¹⁵⁴ A third point of criteria is particularly interesting in that it reflects an assurance made by Wayne C. Grover, former Archivist of the United States, who maintained, “ ‘No one at the National Archives has any inclination or intention whatsoever to gain physical possession of those historical documents in the possession of such responsible institutions as the great university libraries and the widely respected historical societies.’ ”¹⁵⁵ Peterson and Peterson suggest that if a public record is in the custody of another repository and is accessible to the public, the government archives should consider accepting a copy in place of an original. This is provided that the repository in possession of the record can assure that the record will continue to be properly cared for and available to researchers. Finally, Peterson and Peterson recommend that public records that are in private custody and unavailable to researchers should be made accessible either through the recovery of an original or the obtainment of a copy.¹⁵⁶ This dissertation unveils whether state archives subscribe to these suggested guidelines when determining whether to pursue a replevin action and when reaching agreements with individuals outside of court.

Two more recent monographs have informed the archival community of the topic of replevin. While it is a succinct overview of replevin, Behrnd-Klodt’s chapter in her *Navigating Legal Issues in Archives* text is, along with Peterson and Peterson’s work, among the most valuable discussions on replevin in the archival literature. Behrnd-Klodt, an attorney and archivist, offers a description of the procedure for recovering personal property through replevin that is more rooted in a legal understanding of the remedy. In what is her most beneficial contribution to the sparse scholarship of replevin in the archival field, Behrnd-Klodt provides an analysis of the few court decisions that have involved the disputed ownership of public

¹⁵⁴ Peterson and Peterson, *Archives and Manuscripts: Law*, 92.

¹⁵⁵ Robert F. Metzdorf, “Lewis and Clark I: A Librarian’s Point of View,” *Manuscripts* 9, no. 4 (Fall 1957): 227.

¹⁵⁶ Peterson and Peterson, *Archives and Manuscripts: Law*, 92.

records.¹⁵⁷ Her work, however, does not broach the nature of settlements that are reached between parties without the court's intervention, a gap that this dissertation will seek to fill. Dow's *Archivists, Collectors, Dealers, and Replevin*, the second of recent monographs, overviews some public records laws in place and the small number of court cases. The most notable contribution of Dow's 2012 publication, however, is her acknowledgement that replevin has historically been a divisive issue between government archivists and collectors and her suggestion that the variances in the legal environment from state to state can have a bearing on the replevin process.

The term "replevin" is present in court decisions regarding the ownership of objects of cultural property that were displaced during wartime and improperly held by another party.¹⁵⁸ However, when these cases involve an international exchange of cultural property, they are more commonly described as instances of "repatriation." In reviewing the archival literature, there are occurrences in which the legal term "replevin" is used to describe efforts to retrieve records that were seized during war and that are in the custody of an individual or institution outside of the United States. This indicates that individuals in the archival community use the term to describe the general process of recovering materials that are alienated, even if it involves an international exchange. For example, Trudy Huskamp Peterson comments on "replevin" in her essay "Archives in Service to the State," focusing upon the conflict's potential impact to archival repositories. She writes, "Archivists have focused on the legal question of replevin: how to return

¹⁵⁷ Behrnd-Klodt, *Navigating Legal Issues in Archives*, 167-181.

¹⁵⁸ Emily J. Henson, "Comment: The Last Prisoners of War: Returning World War II to its Rightful Owners - Can Moral Obligations Be Translated into Legal Duties?," *DePaul Law Review* 51 (Summer 2002): 1110-1113. See, for example, *Menzel v. List*, in which Mrs. Menzel successfully used replevin to regain custody of a Chagall painting looted from her Brussels apartment by the Nazis during WWII.

or regain (or both) the records armies have seized.”¹⁵⁹ In applying the term “replevin” to cases in which there is an international exchange of property, Peterson is essentially using the term “replevin” to describe the process in which “repatriation” is achieved.

II.E. REPLEVIN OF PUBLIC RECORDS IN COURT

There are, as Behrnd-Klodt notes “relatively few cases” involving replevin of public records that have reached the courts.¹⁶⁰ This review identifies the small number of decisions that emerge from a review of the archival literature, but builds on those that Behrnd-Klodt, Peterson and Peterson, and Dow cite by reaching further into case law.¹⁶¹ The review of the cases is organized chronologically and reveals a mixed scorecard of victories and losses in the courtroom for government archives.

The archival literature suggests that the movement of records during wars fought in the United States can lead to attempted or successful replevin actions. Randolph G. Adams discusses one such case that reached the courts involving a letter of discharge written by General George Washington to the First Troop, Philadelphia City Cavalry in 1777. Following the Revolutionary War, the letter was held in the custody of Samuel Morris, Captain of the troop.¹⁶² In an 1823 report on the troop’s archives, the military group acknowledged that the letter and a silver case bearing Washington’s likeness were in the possession of the Morris family and asserted that the

¹⁵⁹ Trudy Huskamp Peterson, “Archives in Service to the State,” in *Political Pressure and the Archival Record*, edited by Margaret Proctor, Michael Cook, and Caroline Williams (Chicago: Society of American Archivists, 2005), 260.

¹⁶⁰ Behrnd-Klodt, *Navigating Legal Issues in Archives*, 169.

¹⁶¹ In some instances, I first encountered a reference to a replevin case in a media report and which point I would turn to the database LexisNexis Academic to locate the official decision as written by the court.

¹⁶² Adams, “The Character and Extent of Fugitive Archival Material,” 88.

items should remain in the family's custody.¹⁶³ Luke W. Morris, son of Samuel Morris, responded to the troop's statement regarding the family's ownership of the letter by giving the group a facsimile of the item, a gift that representatives of the troop gratefully accepted.¹⁶⁴ The troop seemingly changed its mind later in the 1860s when it brought suit against the Morris family for the return of the letter. The judge ruled that, given the troop's 1823 report in which it recognized the Morris family's ownership, the letter would remain with its current possessor.¹⁶⁵ Adams's discussion of the case involving Morris and the Washington letter is revealing in demonstrating the aforementioned notion of abandonment of title. In this case, the military unit, while arguably once the rightful owner of the letter, alienated and transferred its rights to the Morris family in 1823.

The 1860s saw another replevin case involving a letter written by George Washington. The earliest case that is cited by Behrnd-Klodt, Peterson and Peterson, and Samuel R. Clawson is *Mayor of the City of New York v. Lent*, an 1868 case that focused on the ownership of a letter written by George Washington. The case was rooted in a dispute as to whether the letter was indeed a "public record," underscoring the ambiguity that Holmes and Pickett discuss in their aforementioned publications.¹⁶⁶ The 1785 letter from Washington was addressed to the mayor, recorder, and aldermen of New York City and was in response to an honor that the City Council bestowed upon him.¹⁶⁷

¹⁶³ *The First Troop, Philadelphia City Cavalry, vs. Samuel Morris and Elliston P. Morris: Answer of the Defendant*, The Supreme Court for the Eastern District of PA (1867), 5-6, accessed October 3, 2012, Google Books.

¹⁶⁴ *The First Troop, Philadelphia City Cavalry, vs. Samuel Morris and Elliston P. Morris: Answer of the Defendant*, The Supreme Court for the Eastern District of PA (1867), 6-7.

¹⁶⁵ Adams, "The Character and Extent of Fugitive Archival Material, 88.

¹⁶⁶ Behrnd-Klodt, *Navigating Legal Issues in Archives*, 170; Peterson and Peterson, *Archives and Manuscripts: Law*, 91; Samuel R. Clawson, "Property - Public Documents in the Hands of Private Collectors," 1 *Campbell L. Rev.* 179 (1979): 182.

¹⁶⁷ *Mayor of the City of New York v. Lent*, 51 Barb. 19 (N.Y.S.Ct. 1868), accessed August 2, 2012, Google Books.

Oliver Lorenzo Barbour describes the circumstances surrounding the lawsuit in an 1868 report of contemporary cases in the Supreme Court of the State of New York. When a collector by the name of John Allan passed away in 1863, his library was auctioned and sold to DeWitt C. Lent. Barbour reported that it was unclear how and when the letter came into Allan's possession. Upon learning of the letter, the City of New York sued Lent for its return, claiming it to be a public record. The courts ultimately found in favor of the City of New York, the plaintiff in the case, determining that:

“[The] letter was a peculiar and particular species of property; and that its style, address, and responsive character to a legislative act, should of itself be regarded as having imparted notice to all, that from the moment of its reception and sending it became the property of the corporation to whom it was addressed.”¹⁶⁸

Peterson and Peterson explain that the court's finding was that Lent could not be a bona fide purchaser because the characteristics and content of the letter “gave notice at all times that the letter was property of the city.”¹⁶⁹ Like the case above, there are larger lessons to draw from the court's decision. A potential purchaser assumes a level of burden in identifying a public record or may, if the purchase is made, be subject to a replevin action. Lent was unable to claim that he had legitimate ownership of the letter despite purchasing it through an auction. The court found that there was enough evidence in the content and structure of the letter that should have informed Lent that it was the property of the city government of New York.

One of the most frequently referenced cases involving replevin of public records is *United States of America v. First Trust Company of Saint Paul*, a 1958 case argued in the United States Court of Appeals Eighth Circuit.¹⁷⁰ Peterson and Peterson and Behrnd-Klodt provide a valuable overview of the circumstances of the 1958 case in their legal manuals. The subject of

¹⁶⁸ *Mayor of the City of New York v. Lent* (1868).

¹⁶⁹ Peterson and Peterson, *Archives and Manuscripts: Law*, 91.

¹⁷⁰ *America v. First Trust Company of Saint Paul*, 251 F.2d 686.

the litigation was a series of documents written by William Clark, co-leader of the Lewis and Clark Expedition. Peterson and Peterson explain that the letters were discovered in a desk in the home of the late Mrs. Sophia V.H. Foster and were obtained by her father, General John Henry Hammond. When Foster's heirs gave the documents to the Minnesota Historical Society, the federal government intervened, seeking replevin of the records.¹⁷¹ As both Peterson and Peterson and Behrnd-Klodt indicate, the underlying question put forth by the case was whether Clark, as a government employee, created these documents as personal notes or an official record as the Expedition. The court found that the federal government did not successfully demonstrate that these were public records and, instead, determined that they were Clark's private writings. The federal government failed to recover the Clark papers.¹⁷²

Two articles from the 1950s trace the circumstances leading up to the United States government's action and provide insight into the opinions about the case generally held in the archival community. The rationale of the federal government, the plaintiff in the case, is best represented in Robert H. Bahmer's "The Case of the Clark Papers." Bahmer, the Assistant Archivist of the United States, first presented his view on the dispute during a 1955 meeting of the Society of American Archivists and published his statement in a 1956 article.¹⁷³ At the time of his publication, the government's lawsuit was pending and would be decided two years later by the trial and appeals court. Bahmer explains that NARA was unable to locate evidence that demonstrated the Clark papers had left the federal government's possession through proper procedure. Consequently, Bahmer relates that NARA "had no choice, once the issue of title was

¹⁷¹ Peterson and Peterson, *Archives and Manuscripts: Law*, 92.

¹⁷² Behrnd-Klodt, *Navigating Legal Issues in Archives*, 171 and Peterson and Peterson, *Archives and Manuscripts: Law*, 92.

¹⁷³ Robert H. Bahmer, "The Case of the Clark Papers," *American Archivist* 19, no. 2 (January 1956): 19.

raised, but to recommend intervention.”¹⁷⁴ Although Bahmer acknowledges that other institutions are capable of preserving the Clark papers, he maintains that the NARA has a legal duty to care for public records of lasting value and to make these records accessible.¹⁷⁵ In doing so, Bahmer frames the government’s decision to engage in legal action as obligatory.

In the second article, Julian P. Boyd of Princeton University reacts to the court’s decision concerning the Clark papers shortly after it was made.¹⁷⁶ Boyd is critical of the court’s decision that the papers are private documents and emphasizes his belief that they were the product of Clark’s employ by the United States government. He writes, “Entrapped by its own faulty logic and misuse of history, the court pursued its object with Olympian intransigence. The pocket journals were private.”¹⁷⁷ Boyd’s emotional reaction provides insight into what may have been a shared sentiment among other archivists.

Another replevin case surfaced in the 1960s, one that involved a series of papers pertaining to Spanish and Mexican governance of New Mexico. The papers, dating from 1697 and 1846, were in the possession of Kenneth D. Sender, who first entered into legal proceedings concerning the ownership of the records with the state of New Mexico. In February 1961, New Mexico’s State Records Administrator, the chief party responsible for the implementation of public records statutes in the state, initiated a replevin action against Sender, claiming possession of the historical records. Because New Mexico’s code requires that a plaintiff file within two years, when the State Records Administrator failed to do so and, in April 1963, the Supreme Court of New Mexico dismissed the state’s replevin action.¹⁷⁸ The state was subject to the statute of limitations in this case.

¹⁷⁴ Bahmer, “The Case of the Clark Papers,” 20.

¹⁷⁵ Bahmer, “The Case of the Clark Papers,” 21.

¹⁷⁶ Julian P. Boyd, “These Precious Monuments of Our History,” *American Archivist* 22, no. 2 (April 1959): 147.

¹⁷⁷ Boyd, “These Precious Monuments of Our History,” 173.

¹⁷⁸ *Sender v. Montoya*, 73 N.M. 287, 387 P.2d 860, 1963 N.M. LEXIS 2081 (N.M. 1963).

Sender's success in New Mexico, however, did not bring about a conclusion to the disputes surrounding the ownership of the papers. In late 1967, the United States District Court for the Western District of Missouri heard the case of *United States of America v. Kenneth D. Sender*, in which the federal government laid claim to the same set of papers. There is an absence of any significant discussion of the case in the archival literature, but Paul V. Lutz of the Manuscripts Society, an organization of private autograph and manuscript collectors, published a piece on the trial and court decision in *Manuscripts*. He explains that the federal government argued that the records were public documents and should have been transferred to the custody of the United States after its victory in the Mexican-American War.¹⁷⁹ The presiding judge instructed the jury members that, in order to find in favor of the plaintiff, they would have to agree that the records are public in nature and that they were in the New Mexico territory at the time of the American conquest. The jury found in favor of the defendant, a verdict that Lutz, with bias creeping into his piece, imagined "should deter further [government] actions along these lines."¹⁸⁰

Two decades later, however, North Carolina was successful in the case of *State of North Carolina v. B.C. West, Jr.* In the 1976 case, North Carolina sought the return of two bills of indictment signed in 1767 and 1768 by William Hooper, attorney for the King of England and an eventual signer of the Declaration of Independence for North Carolina. Peterson and Peterson, Behrnd-Klodt, Dow, and others described the circumstances that surrounded the case. The State Supreme Court ruled in favor of North Carolina and offered what William S. Price, Jr., formerly of the State Archives of North Carolina, describes as "an intriguing analysis."¹⁸¹ As Behrnd-Klodt explains it, the court found that the Treaty of Paris, which formally ended the

¹⁷⁹ Paul V. Lutz, "Government Loses Suit for Documents," *Manuscripts* 19, no. 4 (Fall 1967): 9.

¹⁸⁰ Lutz, "Government Loses Suit," 11.

¹⁸¹ Price, "N.C. v. B.C. West, Jr.," 23.

Revolutionary War, transferred ownership of public records from the Kingdom of Great Britain to the colonies. The bills of indictment were the property of the state of North Carolina as a result.¹⁸² This case and its implications for North Carolina's replevin program will be examined in the dissertation. It is one of a small number of case law precedents in which the government was successful in recovering alienated materials.

There are two cases heard in a Virginia court that relates to replevin. In the first, Howard J. Holton, Alexandria's Director of Finance, filed a motion in the Circuit Court of Alexandria for the return of a "collection assignment receipt book maintained by the Clerk and Auditor of the [Alexandria] City Council during the period 1814-1862."¹⁸³ The defense argued that the City of Alexandria discarded the book in 1957 at which time it was gifted to a private book company and, subsequently, acquired by the defendant. Such a gift would invalidate the title the city once held. The city objected to the defense's narrative, but, as the Judge pointed out, the petitioner was "unable to account for the whereabouts of the book prior to the time that it come into the hands of the defendant's consignor."¹⁸⁴

Three findings led to Judge Wiley B. Wright, Jr.'s order for the book to be returned to the custody of the City of Alexandria. First, Judge Wright found that the book was indeed a public record under the Virginia Code section 42.1-77. Second, Wright's interpretation of the evidence led to his determination that "the book was neither abandoned nor given away by the city." Finally, he found that "prior to the seizure ordered by the Court, the book was in the possession of a person not authorized by the custodian of the public records or by law to have possession of

¹⁸² Behrnd-Klodt, *Navigating Legal Issues in Archives*, 174.

¹⁸³ *Howard J. Holtan v. Samuel Yudkin* (Cir. Ct. of the City of Alexandria 1977). Unpublished Opinion; Box 5, Replevin Files, 1914-1992; Virginia State Library and Archives, Office of the State Archivist; Library of Virginia State Records Center, Archives Annex, Richmond, VA

¹⁸⁴ *Howard J. Holtan v. Samuel Yudkin* (Cir. Ct. of the City of Alexandria 1977).

it.” The Court ordered that the defendant return the book to the City of Alexandria.¹⁸⁵

It appears that there was inactivity in this area in the 1980s; this literature review located no cases that were tried in state or federal court on matters relating to the ownership of public records. In 1992, another case was heard in Virginia, this time in the Circuit Court of the City of Williamsburg and James City County, Virginia. In *Middlesex et al. v. Jack Hamilton d/b/a Hamilton’s Book Store*.¹⁸⁶ Hamilton, the owner of Hamilton’s Book Store in Williamsburg, purchased the eighty-one records that were in question and contracted his friends at Middlesex County’s library about his acquisition. News of the acquisition spread from there. On February 11, 1991, Virginia’s State Archivist and a Middlesex County administrator met with Hamilton to view the purchased records and, on the same day, the county sheriff seized the records.

In *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, the county and the Librarian of Virginia petitioned for the *ex parte* seizure of the records under section 42.1-90 of the Public Records Law and for the return of the public records to the government under section 42.1-89 of the statute. Hamilton challenged the constitutionality of the seizure and the statute that allowed for it, but the court did not agree with his position. Having decided this, the judge was charged with identifying whether the records were indeed public in nature as the government officials argued. Interestingly, the judge applied a definition of “public record” that was used in the 1874 case of *Coleman v. Commonwealth*, rather than the definition codified in the Virginia Public Records Act.¹⁸⁷ The court did so upon determining that the Virginia statutory definition of “public record” is broader than the common law definition, as established in *Coleman v. Commonwealth*. The result of his application of the definition was the dispersal of

¹⁸⁵ *Howard J. Holtan v. Samuel Yudkin* (Cir. Ct. of the City of Alexandria 1977).

¹⁸⁶ “d/b/a” is an acronym for “doing business as.”

¹⁸⁷ *Coleman v. Commonwealth*, 66 Va. (25 Gratt.) 865, 875 (1874). In *Coleman v. Commonwealth*, a public record was defined as “a written memorial made by a public officer authorized by law to perform that function and intended to serve as evidence of something written, said or done.”

some of the records to the government and some to Hamilton.¹⁸⁸ This case and its implications for contemporary replevin activities in Virginia are discussed in further detail in Chapter Six.

In the opening decade of the 21st century, disputes surrounding the title to public records again entered the courtroom. In the *United States v. Ralph McElvenny, The John F. Kennedy Museum Foundation*, the government sought the recovery of a map of Cuba that was annotated by President John F. Kennedy during the Cuban Missile Crisis and papers also annotated by the President concerning the enrollment of civil rights figure James Meredith at the University of Mississippi.¹⁸⁹ Following Kennedy's assassination, the trustees and executors of the estate created a deed that donated to the United States what was described as " 'papers, documents, historical materials, mementos, objects of art, and other memorabilia.' "¹⁹⁰ These materials were to be deposited in the John F. Kennedy Library.

A brief interlude regarding presidential papers and ownership thereof is necessary for understanding this particular case. Behrnd-Klodt explains that until Congress's passage of the Presidential Recordings and Materials Preservation Act (PRMPA) in 1974, U.S. presidents viewed the papers from their time in office to be their own property.¹⁹¹ As a result, presidents often took their papers with them when they left the White House and bequeathed them to heirs. Congress secured some of these papers by raising funds for their purchase.¹⁹² Legal scholars have explored the issue of ownership of presidential records in law review journal articles. In his *Minnesota Law Review* article, "Presidents and their Papers," Carl McGowan cites a quote from President Grover Cleveland that very aptly illustrates the position held by many presidents. In

¹⁸⁸ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

¹⁸⁹ *United States v. Ralph McElvenny, The John F. Kennedy Museum Foundation*, 2003 U.S. Dist. LEXIS 4792 (S.D.N.Y. Mar. 31, 2003).

¹⁹⁰ *United States v. Ralph McElvenny, The John F. Kennedy Museum Foundation* (2003).

¹⁹¹ Behrnd-Klodt, *Navigating Legal Issues in Archives*, 150-151.

¹⁹² Behrnd-Klodt, *Navigating Legal Issues in Archives*, 150.

reply to a Senate request for a file, Cleveland maintained, “I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private ...if I saw fit to destroy them no one could complain.”¹⁹³ Like Behrnd-Klodt, McGowan explains that Congress recognized the private ownership of presidential papers before PRMPA through their purchases of documents in the possession of the heirs of the presidents.¹⁹⁴ The materials in question in the case of the *United States v. Ralph McElvenny, the John F. Kennedy Museum Foundation* were not being claimed under PRMPA but rather on the basis of the deed, as Kennedy’s presidency preceded the passage of the law that renders presidential papers to be public records.

In the court decision, the judge found that the defendants received the materials through several intermediaries, but that Kennedy’s secretary Evelyn Lincoln originally acquired the records, “improperly” taking them and giving them to collector Robert White.¹⁹⁵ In 2003, the court denied the defendant’s request to dismiss the replevin action, but the case summary does not provide further insight into a final determination concerning ownership.¹⁹⁶ It is necessary to reach beyond the scholarly literature and case law to resources such as NARA’s *Prologue*, a quarterly magazine, to locate information about what occurred following the judge’s denial of McElvenny’s motion to dismiss the replevin action.¹⁹⁷ This dissertation will examine the implications of the McElvenny case for NARA’s replevin efforts, thus bringing the settlement into the scholarly literature.

¹⁹³ Carl McGowan, “Presidents and Their Papers,” *Minnesota Law Review* 68 (1983): 412.

¹⁹⁴ McGowan, “Presidents and Their Papers,” 411.

¹⁹⁵ *United States v. Ralph McElvenny, The John F. Kennedy Museum Foundation* (2003).

¹⁹⁶ *United States v. Ralph McElvenny, The John F. Kennedy Museum Foundation* (2003).

¹⁹⁷ James Roth, in his article for *Prologue*, explains that the parties reached a settlement through which the government recovered the materials. James M. Roth, “Reclaiming Pieces of Camelot: How NARA and the JFK Library Recovered Missing Kennedy Documents and Artifacts,” *Prologue* 38, no. 2 (Summer 2006): n.p, accessed November 6, 2012, <http://www.archives.gov/publications/prologue/2006/summer/camelot.html>.

North Carolina was successful in the 1970s recovering the bills of indictment in *State of North Carolina v. B.C. West, Jr.* The state was again successful in the first decade of the 21st century in a case that gained even greater attention, one that revolved around the rightful owner of an original copy of the Bill of Rights. News reports and popular literature connected a public much broader than the archival community to the circumstances surrounding the case. While not scholarly in nature and therefore technically not within the scope of this literature review, two books for a popular audience deserve brief recognition here: David Howard's *Lost Rights: The Misadventures of a Stolen American Relic* and Robert K. Wittman's *Priceless: How I Went Undercover to Rescue the World's Stolen Treasures*. Howard, a journalist, traces the fascinating history of the copy of the Bill of Rights, which left the state of North Carolina during the Civil War when a Union soldier pilfered it from a state office, and reminds readers that it was but one of many documents that were taken by the Northerners. In the case of the Bill of Rights, Howard explains that the soldier sold it to Charles Shotwell of Ohio for \$5 in 1866.¹⁹⁸ In *Priceless*, Wittman, the FBI agent who helped to formally establish the Art Crime Unit, discusses his role in the Bill of Rights case. Wittman went undercover, posing as an interested buyer, to ensure that the document was restored to the proper owner, the state of North Carolina.¹⁹⁹

In the scholarly literature, attorney Jeffrey R. Goss describes the litigation that surrounded the original copy of the Bill of Rights in his article for the *Charlotte Law Review*. The contextual information that Goss provides reflects much of what Howard, in a perhaps more engaging narrative, recounts. Goss, however, explains that following the FBI's seizure of the Bill of Rights, which was authorized by a judge, the United States filed a civil forfeiture action

¹⁹⁸ David Howard, *Lost Rights: The Misadventures of a Stolen American Relic* (Boston: Houghton Mifflin Harcourt, 2010), 41.

¹⁹⁹ Robert K. Wittman, *Priceless: How I Went Undercover to Rescue the World's Stolen Treasures* (New York: Broadway Paperbacks, 2010), 212.

against the record.²⁰⁰ The civil forfeiture action, which Jay A. Rosenberg describes as a property seizure that is “widely perceived by law enforcement agencies to be an effective additional deterrent against criminal activity,” gave the United States Marshals custody of the record while North Carolina and the private parties who possessed the Bill of Rights settled the matter of ownership.²⁰¹ The case of *United States of America v. North Carolina's Original Copy of the Bill of Rights* reached the Eastern District of North Carolina court system, but, like those cases described in the following section, the dispute was ultimately settled by the parties. North Carolina was given ownership of the Bill of Rights in September 2003.²⁰²

The case that most quickly followed the Bill of Rights dispute dealt with another seminal record in United States history. In 2008, the Circuit Court of Fairfax County in Virginia heard the case of *Richard L. Adams, Jr. v. State of Maine*, which was concerned with the ownership of an original copy of the Declaration of Independence. Both Adams, a resident of Virginia, and the state of Maine claimed title to the document. An understanding of the history of the document is necessary for understanding the court decision. In 1776, the Executive Council of Massachusetts called for a printing of the Declaration of Independence so that copies could be disseminated to ministers who would then share the text of the document to their congregations. After this point, the Executive Council asked that the copies be sent to the town clerks who would record the document “ ‘in their respective Town, or District Books, there to remain as a perpetual memorial thereof.’”²⁰³ At the time of the order, Massachusetts encompassed the territory that is today Maine.²⁰⁴

²⁰⁰ Jeffrey R. Goss, “A Theft of Constitutional Proportions: North Carolina’s Original Copy of the Bill of Rights,” *Charlotte Law Review* 2 (2010): 259.

²⁰¹ Jay A. Rosenberg, “Constitutional Rights and Civil Forfeiture Actions,” *Columbia Law Review* 88, no. 2 (March 1988): 391; Goss, “A Theft of Constitutional Proportions,” 259.

²⁰² Goss, “A Theft of Constitutional Proportions,” 259.

²⁰³ *Richard L. Adams, Jr. v. State of Maine*, 2008 Va. Cir. LEXIS 17, 75 Va. Cir. 41 (2008).

²⁰⁴ *Adams v. Maine* (2008).

The case reveals that, in 1995, a resident of Wiscasset, Maine (a town formerly called Pownalborough) discovered one of the original copies of the Declaration of Independence in the attic of a deceased daughter of a former town clerk. The document was auctioned and ultimately acquired by Adams in 2001 for \$475,000. Maine initiated a replevin action against Adams in an effort to recover the object and, in turn, Adams sued the state in order to “quiet title.”²⁰⁵ The Circuit Court in Fairfax County found that Adams was indeed the rightful owner of the item, a decision that was upheld by the Supreme Court of Virginia in the 2009 case of *State of Maine v. Richard L. Adams, Jr.*²⁰⁶ The court decision reinforces the discussion in the literature regarding the ambiguous nature of a public record. The state of Maine identified the copy as a public record that was therefore the property of the government. Two courts in Virginia disagreed, demonstrating an understanding of the nature of public records that reflects the above statutory definitions. The private printers were not public officials, the courts found, and therefore the copy was not a public record. The Supreme Court of Virginia stipulated that while the prints were not public records, the town clerks’ records relating to the Declaration of Independence would be deemed as such, a determination that demonstrates the nuances that can riddle the division between public and private records.²⁰⁷

One of the most recent replevin cases differs from those discussed above in that it involves a county’s efforts to recover alienated materials. The case of *Jefferson County, Tennessee v. Margaret V. Smith* was a victory for the local government in Jefferson County and concerned the ownership of an unexecuted marriage license that the county clerk issued to Davy

²⁰⁵ *Adams v. Maine* (2008).

²⁰⁶ *Adams v. Maine* (2008); *State of Maine v. Richard L. Adams, Jr.*, 277 Va. 230, 672 S.E.2d 862, 2009 Va. LEXIS 41 (2009).

²⁰⁷ *Maine v. Adams* (2009).

Crockett in 1805.²⁰⁸ While Bain's study found that Tennessee had no replevin law at the time of his writing in 1983, this has since changed, with the passage of a statute that Bain likely would have coded as among the most stringent of the replevin legislation.²⁰⁹ Jefferson County brought the replevin action against Smith on the basis of this statute, a section of the Tennessee Code Annotated.²¹⁰ The dispute between Jefferson County and Smith reflected the issue of abandonment that Sparling raises in his discussion of the Works Progress Administration prints. The defendant claimed that the county discarded the record and that a relative had obtained it only after this decision was made. Neither the trial court nor the appeals court accepted this account, citing the county's custody of marriage licenses that were contemporaneous to the Crockett record. Smith was ordered to transfer the record to Jefferson County.²¹¹

The case of *United States of America v. Laurie Zook* is the most recent public records replevin case that has reached the federal courts in the United States. Like *United States v. Ralph McElvenny*, *The John F. Kennedy Museum Foundation*, this dispute surrounded a document signed by a former President of the United States. Laurie Zook, defendant in the case, discovered a pardon that was handwritten and signed by Abraham Lincoln in a vacant home that she was preparing for sale. The record pardoned Sergeant Major Adam Laws of the 19th Regiment of the United States Colored Troops, a division of the military whose papers are now in NARA's collection.²¹² The United States was ultimately successful in recovering the record, with the court granting ownership to the federal government in August 2012.²¹³

²⁰⁸ *Jefferson County, Tennessee v. Margaret V. Smith*, 2011 Tenn. App. LEXIS 402 (Tenn. Ct. App. July 26, 2011).

²⁰⁹ Bain, "State Archival Law," 167.

²¹⁰ *Jefferson County v. Smith* (2011); T.C.A. §39-16-504.

²¹¹ *Jefferson County v. Smith* (2011).

²¹² *United States of America v. Zook*, 2012, United States District Court for the District of Maryland, (1:12-cv-01465-JKB), Plaintiff's Motion for Judgment on the Pleadings and Memorandum in Support, filed July 20, 2012.

²¹³ *United States of America v. Zook*, 2012, United States District Court for the District of Maryland, (1:12-cv-01465-JKB), Memorandum, filed August 15, 2012.

What is collectively learned from considering these cases? First, legal research reveals that the group of replevin cases brought to court is somewhat larger than what Peterson and Peterson and Behrnd-Klodt suggest. Interestingly, there is no mention in the archival literature of, for example, Maine's failure to recover an original copy of the Declaration of Independence in 2009 or one Tennessee county's lengthy crusade to successfully regain a Davy Crockett marriage license. The group of cases, still limited in number, exhibits a relatively even level of success for government archives and for private parties; government archives are not victorious in every replevin case that is brought to court, nor are they experiencing regular losses when they do sue for recovery.

The cases, as a collective, provide some insight into how public records leave government custody and enter private hands, with three primary causes emerging. Public officials retain custody of records after terminating their employment, viewing them as their own property. Records are displaced during wartime. Finally, archival theft puts records into the possession of parties who are not the rightful owners. These themes are fleshed out not only in the cases that are settled in a courtroom, but also in those resolved through negotiations among parties.

II.F. REPLEVIN OF PUBLIC RECORDS OUTSIDE OF COURT

As a result of open records laws in the United States, the court records surrounding replevin actions that reach federal and state courts are readily accessible. Conversely, there is relatively limited writing in the archival or legal field about replevin cases that are resolved out of court

following negotiations among parties. This section is, as a consequence, significantly more limited in scope than the preceding section but is the specific focus of this dissertation research.

Two articles in the *American Archivist* underscore a link between replevin and theft while also providing insight into recovery efforts that are settled without a lawsuit. Aaron Purcell's lively account of insider theft at the Library of Congress highlights the government's efforts to retrieve stolen records from individuals who purchased them without being aware that they were pilfered from the repository. William Benjamin, the dealer who purchased stolen documents from the thieves aided the government in its case against Lewis McKenzie Turner and Philip McElhone and agreed to return the materials to the Library of Congress. Purcell notes that Benjamin did so after making a request for monetary compensation from the government, which he was not awarded.²¹⁴ To Purcell, the case of Turner and McElhone highlights the need to address what compensation should be given to individuals who unknowingly acquire stolen materials and are subsequently forced to return them.²¹⁵ However, because of the inalienability of a public record that is outlined above, the government may not be required to purchase materials that have left their custody, even when the records are in the possession of a party who is not a thief and instead an unknowing buyer.

Of the literature that does exist concerning cases settled outside of court, two articles are written by individuals who were directly associated with the negotiations in some capacity. Bruce Stark, former Assistant State Archivist at the Connecticut State Library, discusses another case that demonstrates the connection between replevin and theft, one that he can speak to firsthand. In the early 2000s, state archivists at the Connecticut State Library in Hartford identified records at the Pequot Museum and Research Center in Mashantucket, Connecticut that

²¹⁴ Aaron D. Purcell, "Abstractions of Justice: The Library of Congress's Great Manuscripts Robbery, 1896-1897," *American Archivist* 62, no. 2 (Fall 1999): 339.

²¹⁵ Purcell, "Abstractions of Justice," 345.

they believed had been stolen from their institution. What followed was a dispute between the Connecticut State Library and the Pequot Museum, two institutions that felt they had proper title to the papers. Through a Connecticut state investigation, it was determined that the documents had been stolen by a man named Walter Plowman, who had taken an estimated 600 public records from the Connecticut State Library. Plowman sold the disputed records in question to a manuscript dealer who, in turn, sold them to the Pequot Museum. Through the return of the materials to the Connecticut State Library in October and November of 2002, the negotiations were brought to resolution.²¹⁶

The publication *Manuscripts*, a non-peer reviewed publication of the Manuscript Society, offers a discussion of a replevin settlement that, like Stark's piece, is a firsthand account. Writing about a 1980s dispute in Louisiana that surrounded land survey documents, Patricia Brady Schmit describes a "compromise" that resolved the question of ownership and custody of the materials without the involvement of the courts. Schmit, the Historic New Orleans Collection's director of publications, explains that, poised for sale in a public auction, the survey documents drew the interest of both the Historic New Orleans Collection (HNOC) and the State of Louisiana. On November 1, 1982, however, the seller, the Western Reserve Historical Society, removed four of the six auction lots from the public sale, a decision that followed the State of Louisiana's threat of replevin. The Historic New Orleans Collections purchased the remaining two lots.

Following the Louisianan Attorney General's determination that the Louisiana State Archive and Record Service would be the proper state repository for these materials, the state

²¹⁶ Bruce P. Stark, "The Archivist as Detective: Or, the Case of *Ledyard v. William Morgan*," *American Archivist*, 67, no. 2 (Fall/Winter 2004): 285-289.

archivist released a report on the matter in which he echoed the ownership claim.²¹⁷ In a decision that seemingly was made to avoid the cost of replevin litigation in the courts, the dispute was ultimately resolved through an agreement between the State of Louisiana and the Historic New Orleans Collection. Schmit explains the terms of the agreement as follows:

The State of Louisiana waived all claims of ownership to these documents and requested HNOCC to complete its purchase from the Western Reserve Historical Society. The Collection complied with the request and purchased the documents. The Collection then donated the documents to the State, retaining for a period of thirty years the exclusive right to possess, use, process, publish, and make the documents available for research. It presented a microfilm copy [to the state archivist].²¹⁸

Schmit's account suggests that settlements between parties may consist of terms other than the direct transfer of custody to the state.

This dissertation expands this body of writing on replevin cases settled between parties. It has certainly not been the case that there have been only three cases in which individuals have turned over custody of public records without the intervention of the courts; discussions with individuals at government archives and a study of institutional records have confirmed that this is, in fact, the more common route that recovery efforts take.

II.G. REPLEVIN, PRIVATE DEALERS, AND COLLECTORS

As is the case with the issue of repatriation in the art field, the literature indicates there are two generic camps that have formed around the issue of replevin of archival materials. Dow's recent *Archivists, Collectors, Dealers, and Replevin: Case Studies on Private Ownership of Public*

²¹⁷ Patricia Brady Schmit, "Compromise Resolves Fate of Documents: Replevin Avoided," *Manuscripts* 37 (Fall 1985): 280.

²¹⁸ Schmit, "Compromise Resolves Fate of Documents," 281.

Documents effectively captures the division that has historically existed around this topic, a division that will be probed in this dissertation research.

Rhoads explains that because resolving the issue of title and ownership may involve the courts, there is tension between archivists and collectors and dealers surrounding the issue of replevin.²¹⁹ In discussing *United States v. First Trust Company of Saint Paul*, Boyd points to concerns among private collectors and dealers that the replevin action was “the initial move in a plan to assemble in the National Archives all official records of whatever nature, of whatever rank, wherever found.”²²⁰ Just as encyclopedic museums have voiced concern that repatriation efforts by source countries will empty museum galleries, collectors viewed *United States v. First Trust Company of Saint Paul* as potentially a blanket precedent that would prompt a flurry of replevin actions by the government.

A series of articles in *Manuscripts* captured this concern. Robert F. Metzdorf, in an article entitled “Lewis and Clark I: A Librarian’s Point of View,” articulates the fundamental concern that he feels should be shared by the manuscripts community. He warns, “If the government wins this suit, there is danger that a precedent will have been established which will open all existing collections to confiscation of documents originated by persons in government employ, no matter what the nature of those papers.”²²¹ Fear and alarmism are evident in Metzdorf’s statement, but there is another perceptible element as well. Metzdorf certainly does not acknowledge the legitimacy of the government’s ownership of all records generated during the course of public business. Instead, he references the “nature” of the public records as being

²¹⁹ James H. Rhoads, “Alienation and Thievery: Archival Problems,” *American Archivist* 29, no. 2 (April 1966): 199.

²²⁰ Boyd, “These Precious Monuments of...Our History,” 152.

²²¹ Metzdorf, “Lewis and Clark I,” 226.

an important consideration, suggesting that there are records that the government should not claim. He, however, provides no explication of this clause.

Opposition to replevin is perhaps most evident in John M. Taylor's *History in Your Hand: Fifty Years of the Manuscript Society*. In a chapter tellingly titled "David and Goliath: The Lewis and Clark Case," Taylor describes the position held by the Manuscript Society, the notable organization of autograph and manuscript collectors, at the time of the case and its efforts to raise funds for the defense.²²² Taylor, the former president of the Manuscript Society, expresses the group's belief that the successful replevin of the Clark papers would have made historical documents less available to the public. He argues that collectors and private institutions may have been less inclined to display or provide access to them in fear that they may be the next targets of a replevin action.²²³ His is a very different response than what Boyd articulates in his article for *American Archivist*. Taylor's text is useful in gaining perspective on the Manuscript Society's reaction to the court decision in the *State of North Carolina v. B.C. West, Jr.* case. Describing the court's decision in favor of the State of North Carolina, Taylor remarks that it was a "setback for the Manuscript Society and the broader collector community alike."²²⁴

Like Taylor, Gandert touches on the potential implications of collectors' fear of replevin. He notes that the looming possibility of a replevin action "may well have a chilling effect on collectors" and posits that individuals may even choose to destroy targeted records rather than incur the litigation costs of replevin.²²⁵ Gandert, writing in 1982, suggests that the fear of replevin actions may also lead to less transparency in the sale and purchase of archival materials.

²²² John M. Taylor, *History in Your Hand: Fifty Years of the Manuscript Society* (Westport, CT: Praeger Publishers, 1997): 28.

²²³ Taylor, *History in Your Hand*, 31.

²²⁴ Taylor, *History in Your Hand*, 73.

²²⁵ Slade Richard Gandert, *Protecting Your Collection: A Handbook, Survey, & Guide for the Security of Rare Books, Manuscripts, Archives, & Works of Art* (Binghamton, NY: Haworth Press, Inc., 1982), 55.

Dealers may choose not to share information about the materials they sell and collectors may insist on an agreement with the dealer stipulating that their names will not be released to outside parties.²²⁶

At a session of the 2010 annual meeting of the Society of American Archivists, David Haury, Director of the Bureau of Archives and History at the Pennsylvania Historical and Museum Commission, explained that the Council of State Archivists and the Manuscripts Society have been engaged in discussion about the sale of public documents. Haury is of the opinion that there is a fundamental division between the two parties that will likely not disappear. While archivists hold the position that they have an “obligation” to retrieve all public documents, a sentiment also expressed by Bahmer, Haury maintains that most dealers and collectors believe it is acceptable to purchase and sell public documents that were never in an archives.²²⁷ Although there is this difference of opinion, Haury indicates archivists and dealers have come to an agreement to engage in due diligence in determining the provenance of a record.²²⁸

²²⁶ Gandert, *Protecting Your Collection*, 57.

²²⁷ Bahmer, “The Case of the Clark Papers,” 21.

²²⁸ David A. Haury, Menzi L Behrnd-Klodt, and Karen A. Blum, *Replevin: What's Mine Is Mine (Unless It's Yours): Session 404 of the 2010 Society of American Archivists Annual Meeting*, 2010 by Society of American Archivists, Compact Disc.

III. METHODOLOGY

III.A. CASE STUDIES AS A STRATEGY FOR INQUIRY

This dissertation employs a case study approach, examining the State Archives of North Carolina, the Pennsylvania State Archives, and the Library of Virginia. Martyn Hammersley and Roger Gomm acknowledges that “in one sense, all research is case study: there is always some unit, or set of units, in relation to which data are collected and/or analysed.”²²⁹ The authors note, however, that case study research is distinct from research that is experimental or survey-based and generally “refers to research that investigates a few cases, often just one, in considerable depth.”²³⁰ Robert E. Stake would characterize this dissertation as a “collection case study,” in which more than one case is studied “in order to inquire into the phenomenon, population, or general condition.”²³¹ Replevin, as the archival field understands the term, is the phenomenon that is examined through a study of the state archives in North Carolina, Pennsylvania, and Virginia. These three cases are “constituent member[s] of a target population,” which is, in this study, public archives.²³²

²²⁹ Martyn Hammersley and Roger Gomm, “Introduction,” in *Case Study Method: Key Issues, Key Texts*, eds. Roger Gomm, Martyn Hammersley, and Peter Foster (London: SAGE Publications, 2000), 2.

²³⁰ Hammersley and Gomm, “Introduction,” 3.

²³¹ Robert E. Stake, “Case Studies,” in *Handbook of Qualitative Research*, ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: SAGE Publications, 1994), 237.

²³² Robert E. Stake, “The Case Study Method in Social Inquiry,” in *Case Study Method: Key Issues, Key Texts*, eds. Roger Gomm, Martyn Hammersley, and Peter Foster (London: SAGE Publications, 2000), 23.

When engaging in case study research, there must be a rationale behind the selection of the objects of study. In this dissertation, the cases were selected with a number of considerations in mind, but the legal environment for replevin was the primary motivator. Archivists who are familiar with replevin or public records are likely aware of some of the activities by the State Archives of North Carolina; in recent years, media outlets directed attention to the recovery of the state's original copy of the Bill of Rights and a current Deputy Attorney General of the state has presented on replevin at a Society of American Archivists meeting. The state's replevin activities were earlier a matter of attention and scrutiny in the 1970s, when the archives was simultaneously involved in recovering a George Washington letter and the bills of indictment signed by William Hooper, the latter which was decided in court. With case law precedent and a piece of legislation that codifies the recovery of public records, North Carolina was presumed, at the start of the dissertation project, to have the most favorable legal environment for state efforts in this area. The selection of Pennsylvania was based on the very different circumstances for replevin. David Haury, State Archivist of Pennsylvania, has called attention to the absence of state legislation and case law precedent related to replevin of public records.²³³ The Commonwealth of Virginia's legal environment for replevin is closer to that of North Carolina than Pennsylvania. The inclusion of Virginia in this study is to determine whether the court opinion that split the records, giving ownership to both Virginia and to the dealer, weakened and diminished the frequency of the state's replevin efforts.

²³³ Haury, "A Message from State Archivist David Haury," in *Access Archives: The Newsletter of the Pennsylvania State Archives* 11 (Winter 2012), accessed from http://www.portal.state.pa.us/portal/server.pt/community/access_archives_newsletter/20578/volume_11,_winter_2012/1060471

Peter Yeager and Kathy Kram suggest that, in order for an organization to be willing to engage with researchers, there must be some benefit that would come from participation.²³⁴ The nature of the organizations studied in this dissertation arguably lifts this necessity of providing an identifiable payoff. These are government archival institutions that exist in order to collect and preserve public records for public use. As research facilities, they should, at least theoretically, support dissertation research without the expectation of some received benefit, even if the research is not entirely archival in nature. Moreover, the open access public records laws exist to provide transparency to members of the public. They do not, with the exception of classified categories of records, allow for the governmental body to refuse a request for access or to require a payoff in return for the access.

Stake, who has published extensively on case studies, characterizes the approach as “a small step toward grand generalization,” but cautions researchers that “generalization should not be emphasized in all research.”²³⁵ Each replevin case has unique characteristics that shape the state government’s recovery process and influence the custody determination. Through an analysis of interviews and records of cases resolved between parties, this dissertation presents a visual representation of the replevin process and discusses individual cases of replevin through this conceptualization. Moreover, the dissertation considers what lessons can be drawn from the climate and practices in three states with regard to the influence of state law and case precedent.

The approach is a multi-site and comparative case study, which G.E. Gorman and Peter Clayton explain should involve selecting sites that “reflect a range of subjects or settings

²³⁴ Peter Yeager and Kathy Kram, “Fielding Hot Topics in Cool Settings: The Study of Corporate Elites,” in *Studying Elites Using Qualitative Methods*, ed. Rosanna Hertz and Jonathan B. Imber (Thousand Oaks, CA: Sage Publications), 46.

²³⁵ Stake, “Case Studies,” 238.

applicable to the topic.”²³⁶ The authors identify “analytic induction” as a method for analyzing the data collected through an investigation of multiple cases. The paper utilizes an analytic induction technique from Gorman and Clayton that reflects the following process:

The identification of a preliminary definition and explanation of the phenomenon of study at the start of the research;

The collection of data and continuous examination of how the data compares and contrasts to the preliminary definition and explanation;

The continuous modification of the preliminary definition and explanation to better reflect the data and findings from case study research;

A final redefinition of the phenomenon of study based on the comparative case study research.²³⁷

This technique is applied by beginning with the legal definition of replevin, the phenomenon that is, of course, the focus of this study. Through an examination of cases that are resolved outside of the courts, this accepted legal definition is modified to better reflect what is occurring more commonly in the archival field.

III.B. DATA SOURCES

Raya Fidel, in an essay in *Qualitative Research in Information Management*, characterizes case study research as qualitative in nature and Hammersley and Gomm echo this, remarking, “Frequently, but not always, it implies the collection of unstructured data, and the qualitative analysis of those data.”²³⁸ Textual data sources, coupled with semi-structured interviews with

²³⁶ G.E. Gorman and Peter Clayton, *Qualitative Research for the Information Professional: A Practical Handbook*, 2nd edition (London: Facet Publishing, 2005), 51.

²³⁷ Gorman and Clayton, *Qualitative Research for the Information Professional*, 52.

²³⁸ Hammersley and Gomm, “Introduction,” 3.

individuals associated with replevin cases, serve as the entry points for analysis on the process of replevin.

As James A. Holstein and Jaber F. Gubrium plainly observe, there is “no single correct approach” to the analysis of data.²³⁹ In this study, the analysis is inductive, in that patterns and themes related to the process for identification and recovery of public records emerge directly from the data. The visual and generalized representation of replevin, presented first in Chapter Four, emerged from coding the data sources related to individual replevin narratives.

Data Source 1: Court Records

There is a twofold purpose for examining the relevant court records. First, the common law tradition places court precedent in a role of central importance to the judicial system in the United States. This has bearing for replevin of public records. Government archives can use precedent to add weight to their claim of ownership of public records and those private parties in possession of the materials may point to the case law to demonstrate how the circumstances of their case differ from previous disputes. Moreover, in the rare instance in which replevin cases involving public records reach the courts, judges will look to the case law to come to a decision.

Second, the access to court records is methodologically important to this study to allow for a point of comparison to cases that are negotiated outside of the courts. Given that few cases involving replevin of public records actually reach the courts, the interest that drives this study is to uncover the internal federal and state processes in place. The court cases that follow the codified process of replevin act as a contrast to those that are settled through negotiations between parties. What pushes cases into the court system? Are there circumstances that

²³⁹ James A. Holstein and Jaber F. Gubrium, “Inside Interviewing: New Lenses, New Concerns,” in *Inside Interviewing: New Lenses, New Concerns*, ed. James A. Holstein and Jaber F. Gubrium (Thousand Oaks, CA: Sage Publications, 2003), 26.

characterize these cases that are distinct from those resolved internally? These are questions that guide the analysis of the court records.

Data Source 2: Statute

Stare decisis, literally “to stand by things decided,” is a principle that is fundamental to the common law system. *Stare decisis* means that judges are guided by court precedent in building a body of law. This is in contrast to the system of civil law, which places a primary emphasis on legal statute. Still, legislation, of course, exists and is relevant to the judicial system in the United States. While replevin is a common law writ, it is, as evidenced by the replevin of public records statutes, sometimes codified.

In the United States, legislative statute may serve to define “public record” and codify governmental replevin of public records.²⁴⁰ The absence of legislation that does the latter can act as a hindrance to successful recovery on a state level. David Haury, State Archivist of Pennsylvania, conveys this challenge in describing the absence of clearly defined laws related to public records in Pennsylvania in *Access Archives*, the Pennsylvania State Archives’ newsletter. He writes, “The Commonwealth should pass a replevin or recovery of government records law which allows both state and local governments to recover their records which have been stolen or otherwise alienated from government custody. Without such legislation it is extremely difficult to repatriate to government custody any documents which appear for sale online, such as on e-Bay, or in dealers' catalogs.”²⁴¹ With the dual importance of precedent and statute in matters involving replevin of public records, I analyzed the legislation of relevance for replevin actions by the state governments of North Carolina, Pennsylvania, and Virginia.

²⁴⁰ *Black’s Law Dictionary* 1537 (9th ed. 2009).

²⁴¹ Haury, “A Message.”

Data Source 3: Semi-Structured Interviews

Given that public records replevin cases are generally negotiated outside of the courts, there is a subsequent absence of legal records associated with them. This dissertation uncovers the internal processes for identification and recovery of public records in private hands through semi-structured interviews with individuals associated with the organizational efforts. While quantitative researchers select participants at random, the interview subjects in this qualitative study are purposefully chosen based on their involvement with replevin cases and their ability to speak to the process of recovering public records in private hands. The interviews were audio-recorded and transcribed by the researcher in their entirety. There were some instances in which telephone and face to face conversations were treated more informally and not recorded; such conversations provided context, often for interviews that later followed.

Comparability in interviews is, as Mark Benney and Everett C. Hughes note, a methodological convention that is beneficial to the researcher.²⁴² As such, this project employed a semi-structured interview approach, allowing for some consistency in data analysis. As Adler and Adler explain, the semi-structured interview permits researchers “to allow respondents to shape the contours of the interview.”²⁴³ The interview participant’s responses prompted additional questions and conversation during the interview and the general interview script was modified as necessary during the data collection process.

The following individuals participated in semi-structured interviews:

- State Archives of North Carolina: North Carolina State Archivist

²⁴² Mark Benney and Everett C. Hughes, “Of Sociology and the Interview: Editorial Preface,” *American Journal of Sociology* 62, no. 2 (September 1956): 141.

²⁴³ Adler and Adler, “The Reluctant Respondent,” 167.

- North Carolina Department of Cultural Resources: Deputy Secretary of Archives and History
- North Carolina Office of Attorney General: Deputy Attorney General
- Pennsylvania State Archives: Pennsylvania State Archivist
- Pennsylvania State Archives: Former Chief of the Division of Archives and Manuscripts (1977 to 1987)
- Library of Virginia: Director of Description Services

Data Source 4: Records Related to Replevin Cases

There were two ways in which records were accessed in this study. The first, and the most valuable, was through archival research. In the study of each jurisdiction, the administrative records of the archives were sources of data about individual replevin cases. The benefit to studying the archival record was that it afforded a historical view of replevin, one that enabled the study of how different eras of institutional leadership approached and prioritized recovery of public records. Archival research was conducted at the State Archives of North Carolina, the Pennsylvania State Archives, Old Economy Village, the Library of Virginia, and the Library of Virginia State Records Center Archives Annex. The submission of records requests was the second means of securing documentation related to replevin in North Carolina and Pennsylvania.²⁴⁴

I deliberated about naming the individuals who appeared in the records. Names are not essential pieces of information in the replevin stories; the more essential pieces of information are whether the players were private citizens or public officials and, if they are latter, what position they hold. I decided that it was appropriate to use individuals' names if they were

²⁴⁴ Footnote: Because the Library of Virginia was substituted as a case study in this dissertation and replaced NARA, there were time constraints for submitting a records request. The archival records were the primary source of textual data in this case study.

present in the archival records. These are public archives where any researcher can access the materials with a visit. In the case of records accessed by requests, I used the names of the public officials but chose not to refer to the private party by name. I articulated this second decision to the legal counsel at the State Archives of North Carolina and gathered that this was the preference of the state.

Data Source 5: Email Communications

Instances arose during the course of this research in which it was necessary to follow-up with interview participants and to direct reference inquiries to additional parties. For example, after I was informed that replevin cases in Virginia generally occur on a local level, I relied on email to ask circuit court clerks if they had been involved in any recovery efforts during their terms in office.

III.C. THE INSTITUTIONAL REVIEW BOARD

The Institutional Review Board (IRB) at the University of Pittsburgh characterized this project as an exempt non-human study. Because this is a study about an institutional process, the IRB did not require written consent from the participants. The documentation of correspondence with the IRB is included in Appendix A.

IV. THE NORTH CAROLINA CASE

*“And those who buy hot goods do so at their own risk.”*²⁴⁵

For those familiar with replevin, the selection of the North Carolina Department of Cultural Resources the State Archives of North Carolina as a case will be an unsurprising decision. The state’s victory in the case of *State of North Carolina v. B.C. West, Jr.* was a watershed, bringing media attention and cries of concern from select members of the records community. Since the 1970s, the state has continued to pursue alienated records, motivated by what state officials view as a moral imperative to reconnect the public with the records of the government. “Our reputation for how dogged we are for getting the documents back precedes us,” said the Deputy Secretary of the Department of Cultural Resources, and the successful recovery of the North Carolina copy of the Bill of Rights served to popularize this reputation as the determined stewards of the state’s heritage.²⁴⁶ The North Carolina Department of Cultural Resources and the State Archives of North Carolina are included in this study because of the authority they possess, through statute and case law, in the area of replevin and public records. The chapter considers the implications of the legal environment for the state’s replevin efforts.

²⁴⁵ Editorial, “Buy Hot Goods at Own Risk,” *The Raleigh Times*, June 15, 1977; folder titled “Reaction after Supreme Court Decision,” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

²⁴⁶ Kevin Cherry, Deputy Secretary of the Department of Cultural Resources and Director of the Office of Archives and History, interview with author, June 6, 2013, North Carolina Department of Cultural, Raleigh, NC.

IV.A. THE MEANING OF PUBLIC RECORD IN NORTH CAROLINA

Today, all initial correspondence from the Department of Cultural Resources to a private party in possession of an alienated public record includes a reference to the statutory definition of “public records.” Located in section 132-1(a) of North Carolina’s General Statutes, the General Assembly defines public record as a category that includes:

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.²⁴⁷

This is an encompassing definition, one that includes elements that Elizabeth Dow observes as common to statutory formalizations of the term. A public record in North Carolina is characterized by having been *received or created* by a government entity during the course of government transactions. In addition, the state specifies that medium is immaterial; a public record can be fixed as analog or digital forms.²⁴⁸

During the 1970s, public officials, private collectors, and the North Carolina court system were deeply focused on understanding the division between the public and the private. It is a decade marked by the case against B.C. West Jr., the codification of a recovery process with General Statutes sections 132-5 and 132-5.1, and reactions to these developments in the form of journal articles, newsletter pieces, and briefs to the court. The opinion of the North Carolina Court of Appeals in *State of North Carolina v. B.C. West, Jr.*, upheld by the Supreme Court of North Carolina, built on the codified definition of a North Carolina “public record” by specifying the inclusion of a group of materials. The ruling in this case places records that predate

²⁴⁷ N.C. Gen. Stat. § 132-1.

²⁴⁸ Dow, *Archivists, Dealers, Collectors, and Replevin*, 57.

independence and the formation of the state of North Carolina in this category. The bills of indictment, the records in dispute, were issued in 1767 and 1768 and signed by William Hooper, then the attorney for the Crown. In their argument for custody of the two bills, public officials pointed to a 1766 act of the Colonial Assembly that gave the responsibility for the management and keeping of court records to the court clerk and the courts found that custody should have remained with post-colonial North Carolina. As Price reported in his piece for *The American Archivist*, the Supreme Court of the State found that “sovereignty does not lapse...sovereignty of the crown became sovereignty of the state.”²⁴⁹ This precedent established colonial court records as the records of the state of North Carolina, broadening the meaning of public records to include records “made or received pursuant to law ... by any agency of North Carolina government or its subdivisions” to records made or received during the transaction of colonial court business. The North Carolina Court of Appeals maintained “the form, substance, and nature of the indictments involved in the instant case imparted notice to the world that they were court records of North Carolina,” an opinion that the Supreme Court upheld.²⁵⁰

While B.C. West, Jr. and his supporters argued that the state had abandoned the property, the court found that a records custodian does not have the authority to discard public records. The Supreme Court justices cited the public records section in *American Jurisprudence*, which reads,

Public records and documents are the property of the State and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the Legislature and in the manner and for the purpose designated by law. The custodian of a public

²⁴⁹ Price, “N.C. v. B.C. West, Jr.,” 23.

²⁵⁰ *State of North Carolina v. B.C. West Jr.*, 31 N.C. App. 431, 229 S.E.2d 826 (1976); *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made.²⁵¹

In doing so, the North Carolina Supreme Court created case law that supported North Carolina statutory law in section 121-5(b). Public records are records that must be disposed of in accordance to law or by the express permission of the General Assembly, not at the will of the custodian. This principle of the inalienability of public records is not captured in the statutory definition in Chapter 132, but is codified in section 121-5(b) of the North Carolina General Statutes. Under this section, a public record can be transferred to a private party only with express permission from the General Assembly of the state or from the North Carolina Historical Commission, the policymaking body for the Department of Cultural Resources that is composed of gubernatorial appointees.²⁵²

The current State Archivist offered a description of public record that was less legal and more emotive. She cited the collective interest and meaning in a public record as what sets it apart from a private manuscript. In the case of the recovery copy of the Bill of Rights, she said that citizens appreciated why such a significant record should be available to all. She explained, “We tend to educate the public primarily through our biggest case with the Bill of Rights...The public by and large understands that there are some things that just belong to the government – to everyone, to the public.”²⁵³ This is an interesting comment in that it deemphasizes the complex division between private and public records that others, like Holmes, have observed and rather frames the division in a way that non-records professionals can appreciate. Instead, Koonts offers a simple litmus test: If a record has meaning to the collective citizenry of North Carolina, it

²⁵¹ 66 Am.Jur.2d, Records and Recording Laws, § 10.

²⁵² H.G. Jones, “Historical Commission,” NCPedia, last modified in 2006, accessed March 25, 2014, <http://ncpedia.org/historical-commission>.

²⁵³ Sarah Koonts, State Archivist, interview with author, June 6, 2013, North Carolina Department of Cultural Resources, Raleigh, NC.

should not be in the hands of one citizen alone. It should, instead, be available to all.

Thornton T. Mitchell, North Carolina's State Archivist from 1973 to 1981 offered a definition of public records that manages to succinctly capture the elements codified by the General Statutes, the principle of inalienability, and the publically-held "rights in or to things, the "things" being the records of government transactions.²⁵⁴ "Public records," he told his legal counsel, "are made or received by public officials in the transaction of public business and, as such, are the property of the public. Public records retain their public nature in perpetuity unless they are deliberately alienated."²⁵⁵ Mitchell evidently did not include records approved for destruction as among those that the state "deliberately alienated." They remain, he maintained, the property of the state. A deliberate alienation, presumably, would be one authorized in accordance to section 121-5(b) of the General Statutes. In his testimony in the case challenging West's custody of the bills of indictment, Mitchell provided this interpretation of the principle of inalienability: "Since 1903 some papers which had been authorized to be destroyed were inadvertently, or by some other means, not destroyed, but were dispersed into the hands of private individuals ... If the papers had been consumed by fire, they would have been State property up to the last moment of existence, but if they escaped fire, and got in the hands of someone that kept them, they would still be State property."²⁵⁶

²⁵⁴ MacPherson, "The Meaning of Property," 2; "Thornton W. Mitchell Service Award," Society of North Carolina Archivists, accessed April 1, 2014, <http://www.ncarchivists.org/awards/thornton-w-mitchell-service-award/>.

²⁵⁵ Thornton W. Mitchell, State Archivist of North Carolina, to T. Buie Costen, Special Deputy Attorney General, December 15, 1975; Correspondence folder, Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

²⁵⁶ Tr. of Evidence, p. 34-35, November 6, 1975, submitted in *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

IV.B. THE SHAPE OF REPLEVIN

Through coding the interview data and records from each of the three cases studies, a pattern to the replevin process emerged. This basic structure, depicted in Figure 4, serves as the framework from which an understanding of replevin activities and decisions in each of the three jurisdictions studied is built. It is a process that consists of six stages that generally follows a linear progression, though activities in the stages can occur concurrently. States can choose to reconsider decisions made and actions taken in a previous stage, particularly when it reaches what this dissertation terms the negotiation stage.

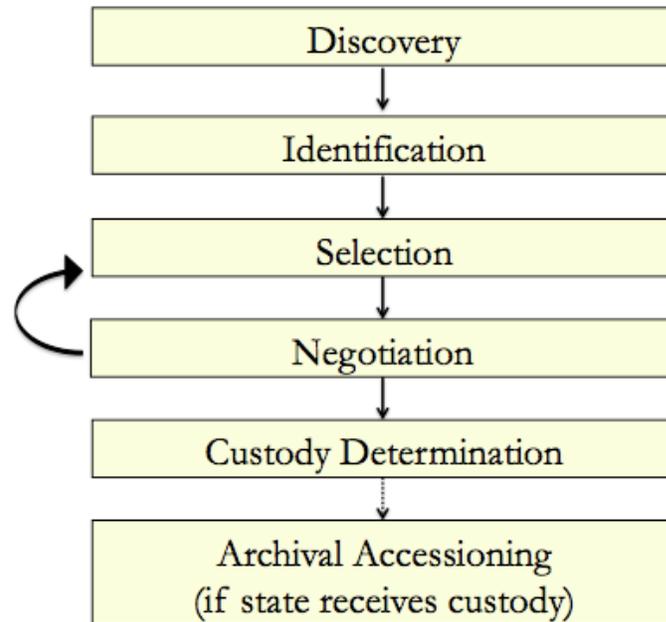


Figure 4: The Replevin Process

Throughout this dissertation, *discovery* refers to the initiation of the replevin process through the act of locating of a record that is believed to be public property. A study of replevin cases in each jurisdiction revealed two means through which the discovery occurs: through an

internal discovery by the state archives or through contact with an external party who informs the archives of the alienated record. Individuals at each of the repositories said that staff monitor eBay and auction house catalogs to some extent. However, the cases presented in this dissertation suggest that the replevin process more commonly begins through contact with an outside party.

The *identification* stage of the replevin process encompasses the activities that a state archives engages in to determine whether the record in question is public property. The outcome of this stage, however, is not a definitive or irrefutable determination of the record's nature; as Holmes aptly observed, there are "conflicting views and definitions of public records" that complicate the replevin process.²⁵⁷ When disagreement arises between a state archives and a private party in a replevin case, the identification of the record as public is often at the root of the dispute.

Selection refers to the state's appraisal decision regarding the alienated record. There are two components to this stage. First, the state determines whether the record is archival, meaning whether it has long-term value for the public, and, second, the state decides whether it will attempt to recover the record from the private party. Government archives do not indiscriminately pursue all government records that are in private hands; this is an important finding of the dissertation that is addressed in each case study. Instead, it is possible to learn about archival appraisal in the public sector by looking at the records that the government targets for recovery.

The *negotiation* stage of the replevin process includes the activities and decisions that follow the state's initial request for the document and leading to a determination of ownership. As the cases in this dissertation illustrate, seldom do the cases have a litigious tone at their start.

²⁵⁷ Holmes, " 'Public Records,'" 4-5.

The state generally begins negotiations for the return of the record by citing the public interest in having the record in a public repository. Where there is neither case law nor an explicit statute related to replevin, a stalemate at this stage can prompt the state to reevaluate the pursuit of the record, prompting a return to the selection stage. If there is fear that the record will be sold or disappear underground, states with a replevin statute can petition the court to seize the record until custody is determined.

The *custody determination* is the point in the replevin process in which the parties reach a decision concerning the possession of the record. Concessions often occur at this stage, which are addressed below. If negotiations fail and if the government archives chooses, the state may ask the court to render a custody determination. The state archives reaches the *archival accessioning* stage only when it succeeds in recovering the record in question. There are decisions made at this time concerning how the item will be integrated back into the collection and described. Decisions at this stage affect whether future users of the now-archival record will be able to glean from its arrangement and description that it was once out of public custody.

This is the first layer of the replevin process, a basic structure that is consistent among each of the case studies and upon which common practices in the state are added for a second layer. The third layer is built from the examination of a set of individual cases in each state and a consideration of what these narratives reveal about replevin and public and private property issues.

IV.C. THE REPLEVIN PROCESS IN NORTH CAROLINA

Discussions with representatives of the Department of Cultural Resources affirmed that individuals in the archival field use the term “replevin” more broadly than its technical legal meaning. Kevin Cherry, Deputy Secretary of the Department of Cultural Resources and Director of the Office of Archives and History, defined replevin as “the action taken to retrieve property belonging to the people that are out of the hands of the people.”²⁵⁸ He included recovery cases that enter litigation and those do not. North Carolina statute, however, does not actually include the term replevin. Instead sections 132-5 and 132-5.1 include the phrases “regaining custody” and “seeking the return” to describe the process of recovering public records. The Special Deputy Attorney General, the legal counsel for the Department of Cultural Resources, said that while she knows that some states have statutes that employ the term “replevin,” she refers to such an action as a “recovery of alienated records.”

In *State of North Carolina v. B.C. West Jr.*, the defense argued that the state’s statute of limitations for recovering the records had long expired. The North Carolina Supreme Court, however, cited the common law doctrine of *nullum tempus occurrit regi*, a Latin expression that translates to the phrase “no time runs against the king.” An ancient common law doctrine that refers to the sovereign’s immunity to statutes of limitations, the court found that the state of North Carolina could pursue public records in private hands regardless of when the records escaped government custody.²⁵⁹ Public records are inalienable and the Department of Cultural Resources is not subject to the same time restrictions that affect private citizens in their recovery of personal property.

²⁵⁸ Kevin Cherry, interview with author, June 6, 2013.

²⁵⁹ *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

Karen Blum, Special Deputy Attorney General for the Department of Cultural Resources, identified a series of approaches for recovering North Carolina's public records in a session at the 2010 Society of American Archivists meeting. The least severe, she explained, is the issuance of a demand letter to the private party in possession of the record. If the record is located in North Carolina, the State Archives may choose to implement sections 132-5 and 132-5.1 of the North Carolina General Statutes, meaning that the Department of Cultural Resources may petition the court for the seizure of the record in question or can file misdemeanor charges against the resistant party who is in possession of it. In cases in which a record is out of state borders, the state can cite federal law on the interstate trade of stolen goods and bring a civil forfeiture action against the document; an example of this action is the case involving North Carolina's original copy of the Bill of Rights.²⁶⁰ This chapter examines cases that fall into two of these categories: cases that were resolved without the involvement of the court system and cases in which the state petitioned for the seizure of the record but settled the matter with the party. There were no located instances up to the time of writing in which the state filed criminal charges as pursuant to section 132-5.1.

Discovery: Interviews with current public officials presented a glimpse into the replevin process in North Carolina today. Discovery of alienated public records, the first stage described above, most often occurs when a staff member or an individual in the public observes an item available for sale online. While there are designated individuals on staff who regularly monitor eBay, today's replevin cases more frequently begin with an alert from an external party.²⁶¹ Both the Deputy Secretary of the Department of Cultural Resources and the State Archivist

²⁶⁰ Karen A. Blum in David Haury, Menzi Behrnd-Klodt, and Karen A. Blum, *Replevin: What's Mine is Mine (Unless It's Yours): Session 404 of the 2010 Society of American Archivists Annual Meeting*, 2010, Society of American Archivists, Compact Disc.

²⁶¹ Kevin Cherry, interview with author, June 6, 2013; Sarah Koonts, interview with author, June 6, 2013.

specifically referenced the contributions from members of the collecting community in bringing the state's attention to item that may be public property. The State Archivist characterized this action by collectors as a form of self-protection from a potentially unwise purchase. She explained, "In the recent years to be honest with you, we have people bring our attention to auction pieces because they don't want to bid on it if we're going to go after it. So we've actually had collectors ... that have contacted us and said, 'Hey, are you aware that such and such letter is for sale by this auction house?' Because they don't want to get in the middle of a government record."²⁶² This trend challenges the rhetoric of the collector as an adversary to the state archivist in the matter of replevin. Although motivated by the apprehension of purchasing a record that may be public property, the collectors, by bringing the discovery to the attention of the archives, are serving as partners in the state's replevin efforts.

Identification: Upon discovery, state officials must determine whether the record should indeed be characterized as a public record. Today, this stage of the replevin process is localized in the State Archives, which serves as "the research arm" of the replevin process. The State Archivist explained that the registrar, who is responsible for the accessioning and deaccessioning of records, leads the efforts to identify the item and its provenance. In researching the record, the staff benefit from the recordkeeping practices of the antecedents to the State Archives. The State Archivist maintained, "Even in the absence of the formal state archives before 1903 there is a long history in North Carolina of good, strong centralized recordkeeping... [That] helps us as much as [section] 132 with the process for seizing records."²⁶³ She pointed to the Governors' letter books as an example of an identification tool that is the product of a historical recordkeeping practice. In 1782, the North Carolina General Assembly mandated that the

²⁶² Sarah Koonts, interview with author, June 6, 2013.

²⁶³ Sarah Koonts, interview with author, June 6, 2013.

Governor hire a clerk who was responsible for copying official correspondence received and sent by the executive office in a letter book. The directive stipulated that government officials should create letter books for the pre-1782 gubernatorial administrations.²⁶⁴ The State Archives staff can reference the letter books to produce evidence that the governor's office received or issued the letter the letter in question.

The Deputy Secretary of the Department of Cultural Resources, the individual who makes the determination about pursuing a record, offered insight into identification efforts that precede his decision. He stressed the importance of uncovering and understanding the provenance at this stage. With a letter, for example, knowing the status of the recipient at the time it was created is a critical piece of information for the staff. "If it was written to this person in this time period in his capacity as a public official," he explained, "it is a state document."²⁶⁵ At times, staff at the State Archives solicits the research aid and expertise of historians employed within the Division of Historical Resources or from employees at one of the state's museums or historic sites.

When there are comparable records already in the State Archives collection, the Department of Cultural Resources can point to the similarities between these records and the alienated record support its ownership claim. In the case against B.C. West Jr. in the 1970s, the Department of Cultural Resources contended that the presence of other Salsibury District Court indictments from the years of 1767 and 1768 was evidence that the records in West's possession belonged to the state.²⁶⁶ The North Carolina Supreme Court agreed that the existence of

²⁶⁴ "Acts of the North Carolina General Assembly, 1782, North Carolina. General Assembly, 1782" in *The State Records of North Carolina* vol. 24, ed. by Walter Clark.445 (Raleigh, NC: P.M. Hale, 1905), accessed March 15, 2014, <http://docsouth.unc.edu/csr/index.html/document/csr24-0012>

²⁶⁵ Kevin Cherry, interview with author, June 6, 2013.

²⁶⁶ Price, "N.C. v. B.C. West, Jr.," 24

“contemporaneous records” in the State archives casted shade on West’s position that the bills of indictment were willfully abandoned by the state.²⁶⁷

Not all public records are records that will be subject to a replevin action. H.G. Jones, who served the state of North Carolina as both the State Archivist and as the Director of the Department of Archives and History, commented on the court opinion in *State of North Carolina v. B.C. West Jr.* and described to a colleague which records would fall outside of state interests. He wrote, “The only records at issue are those that were alienated without proper legal authority.”²⁶⁸ If the State Archives identifies the alienated record as one that the General Assembly authorized the transfer of title to, the Department of Cultural Resources has no claim to it.

Selection: It is the Deputy Secretary of the Department of Cultural Resources who makes the decision to pursue, following consultation and advice from staff in the Division of Archives and Records and the legal counsel. The current Deputy Secretary, who also carries the title of Director of the Office of Archives and History, said of the selection decision: “In North Carolina, our tradition is we pursue, we pursue, we pursue. We go after anything we can reasonably show is actually a state document. If we know that it exists and we know that it was ours and we know it is a state document, we will go after it.”²⁶⁹ The North Carolina Department of Cultural Resources has a self-described reputation as a “bulldog” in the area of replevin.²⁷⁰ Since engaging in notable recovery efforts in the 1970s, state officials in North Carolina have actively embraced what they describe as a moral imperative to ensure that public records are accessible to

²⁶⁷ *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

²⁶⁸ H.G. Jones to Richard D. Williams, Eleutherian Mills Historical Library, Dated as “My Birthday, 1977”; folder titled “Reaction after Supreme Court Decision,” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

²⁶⁹ Kevin Cherry, interview with author, June 6, 2013.

²⁷⁰ Kevin Cherry, interview with author, June 6, 2013.

the people. Like in the states that follow, however, decisions to pursue a record are measured and based on a confident assessment that it is indeed public property. The current State Archivist explained, “We are very careful in North Carolina to be good stewards in proving that this was in our custody. We have passed up on going after things if it is iffy. I don’t want to go after someone just to be aggressive.”²⁷¹

Even in North Carolina, there are instances in which the state will decline to pursue records that are confidently identified as public property. When the state was involved in the case against B.C. West Jr., Duke University and the American Library Association filed *amicus curiae* briefs in support of the private manuscript dealer’s ownership of the bills of indictment.²⁷² In Duke University’s brief, the University’s legal counsel articulated the following concerns: “Duke University is directly interested in the outcome of this case because the reasoning of the Court of Appeals, if adopted by this Court, could result in a claim by the State to documents held by the University... The result could have the wholesale, legally-sanctioned raiding of the great (and lesser) collections in the libraries of private institutions.”²⁷³ The American Library Association’s legal counsel expressed similar anxiety in the organization’s petition to the North Carolina Supreme Court.²⁷⁴ Even Larry E. Ties, Director of the North Carolina Division of Archives and History from 1975 to 1981, did not share State Archivist Mitchell’s enthusiasm for the state’s recovery efforts. He wrote, “In order to separate the impact that a judicial decision would have in favor of replevin on semi-public and private archival institutions of good standing, it seems to me that the concept of replevin must be refined and elaborated substantially in the

²⁷¹ Sarah Koonts, interview with author, June 6, 2013.

²⁷² Amicus curiae briefs filed by parties who are not the plaintiff or defendant but who have an interest in the court’s decision. “Amicus Curiae,” Legal Information Institute, accessed March 15, 2014, http://www.law.cornell.edu/wex/amicus_curiae.

²⁷³ Brief of Duke University as Amicus Curiae in Support of Appellant, *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

²⁷⁴ Motion by American Library Association for Leave to File Brief Amicus Curiae and for Extension of Time, *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

law before a Pandora's box is opened that might lead to the destruction of such institutions”²⁷⁵ Mitchell, responding to these concerns, distinguished between public records that are in the hands of private individuals and auction houses and public records that are in institutional archival collections.²⁷⁶ Despite the Duke University's voluntarily revelation that public records are part of its archival collection, this dissertation research located no ownership claims by the Department of Cultural Resources against the academic institution. The decision to refrain from pursuing known public records that are in existing institutional collections is in line with Peterson and Peterson's set of recovery priorities; they suggest that if an alienated record is available for researchers at another archival repository, the state may consider leaving it in the collection.²⁷⁷ There was, however, one exception to this policy discovered during the dissertation research. In his testimony in the appeals case in *State of North Carolina v. B.C. West Jr.*, Mitchell referenced an undated case in which the Department of Cultural Resources recovered a series of Cumberland County records in the possession of the Cumberland County Public Library.²⁷⁸ This case, however, did not spark similar efforts to recover public records in repository collection.

In contrast to the cases of Pennsylvania and Virginia, the physical location of a record – whether it is in state or out of state – does not significantly influence the Department of Cultural Resources' decision to pursue a record. Three of the four cases examined below involved records that were outside of North Carolina. The state has not only been willing to pursue records that

²⁷⁵ Larry E. Tise to Grace J. Rohrer, Thornton W. Mitchell, and T. Buie Costen, April 1, 1976; Correspondence folder, Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

²⁷⁶ Thornton W. Mitchell to Larry E. Tise, Director of the Division of Archives and History at the North Carolina Department of Cultural Resources, February 17, 1976; Correspondence folder, Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

²⁷⁷ Peterson and Peterson, *Archives and Manuscripts: Law*, 92.

²⁷⁸ Tr. of Evidence, p. 39 November 6, 1975, submitted in *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

are out of state, but also successful in doing so. This is contrary to the cases of Pennsylvania and Virginia, where public officials are less inclined to enter negotiations with individuals who are out of state.

Negotiation: Negotiations in the cases presented below follow a similar pattern. Either a senior official within the Division of Archives and History or the legal counsel for the Department of Cultural Resources sends a letter to the party in possession of the record in question. This initial correspondence requests the “voluntarily return” of the item and cites sections 132-1(a) – the definition of “public record” -- and 121-5(b) – the stipulation requiring transfer of title by an act of the General Assembly -- as the statutory authority that enables the state’s claim. In these cases, there was no reference at this time to sections 132.5 or 132-5.1, which outlines the seizure process and the potential implications for a party who does not comply with the state’s claim.

The current State Archivist of North Carolina stressed that a valuable approach in replevin negotiations is one that focuses on educating the individual in possession of the record about the mission of the State Archives and the importance of the record for the general citizenry. She recalled one instance in which her predecessor invited the collector to Raleigh and gave him a tour of the stacks to illustrate where and how the record in question would be preserved. In another case, the current State Archivist aimed to educate the collector about just why the state was so concerned about recovering a court docket. “ ‘It’s the earliest known docket from the county,’ ” she told the party, “ ‘wouldn’t you rather have everyone see it rather than just one person?’ ”²⁷⁹ This tactic again places private dealers and collectors as partners, and challenges the dichotomy of two camps that form around the replevin issue, one composed of public archivists and the other of private citizens. Through education, collectors may become

²⁷⁹ Sarah Koonts, interview with author, June 6, 2013.

willing collaborators to the state's mission to make the records of the government available to the people.

There is one matter that the Department of Cultural Resources will not negotiate. Unlike the states studied below, public officials do not entertain discussions about monetary compensation during the negotiations with the private party in possession of the record. The absence of payment was, in the B.C. West Jr. case, a particularly divisive issue between the state and the Manuscript Society. In the aftermath of the court decision, P. William Filby wrote to Mitchell, "It is difficult to see why the State should have sought to receive them without paying for them, and I am afraid that in the future the decision will be regarded by most collectors and many institutions as the most unfortunate in the history of archives."²⁸⁰ Cherry, Deputy Secretary of the Department of Cultural Resources and Director of the Office of Archives and History, cited a continuation of the position former Department of Cultural Resources official Robert B. House adopted when he was approached about purchasing the North Carolina copy of the Bill of Rights in 1925. The state of North Carolina, House said, would not purchase its own property.²⁸¹ Today, Cherry said, "We'll stand on what Robert House said."²⁸²

With the case against B.C. West Jr., there were individuals in the media and the Manuscript Society membership who reacted strongly to the absence of compensation for the bills of indictment. In a newspaper article titled "Who Has the Right to Old Documents," one reporter wrote, "North Carolina is the focus of a national debate among libraries and archivists over whether governments have the right to take valuable documents from private collectors

²⁸⁰ P. William Filby, President of the Manuscripts Society, to Thornton W. Mitchell, June 21, 1977; folder titled "Correspondence;" Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

²⁸¹ Mike Easley, "Lost and Found: The Curious Journey of North Carolina's Looted Copy of the Bill of Rights," *The North Carolina State Bar Journal* 14, no. 1 (Spring 2009): 8, accessed March 15, 2014, http://www.ncbar.gov/journal/archive/journal_14,1.pdf.

²⁸² Kevin Cherry, interview with author, June 6, 2013.

without paying for them. State officials here are convinced they do have such a right, and proved it earlier this year with a successful court battle to reclaim two colonial indictments”²⁸³ “Old” documents, however, are very different from “public records.” Today, the position of the Department of Cultural Resources does not appear to elicit the same objections as those responses that followed the North Carolina Supreme Court opinion in *State of North Carolina v. B.C. West, Jr.* While the newspaper reporter implied that the state was performing an unconstitutional takings without compensating West, such reactions do not accompany in the more recent cases discussed in this chapter, suggesting perhaps a growth in understanding of the state’s rights to public property.

Custody Determination: In cases that are settled outside of court by the Department of Cultural Resources, a custody determination is generally recorded with an acknowledgement of the transfer of the record. As illustrated in the cases examined below, private parties who transfer the records that had been in their possession often characterize this transfer as a “donation,” allowing them to receive a tax write-off. The interviewed officials within the Department of Cultural Resources do not attach the same descriptor to these transfers and they are not willing to issue a deed of gift, which is the practice if a party donates a private manuscript to the state. The State Archivist said,

“We don’t really call it a donation. We don’t refer to it that way. We’re very careful with our language. ... But I’m not going to split hairs with people over a word. It’s the same end result. And we’re not going to stop people from using it as a tax write-off. We don’t get in the middle of that but we’ll sign that it’s here. If the IRS are going to let you call it a donation, that’s between you and the IRS. We’re not going to get in the middle of that...Some of the higher dollar things that have come up for sale and then have been given back to us, they also tend to be owners with deep pockets. So they may be just as satisfied taking a tax write off for the ‘donation.’ ”²⁸⁴

²⁸³ David Tomlin, “Who Has the Right to Old Documents?” *The Dispatch*, October 19, 1977, A15.

²⁸⁴ Sarah Koonts, interview with author, June 6, 2013.

A study of the records associated with the custody resolutions affirms that the officials within the Department of Cultural Resources are careful with the language. Because an individual cannot donate property that does belong to him or her, the Department of Cultural Resources does not use this term and do not acknowledge the transfer as a “gift.” The private party’s use of the term – and, if the Internal Revenue Service, recognizes the transfer as a “charitable donation” – does arguably challenge the characterization of the item as “public property,” a point taken up below.

Archival Accessioning: If the State Archives of North Carolina recovers a record, it is reunited with the collection, but forever marked as having been out of the custody of the state. The current State Archivist and the registrar at the State Archives identified the past and contemporary policy for arranging and describing these materials. When the State Archives recovered alienated records, the past practice was to segregate the records from the original record group. The registrar explained, “The document was normally added to our Vault Collection due to its ‘historical’ value and to prevent any accidental inclusion in any chain of custody determination for a record group.”²⁸⁵ Today, the State Archives makes a copy of the record on a different color paper and places the copy with the original record group so that researchers have the opportunity to study it within its context.

In addition, the State Archives uses a coding system to mark the record as once out of custody. If a record was out of government custody, for any reason, the State Archives will indicate this with either an “SRX” for a state record or records or “CRX” for a county record or records. The facsimile, the folder, and the box are stamped accordingly. The original document is placed in the Vault Collection, which is also called the state’s “Treasures Collection.” The State Archivist explained that this description and arrangement practice is “not really something that is

²⁸⁵ Registrar at the State Archives of North Carolina, email to author, June 11, 2013.

a replevin specified action, it's just that we note that it's been estranged for whatever reason for some period of time."²⁸⁶ Both researchers and staff alike can learn that the record was out of custody from a note in the electronic and paper finding aid as well.²⁸⁷

IV.D. CASE STUDIES OF REPLEVIN IN NORTH CAROLINA

The cases studies examined in this chapter include one of the earliest replevin cases in North Carolina, a dispute in the mid-1970s involving a 1790 letter from George Washington to the North Carolina Governor and Council. The three cases that follow are more recent, having been resolved during the past ten years; they provide insight into the modern replevin process in the state. Two of these cases were resolved following demand letters and communication with the holder. One of the cases entered litigation but was settled between the state and the private party.

The George Washington Letter

As former North Carolina State Archivist Thornton W. Mitchell tells it, the lawsuit against B.C. West Jr. for the recovery of two bills of indictment was not about the bills of indictment. It was about a letter sent by George Washington to the North Carolina Governor and his council on August 26, 1790. "In regard to my personal motives in the West case," Mitchell wrote, "I was principally concerned about obtaining a modern precedent to support our efforts to recover the George Washington letter."²⁸⁸

This was a case that was initiated by an external tip from an ironic source. On May 10, 1974, B.C. West Jr. contacted Paul Hoffman of the Department of Cultural Resources and called

²⁸⁶ Sarah Koonts, interview with author, June 6, 2013.

²⁸⁷ Registrar at the State Archives of North Carolina, email to author, June 11, 2013.

²⁸⁸ Thornton W. Mitchell, "Another View of the West Case," *Carolina Comments* 29, no. 6 (November 1981): 130.

his attention to the Washington letter advertised for an upcoming sale at Sotheby's in New York City (then Sotheby's Parke Barnet, Inc.).²⁸⁹ This contact preceded the state's case challenging West's possession of the bills of indictment, though that would quickly follow. Although the reasoning behind West's notification does not emerge from the archival records related to the case, his later contention that the state violated his private ownership rights suggest that West was probably not concerned that state property was out of custody. Instead, it is more plausible that West thought the State Archives may be interested in placing a bid for the letter. Believing the letter to be alienated state property, Hoffman's first step was to seek the advice of legal counsel at the North Carolina Department of Justice. Thomas M. Ringer Jr., Associate Attorney General, directed him to contact Sotheby's and inform the auction house of "our interest in and possible claim to the letter."²⁹⁰

Initial identification attempts began with study of a copy, a common approach in the cases examined in this dissertation. The addressee was sufficient evidence, in the view of the state, that the record was public property. Ringer maintained that the state's case turned on the argument that "delivery of a letter which is addressed to the Governor and Council of State is *prima facie* evidence that title to said letter is vested in the State of North Carolina and that title to the letter can be divested only by specific act of the General Assembly."²⁹¹ Ringer's stance is in keeping with the statutory definition of "public record" located in section 132-1 and with stipulation in 121-5(b) that only an authorization by the state legislature can transfer title of a public record to a private party.

²⁸⁹ Mitchell, "Another View of the West Case," 131.

²⁹⁰ Thomas M. Ringer, Jr., Associate Attorney General, to Harry W. McGuilliard, Chief Deputy Attorney General, June 14, 1974; folder titled "Letter from President George Washington to Governor and Council of State," North Carolina Department of Justice Records Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

²⁹¹ Thomas M. Ringer, Jr. to Harry W. McGuilliard, June 14, 1974.

An examination of the actual record, however, proved to be a challenging venture for the Department of Cultural Resources. While the letter was on consignment at Sotheby's when the state first learned of it, the auction house returned it to an anonymous party, prompting state officials to fear that it "could be lost, destroyed, mutilated, or concealed to the irreparable harm of the people of the State."²⁹² Although the legal counsel for the state first requested a physical examination of the record in July of 1974, it was not until January of 1977 that permission was granted; leading up to this inspection, all efforts to petition the court for discovery of the name and location of the private party in possession of the record were denied.²⁹³ Even with the challenges associated with examining an original record, the state officials were confident that the record met both the statutory definition of "public record" and that it had never been legally transferred to a private party, rendering it public property.

The Attorney General's Office in North Carolina took the initial lead in negotiating the case in 1974, issuing a demand letter to the anonymous holder care of his attorney. It read,

It is our belief that this letter from President Washington was received by the State of North Carolina, that the ownership of the letter has never been lawfully transferred by the State of North Carolina, and that the letter continues to be the property of the State of North Carolina.

If this letter is in our actual or constructive possession and you can not produce proof satisfactory to this office that your claim to this document is superior to the right, title, and interest of the State of North Carolina, then we hereby demand that you deliver possession of the aforesaid document by October 25, 1975.²⁹⁴

²⁹² *The State of North Carolina v. Sotheby Parke Bernet, Inc., and Coudert Brothers*, Petition to Perpetuate Testimony, 75. Civ. 1322; North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

²⁹³ Washington Letter Chronology, undated, folder titled "Chronology," Box 77, General Correspondence 1974-1978, George Washington Letter File; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

²⁹⁴ James S. Carson Jr., Attorney General, and Thomas H. Ringer, Jr., Associate Attorney General, September 20, 1974; North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

In response, the attorney for the anonymous party in possession of the record raised three main challenges to the state's claim to ownership, challenges that crop up in the arguments of private parties throughout the dissertation. First, the attorney questioned whether the state was able to prove that George Washington actually ever mailed the letter. He cited the absence of physical clues on the letter that were common to mailed documents from the period, namely the inclusion of an address on the letter itself so that the sheets could double as an envelope. If the letter was never mailed to the North Carolina Governor and his council, the attorney argued that it would not be the property of the state. Second, the attorney maintained that even if the Department of Cultural Resources was able to prove that Washington mailed the letter, it was not inconceivable that the state had once sold or abandoned the letter, thus relinquishing its title to it. Finally, the attorney objected to the suggestion that his client was required to exhibit superior title to the state's. "I would assume," he said, "since my client not only has possession of the document but has had that possession for many years, that the burden of proof of superior title would lie with the state."²⁹⁵ With this response, officials with the North Carolina Attorney General's Office told the Department of Cultural Resources that they reached an impasse in negotiations. In the states studied in the following chapters, such a realization occasionally prompted public officials to reevaluate their interest in the item. Instead, North Carolina pushed forward, armed with the belief that the absence of any official transfer of the record to a private party rendered it state property.

With the approval of the Governor of North Carolina, the Attorney General's Office and the Department of Cultural Resources hired a New York-based attorney to represent the state in

²⁹⁵ H. Struve Hensel, Attorney for Defense, to Thomas M. Ringer, Jr., October 8, 1974; folder titled "Letter from President George Washington to Governor and Council of State," North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

the ownership claim.²⁹⁶ During the time, the Department of Cultural Resources staff continued their identification research and was able to collect evidence that countered the attorney for the defense's arguments. The Library of Congress's collection of George Washington papers proved to be a valuable resource; in one of the letter books, there was a transcription of a letter that George Washington sent to the North Carolina Governor and his Council on August 26, 1790.²⁹⁷

Years after the initial discovery – and now with the decision in the case against B.C. West Jr. on the books – the attorney for the state was successful in brokering an agreement with the anonymous holder and his attorney, with the individual agreeing to turn the letter over to the state and filing for a tax benefit. The state expressed an interest in taking a hands-off approach to the tax write-off, an interest that persists today. However, the North Carolina officials agreed to furnish the holder and his attorney with a receipt that acknowledged the transfer, a common component to modern custody determinations in the state. They went one step beyond what is the practice in contemporary settlements, however, and provided the funds for a financial appraisal, which was conducted by a party external to the state's employ.²⁹⁸

The language used in the custody agreement was of great concern to State Archivist Mitchell. Upon receiving from the private party's attorney the first iteration of the letter of agreement, Mitchell wrote, "I take exception to the letter ... which contains the statement: 'One

²⁹⁶ Philip J. Kirk, Jr., Administrative Assistant to the Governor, to Rufus L. Edmisten, Attorney General of North Carolina, January 21, 1975, folder titled "George Washington – Correspondence, 76-77," North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC; Rufus L. Edmisten to Frederick J. Damski, New York City-based attorney, February 24, 1975, folder titled "George Washington – Correspondence, 76-77," North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

²⁹⁷ Thornton W. Mitchell to Charles G. LaHood, Jr., Chief of the Photoduplication Service at the Library of Congress, February 27, 1976; folder titled "Correspondence 1976-77," Box 77, General Correspondence 1974-1978, George Washington Letter File; Archives and Records Section, State Archives of North Carolina, Raleigh, NC; George Washington to North Carolina Executive Officials, August 26, 1790, 1741-1799: Series 2 Letterbooks, pages 3 and 4, George Washington Papers at the Library of Congress, Washington, D.C.

²⁹⁸ Rufus L. Edmisten, Attorney General, and T. Buie Costen, Special Deputy Attorney General, to Seng Kie Tjia, March 16, 1977; North Carolina Department of Justice Case File Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

of our clients...is the owner of a letter...' I am not willing to concede that the person who has the letter in his possession at the present time is the 'owner' since that is what this litigation is all about. I am concerned that I may be asked to send an acknowledgement that I have received such a letter and with this statement in it and I am not willing to do so."²⁹⁹ Had state officials signed such a letter, it would call into question the very principle behind the claim – that the letter by George Washington was the property of the public and was never legitimately owned by the private party. "The State will not acknowledge ownership of the document," the Attorney General informed the attorney for the private party and the parties revised the language accordingly.³⁰⁰ The settlement concluded on June 10, 1977, three days before the North Carolina Supreme Court upheld the state's ownership of the bills of indictment.³⁰¹

As per a request from the counsel for the private party, the state officials agreed that they would not "initiate any public announcement of the receipt of the document."³⁰² News of it, however, did find its way into the newspapers. One of the accounts provided insight into arrangement decisions upon the accessioning of the letter, reporting that it would "be filed with governors' papers in the State Archives."³⁰³ This suggests that the aforementioned practice of segregating the recovered item has more recent origins. Today, the George Washington letter to the Governor and Council is not housed with the governor's papers. Instead, it is part of the Vault, or Treasures, Collection at the State Archives. A description of the replevin case

²⁹⁹ Memo from Thornton W. Mitchell to T. Buie Costen, May 10, 1977, folder titled "George Washington – Correspondence, 76-77," North Carolina Department of Justice Records Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

³⁰⁰ Rufus L. Edmisten and T. Buie Costen, to Seng Kie Tija, Attorney for the Defense, April 12, 1977, folder titled "George Washington – Correspondence, 76-77," North Carolina Department of Justice Records Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

³⁰¹ Mitchell, "Another View of the West Case," 131.

³⁰² Rufus L. Edmisten and T. Buie Costen, to David Wolf, Attorney for the Defense, June 10, 1977; folder titled "George Washington – Correspondence, 76-77," North Carolina Department of Justice Records Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

³⁰³ Janet Guyon, "State Regains Letter Written by Washington," *The News and Observer*, July 29, 1977, 16.

accompanies the record, reading, “In May 1974 this historic letter was offered for sale by Sotheby Parke Bernet of New York. Since it is clearly a public record from the files of the governor, the state took legal action to recover it. In an out of court settlement, the letter was returned to North Carolina and the North Carolina State Archives by an anonymous donor in 1977.”³⁰⁴

The state could only suppose when and how the letter came to be out of state custody.³⁰⁵ This did not hinder its success in court. With *State of North Carolina v. B.C. West, Jr.*, however, the North Carolina Supreme Court ruled that the issue of “when” a public record left government custody matters little. The government in common law jurisdictions are not held to any statutes of limitations. This is the doctrine of *null tempus occurrit regi*, a doctrine that supports the state’s ability to recover public records at any point in time. The case also enhances an understanding of replevin and ownership in North Carolina with what it reveals about the burden of proof. With this successful settlement and the court opinion in the case against B.C. West Jr., the state shifted the burden of proving ownership rights to the private party in possession of the item. The absence of an authorized transfer from the General Assembly or the North Carolina Historical Commission is sufficient evidence that the record belongs to the state. Conversely, in Pennsylvania and Virginia, the inability to explain how a record escaped a government office can halt recovery efforts before they begin.

The Jefferson Davis Letter

³⁰⁴ “Letter from George Washington to Governor and Council, 1790: Treasures Collection,” North Carolina Digital Collections, accessed March 23, 2014,

<http://digital.ncdcr.gov/cdm/compoundobject/collection/p15012coll11/id/102/rec/22>

³⁰⁵ Memo, George Stevenson, Archivist with North Carolina Archives Branch, to Paul P. Hoffman, Head of North Carolina Archives Branch, May 16, 1974; folder titled “Letter from President George Washington to Governor and Council of State,” North Carolina Department of Justice Records Related to George Washington Letter Case, State Archives of North Carolina, Raleigh, NC.

In 1861, Jefferson Davis, President of the Confederacy, wrote to North Carolina Governor John W. Ellis on the matter of securing machinery for artillery assembly. Centuries later, in 2004, the letter was advertised in a catalog for a North Carolina-based auction house. The discovery of the item's location came from the outside, from an archivist at a North Carolina university who contacted an archivist at the State Archives.³⁰⁶ The day following the university archivist's alert, the archivist who received the call was able to provide the Assistant State Archivist with his initial findings from his identification research. Again, the pace is of note; the State Archives took immediate action following the discovery, demonstrating that the Department of Cultural Resources prioritizes replevin matters and the responsibility of making records available to the public.

The Governors' Letter Books, described by the current Deputy Secretary of Cultural Resources as a "secret weapon" for the state's identification research, proved valuable in demonstrating that the Governor Ellis's office had indeed received the letter.³⁰⁷ In accordance with the aforementioned legislative requirement, correspondence received and mailed by the Governor's office was recorded and transcribed by a clerk. The archivist located the letter in Ellis's letter book, prompting him to report, "There is no question but that the letter was received by Governor Ellis and at one time formed part of the archives of his administration."³⁰⁸

In his memo to Assistant State Archivist Jesse R. Lankford, the archivist who received the discovery call reported that records Ellis received "in his public character" found their way into the archival collections of other institutions following his death. Nearly forty letters and

³⁰⁶Memo, George Stevenson, Private Manuscripts Archivist at the State Archives, to Jesse R. Lankford, Assistant State Archivist, February 24, 2004; Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³⁰⁷ Kevin Cherry, interview with author, June 6, 2013

³⁰⁸ Memo, George Stevenson, Private Manuscripts Archivist At the State Archives, to Jesse R. Lankford, Assistant State Archivist, February 24, 2004; Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

telegrams received in his capacity as Governor were accessioned into the War Department Collection of Confederate Records at the National Archives.³⁰⁹ He cited twenty-five more telegrams sent to and received by Governor Ellis that were in the collection of the Confederate Museum in Richmond and two letters in the Historical Society of Pennsylvania's collection. These records were among those that Ellis's clerk transcribed in the letter book, but these records were not among those that the Department of Cultural Resources was interested in pursuing.³¹⁰ The concerns that Duke University and the American Library Association expressed in their *amicus curiae* briefs in *State of North Carolina v. B.C. West Jr.* were not realized. The Department of Cultural Resources never had an intention of claiming records that were already part of institutional archival collections. The Department officials were instead concerned about the letter that was not available for research and instead poised to be purchased by a private collector.

Negotiations began when the state made contact with the auction house. While the auction house president was agreeable to working with the state, fear that the record would be sold prompted the State to petition the court to seize the letter while a custody determination was reached between parties. This followed the process that is codified in section 132-5.1 of the North Carolina General Statutes. In their petition to the court, the Department of Cultural Resources officials, led by Deputy Secretary Jeffrey J. Crow, maintained that "there was real danger that the public record will be sold, secreted, removed out of the State or otherwise

³⁰⁹ Stevenson explained that at the conclusion of the Civil War, the War Department took custody of records in the southern states in order to learn about "participation in rebellion, and especially armed rebellion." The Ellis records are among those that entered the custody of the federal agency at that time.

³¹⁰ Memo, George Stevenson, Private Manuscripts Archivist At the State Archives, to Jesse R. Lankford, Assistant State Archivist, February 24, 2004; Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

disposed of so as not to be forthcoming to answer the final judgment of the Court.”³¹¹ The court granted the petition and directed the sheriff in the county where the record was located to “seize immediately the public record...and deliver it forthwith to the court.”³¹² The Department of Cultural Resources did not petition the court to seize the document in order to penalize the private party or auction house. Instead, it was a precautionary measure to halt the auction. With the seizure, the court held physical custody of the record until the matter was resolved ³¹³

A seizure does not equate to an unwillingness to work with the private party to reach a settlement. Prior to submitting the petition to the court, the Special Deputy Attorney General spoke with the auction house president, who inquired whether the Department of Cultural Resources would be interested in settling the case. The legal counsel recorded in her notes, “I told him that the legislature encourages settlements, and, that although I would need to speak with my client, I didn’t think they would object to sitting down to discuss this (though I didn’t say they would be willing to discuss paying money to get the letter back).”³¹⁴ Even in instances when the court system becomes involved by ordering the seizure of an item until custody is determined, her response reveals that the Department of Cultural Resources prefer, whenever possible, to come to a settlement with the party rather than to turn the decision over to a judge.

This case again calls into question the division between public archivists and private manuscript collectors and dealers. The auction house president was, in fact, conciliatory when the state first contacted him, informing the Special Deputy Attorney General that “his goal was

³¹¹ *North Carolina Attorney General Roy Cooper ex rel. State of North Carolina and Dr. Jeffrey J. Crow v. Raynor HCA, Inc. and Robert J. Raynor*, Petition for Order of Seizure, 04 CVS 530 (March 15, 2004).

³¹² *North Carolina Attorney General Roy Cooper ex rel. State of North Carolina and Dr. Jeffrey J. Crow v. Raynor HCA, Inc. and Robert J. Raynor*, Order of Seizure, 04 CVS 530 (March 15, 2004).

³¹³ 2004 Communications Log: Karen A. Blum, Jefferson Davis Letter, Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³¹⁴ 2004 Communications Log: Karen A. Blum, Jefferson Davis Letter, Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

to see that the letter went to the rightful owner.”³¹⁵ Given his willingness to negotiate, he expressed indignation when the state decided that the state viewed a seizure as a necessary action. Upon the involvement of the court, the auction house president assumed a more defensive position, but still demonstrated a willingness to cooperate with the state. He indicated that the Manuscript Society offered to commit financial support through its replevin fund and stated, “The consigner strongly believes that his ownership position would be upheld in the event this situation is litigated. He understands the State of North Carolina equally believes in their position. Therefore I have received authority from my consigner to attempt a negotiated resolution, which could greatly reduce the time, effort and aggravation associated with a litigation solution.”³¹⁶ What followed was an agreement that included the following terms: the private party would “donate” the Jefferson Davis letter and all rights to it to the state of North Carolina. The private party would be responsible for securing a financial appraisal of the item for the purposes of a desired tax deduction. This is in contrast to the case involving the George Washington letter, in which the state agreed to provide funds for the appraisal. The state agreed, with the custody resolution, to withdraw all litigation against the consignor and the auction house, and all parties asserted that, by signing the terms of agreement, the matter was closed.³¹⁷

The state recovered the letter, but it was segregated from the executive papers of the Ellis administration – closer in proximity than those Ellis records in the collections of NARA and the Historical Society of Pennsylvania, but still separated. The record joined the Vault Collection, as

³¹⁵ 2004 Communications Log: Karen A. Blum, Jefferson Davis Letter, Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³¹⁶ Facsimile from Auction House Representative to Karen A. Blum, March 16, 24004, Jefferson Davis Letter Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³¹⁷ Terms of Agreement, signed by auction house president, consignor, and Deputy Secretary of the Department of Cultural Resources in April and May of 2004; Jefferson Davis Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

is the practice for records once out of custody of the state. Unlike the George Washington letter, there is no indication in the catalog entry for the item that this was once out of custody.³¹⁸

The case of the Jefferson Davis letter to Governor Ellis follows a common narrative of replevin cases in North Carolina. It begins with an individual outside of the State Archives bringing the record to the attention of the state and it concludes with the record accessioned in the Vault Collection at the State Archives. It transforms, however, the perception of replevin as a consistently divisive issue within the records community. Instead, cooperation is strongly present in this story. An observant university archivist called a state archivist's attention to the record, an act that would have likely surprised the Department of Cultural Resources decades before when Duke University was among the vocal objectors to the replevin efforts of the state. The auction house president was receptive to the concerns of the state and, though miffed by the state's seizure of the letter, was willing to mediate between his client and the Department of Cultural Resources to avoid litigation. The Deputy Director of the Department of Cultural Resources made a concession by acknowledging the letter as a donation, thereby rewarding the private party in a small way for his cooperation in the matter.

The General Assembly Secession Document

The case involving a record of the General Assembly is notable for the compromises present in the negotiation and custody determination stages. The record in question, now part of the Vault Collection at the State Archives, "documents the North Carolina General Assembly's discussion of secession from the United States in the earliest days of the Confederate movement then

³¹⁸ "Letter from Jefferson Davis to Governor John W. Ellis, May 23, 1861," North Carolina Digital Collections, accessed April 3, 2014, <http://digital.ncdcr.gov/cdm/ref/collection/p15012coll11/id/770>.

sweeping through the Southern states.”³¹⁹ A former administrator at a nonprofit educational and lobbying organization contacted Jeffrey J. Crow with “another” lead, suggesting that this particular external party had brought records to the attention of the Department of Cultural Resources in the past.³²⁰ An hour and a half after the external party sent his email, Crow issued a message to the Department’s legal counsel: “Clearly we need to pursue this posthaste.”³²¹ It is yet another example of immediate action by the Department of Cultural Resources.

The records for this particular case provide limited insight into the identification research that the staff at the State Archives conducted and the rationale behind Crow’s blunt assertion that the Department “clearly” had to take action and recover the record. The selection decision can only be inferred from a consideration of the record’s provenance and context. It certainly has value as evidence of the North Carolina legislature’s discussions in advance of the decision to secede from the Union. A study of the existing record groups at the State Archives reveals that the state’s identification of this particular record as “archival” is unsurprising. General Assembly resolutions, both historical and contemporary, are part of the General Assembly Record Group at the State Archives and, specifically, the Session Records series.³²²

With this particular record, an annotation the verso captures how it escaped government custody. It reads, “Taken from the Hall of Records, Raleigh N.C. on the 15th day of April 1865 by Capt. S.B. Wheeler, A.A.A.G. 3d Brigade, 2d Div., 20 AC.”³²³ The legal counsel for the Department of Cultural Resources cited this passage as evidence that the record was removed

³¹⁹ Auction House Catalog Description, Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²⁰ Email from Private Party to Jeffrey J. Crow, Deputy Secretary of the Office of Archives and History at the North Carolina Department of Cultural Resources, October 23, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²¹ Email from Jeffrey J. Crow to Karen A. Blum, October 23, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²² Session Records series, General Assembly Record Group, State Archives of North Carolina, Raleigh, NC.

³²³ Karen A. Blum to President and Chief Executive Officer of Auction House, October 24, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

illegally from a government office. She cited government President Abraham Lincoln's *General Orders 100*, also called the Libber Code of 1863, and suggested that the presidential directive prohibited theft and looting by soldiers.³²⁴ Like the case of the Jefferson Davis letter, however, the argument for state ownership was focused on the applicability of the statutory definition of "public record" to the item and the absence of "specific consent of the State General Assembly" of the transfer of the record, a requirement under section 121-5(b) of the General Statutes.³²⁵

As is common in replevin cases, the legal counsel for the auction house responded with the assertion that his client was a "good faith purchaser ... and therefore owns all rights, title and interest in the document."³²⁶ Although the Department of Cultural Resources could have cited the court opinion in *State of North Carolina v. B.C. West Jr.* that established there could be no *bona fide* purchaser of a North Carolina public record, the auction house demonstrated a willingness to cooperate. If the Department of Cultural Resources would agree to acknowledge the donation of the record, the auction house would transfer ownership of the item. Here, Honoree's incidents of ownership and the broader "bundle of rights" conception of property are relevant. It can be inferred that the auction house leadership viewed themselves as having the "power to alienate the thing" through sale, gift, or destruction.³²⁷ From the perspective of the Department of Cultural Resources, the auction house had no rights to the record; all rights belonged to the public.

³²⁴ A review of the General Orders 100 questions the applicability of the directive to this case. While the Orders prohibit the seizure of private property in "charitable" institutions such as churches, schools, libraries, and museums, the Orders provide that "a victorious army appropriates all public money, seizes all public movable property until further direction by its government" (Article 31). See General Orders No. 100: The Lieber Code, prepared by Francis Lieber and promulgated by Abraham Lincoln, April 24, 1863, accessed April 2, 2014, http://avalon.law.yale.edu/19th_century/lieber.asp#sec2 and Andrea Cuning, "The Safeguarding of Cultural Property in Times of War & Peace," *Tulsa J. Comp. & Int'l L.* 11, no. 1 (2003-2004): 214.

³²⁵ Legal counsel for Auction House to Karen A. Blum, October 24, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²⁶ Legal counsel for Auction House to Karen A. Blum, October 24, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²⁷ Legal counsel for Auction House to Karen A. Blum, October 24, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

It is evident, however, that the state officials viewed the actual transfer of the record as more important than the semantics associated with it. Although the current leadership at the Department of Cultural Resources avoids the term “donation” when reaching a settlement agreement a private party, neither Crow nor the Department’s legal counsel challenged the language that the auction house’s attorney used. The Special Deputy Attorney General instructed the auction house’s attorney that “whether or not the gift is, in fact, tax deductible is a matter outside of the authority or control of the Department of Cultural Resources” but agreed that the state would provide an acknowledgment of the donation.³²⁸ In the acknowledgement letter, which formally documented the custody determination, Crow expressed appreciation for the donation, writing, “Thank you for returning this piece of history to the people of the State of North Carolina.”³²⁹ Crow’s recognition of the donation implies a few things, namely, that the record was once in public custody and that the owners of the letter are the people of North Carolina. It does, however, appear to suggest that the auction house had the right to voluntarily choose to gift the letter to the Department of Cultural Resources. This concession was a practical way in which the matter could be closed.

First State General Assembly Document

On January 31, 2008, a concerned citizen sent an email to Jeffrey J. Crow, then the Deputy Secretary of the Office of Archives and History at the North Carolina Department of Cultural Resources. The party, writing from a non-governmental email domain, simply asked, “Jeff: Is this document properly in private hands?” and provided a link to an item available for sale by a

³²⁸ Karen A. Blum to Legal Counsel for Auction House, October 30, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³²⁹ Jeffrey J. Crow, Deputy Secretary of the Office of Archives and History at the North Carolina Department of Cultural Resources, to President and Chief Executive Officer of Auction House, November 28, 2006; Secession Resolution Case File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

Dallas-based auction house.³³⁰ It was not an employee of the North Carolina Department of Cultural Resources who made the discovery, but rather a private citizen who demonstrated an aptitude for identifying a public record and who further understood that this state agency is the rightful custodian of a public record. The informal way in which the author addressed Crow suggests that the two men were familiar with one another. Like a member of a neighborhood watch, he saw a problem and alerted the appropriate official. It does not appear that the concerned citizen expects anything in return, but was instead acting in the best interest of the public.

Crow initiated the state's replevin process by forwarding the discovery email to the State Archivist and the Special Deputy Attorney General, an action that reveals who the central players were in the state's replevin activities in 2008. He provided the beginnings of the state's efforts to identify the item as a public by studying the image on the auction house website. Although he says that it is difficult to be certain, the item appeared to be a record from the first state assembly in 1777; the General Assembly was established by North Carolina's state constitution in 1776 and first convened in April 1777.³³¹ The speed in which Crow reacted to this lead is particularly suggestive of the fact that replevin is a priority of the Office of Archives and History. The concerned citizen emailed Crow at 7pm on the evening of January 31, 2008. Crow sent his reactionary email the following morning, at 8:30am.³³²

Crow made the first contact with the auction house holding and identified himself upfront as the "legal custodian" of the records of the state. This notice has a marked similarity to the

³³⁰ Email from Private Party to Jeffrey J. Crow, Deputy Secretary of the Office of Archives and History at the North Carolina Department of Cultural Resources, January 31, 2008; First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³³¹ Walter Clark, *The State Records of North Carolina: Laws 1777-1788* (Goldsboro, NC: Nash Brothers Book and Job Printers, 1905), iii.

³³² Email from Jeffrey J. Crow to Dick Lankford, State Archivist, and Karen Blum, Special Deputy Attorney General, February 1, 2008; from the records of Special Deputy Attorney General, obtained October 12, 2012.

approach seen in the cases of Pennsylvania and Virginia in that the Deputy Secretary refrained from issuing any legal threats at this time. He wrote, “Before involving the State Attorney General’s Office in this matter, I am writing to formally request” the return of the item.³³³ He did not cite legal consequences, provided for under sections 132-5 and 132-5.1 and, instead, thanked the auction house president for the cooperation he anticipated receiving.³³⁴ The central argument in the state’s negotiations of this case was that there was an absence of an authorized transfer of the item to the party in possession it. Empowered by statute, Crow informed the auction house that “Neither the General Assembly nor the North Carolina Historical Commission, which has the statutory authority to deaccession public records with historical value, authorized the removal of the 1777 manuscript from the State Archives.”³³⁵ Thus, it belonged in the custody of the Department of Cultural Resources.

While staff in the State Archives gathered additional provenance and contextual information about the document and provided it to Crow, the auction house was, from the vantage point of the Department of Cultural Resources, considering the request. The Special Deputy Attorney General said that if the records documenting this replevin case suggested that there was a “pregnant pause” following Crow’s demand letter, this is because there was.³³⁶ On April 8, 2008, Crow emailed the State Archivist and the Special Deputy Attorney General and reported that he had received the requested letter from the auction house.³³⁷

³³³ Jeffrey J. Crow to President of Auction House, February 13, 2008; First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³³⁴ Jeffrey J. Crow to President of Auction House, February 13, 2008; First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³³⁵ Jeffrey J. Crow to President of Auction House, February 13, 2008; First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³³⁶ Karen A. Blum, Special Deputy Attorney General, interview with author, June 6, 2013, North Carolina Department of Cultural Resources, Raleigh, NC.

³³⁷ Email from Jeffrey J. Crow to Jesse R. Lankford and Karen A. Blum, First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

This case is an example of a replevin case that involved no concessions on the part of the state and no objections from the private party in possession of the record. The auction house's legal counsel did not send a letter asserting the private property rights of the consignor. The custody determination came with the arrival of the letter at the Department of Cultural Resources. The quiet nature of this case challenges the an assumption that North Carolina's replevin efforts are as controversial today as they were when the Department of Cultural Resources took West to court. There is an ease that characterizes the state's ownership claim in this case, suggesting that perhaps its "dogged" reputation for recovering records – and its success in doing so -- discourages private parties to resist ownership claims and instead elicits cooperation.

IV.E. SUMMARY

The State of North Carolina is a notable player in the story of replevin of public records. With a favorable opinion secured with the case of *State of North Carolina v. B.C. West Jr.*, fellow public archivists took notice. James B. Rhoads, then Archivist of the United States, wrote to State Archivist Mitchell to offer his congratulations and to express hope that the state of North Carolina's success would support recovery efforts in other jurisdictions.³³⁸ David Gracy, then at the Texas State Archives, wrote to Mitchell to report a successful recovery in the months that followed the decision regarding the bills of indictment. "The manuscript dealer in Massachusetts has returned to us (he calls it a donation) the Stephen F. Austin letter I wrote you about a couple of weeks ago," Gracy wrote, "I don't know whether the West case figured in the dealer's

³³⁸ James B. Rhoads to Thornton W. Mitchell, March 27, 1975, folder titled "Correspondence;" Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

decision, but I am glad we have the verdict on the books.”³³⁹ In Chapter Five, a Pennsylvania state official’s use of the court opinion to bolster his claim proved successful at the time. The long-lasting influence of a decision in one state for another jurisdiction, however, is discussed further in the following chapter.

Even in North Carolina, the specter of the *B.C. West* decision appears to have waned. In the replevin cases resolved in the past decade, state officials did not reference the court opinion in *State of North Carolina v. B.C. West, Jr.* Instead, the demand letters that the state issues at the start of the replevin negotiations include arguments for ownership that are based on the North Carolina Code of Statutes, namely the sections that define public record, codify the procedure for transferring a record to a private party, and that name the Deputy Secretary as legal custodian. These, interestingly, are elements that are common to public records statutes throughout the states, as Bain exhibited in his article “State Archival Law: A Content Analysis,” a piece that would benefit from updating.³⁴⁰ This raises a question: what exactly is needed for a state to have a successful replevin program? While the statute and case law should not be discounted, the strong commitment of the Department of Justice in North Carolina is a factor that distinguishes it from the environment present in the chapters that follow. Since the 1970s, the Department of Justice, led by the Attorney General of the state, has demonstrated a willingness to invest resources into recovering public records. This remains the case today. The current legal counsel for the Department of Cultural Resources has not only represented the agencies in several cases, including the notable recovery of the state’s copy of the Bill of Rights, but has also presented on replevin at public events and professional meetings.

³³⁹ David B. Gracy II, Director to the Texas State Archives, to William S. Price, Jr., December 1, 1977; folder titled “Correspondence;” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

³⁴⁰ Bain, “State Archival Law,” 158-174.

Still, for a state, a favorable court opinion can support its future recovery efforts, especially those that reach litigation. One that favors the private party's possession, however, can do the opposite. With *State of North Carolina v. B.C. West, Jr.*, public officials were cognizant of the risks. Price, the former assistant director of the North Carolina Division of Archives and History worried that the suing for the return of the Hooper indictments could, if unsuccessful, damage the state's ability to recover the record it really wanted for the archives: the George Washington letter. Mitchell viewed the suit against West as strategic; the state, he believed, had a strong case, would be successful in court, and then use the success as leverage in the George Washington letter case.³⁴¹ Mitchell viewed the West suit as strategic; the state, he believed, had a strong case, would be successful in court, and then use the success as leverage in the George Washington letter case.³⁴² Mitchell was right. The case law precedent helped with bringing conclusion to that case and presumably would help again if another matter reached the courts.

Price's concerns, however, have merit, as evidenced by the effects of *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store* on Virginia's contemporary replevin activities, discussed in Chapter Six. When deciding whether to ask the court to determine ownership, a state archives must weigh the importance of the record against the potential impact of a court opinion that favors the private party. Alternatively, if the private party demands payment for the record, the state archives may decide that this cost is lower than the potential cost of taking the matter to court and losing; the Library of Virginia, for example, employs this reasoning. This discussion contributes to an understanding of why a state archives may choose to settle an ownership dispute with a private party. This route is, simply, less of a gamble for the state.

³⁴¹ Price, "N.C. v. B.C. West, Jr.," 24

³⁴² Price, "N.C. v. B.C. West, Jr.," 24

The cases and evidence examined above offer some insight into those records that the state is most likely to pursue through an ownership claim. First, records that are in the hands of an individual or an auction house are more likely to be targeted than those in a repository. While replevin is commonly conceived as an issue that divides public archivists and private collectors and dealers, a study of North Carolina archival and court records reveals that in the case of *B.C. West Jr.*, there were additional groups on the opposing side that included members of the American Library Association and university archivists. The American Library Association's legal counsel expressed concern to the court that "The decision of the Court of Appeals would appear to cloud the title of every library in North Carolina and to the public records and documents in these collections. If the decision is upheld by this Court, its impact would not be confined to North Carolina but would extend to other states who might be influenced by the precedent."³⁴³ It did not. As the *Jefferson Davis* case illustrates, known public records in institutions both within and outside the state are untouched. The reality that these institutions are caring for the records and making them available for research is one likely source of the state's disinclination to engage in replevin efforts.

Another likely reason behind the state's indifference regarding the records in existing collections is what Frank Boles and Julia Marks Young describe as reflection on the "implications of the appraisal recommendations" and, namely, the "political considerations."³⁴⁴ The officials at the Department of Cultural Resources and the legal counsel may be concerned about maintaining relationships with the archival community and entities like the American Library Association, once an outside critic of the state's replevin efforts. Concern about

³⁴³ Motion by American Library Association for Leave to File Brief Amicus Curiae and for Extension of Time, *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

³⁴⁴ Frank Boles and Julia Marks Young, "Exploring the Black Box: The Appraisal of University Administrative Records," *The American Archivist* 48, no. 2 (Spring 1985): 135

overreaching is, this dissertation found, present in the minds of public officials in each of the jurisdictions.

In the Superior Court's hearing of *State of North Carolina v. B.C. West Jr.*, Mitchell conveyed a policy of the State Archives that may influence replevin selection decisions. At the time of his testimony, his office would not authorize the destruction of records that predate 1800.³⁴⁵ This retention policy identifies records created prior to this date as archival and, thus, likely interests for the Department of Cultural Resources should one be discovered in private hands. Mitchell was testifying at a hearing that concerned ownership of two records that fall into this category. Two of the four cases considered in section IV.c. similarly targeted 18th century records, further suggesting that records of a particular age are of interest to the state.

Of course, it is not the age alone of a record that determines its value. This was made apparent in January of 2014, when the Department of Cultural Resources responded to media coverage regarding the destruction of a collection of records that was discovered in the basement of a county courthouse and that included papers dating from the 1880s. In explaining the decision, State Archivist Sarah Koonts said that the State Archives advised the local officials in the county to consult the relevant records schedules. Those records that were past their retention period, and thus not archival, were approved for destruction.³⁴⁶ High replevin targets in North Carolina are any records that retention schedules identify as permanent; not all "old" materials may be considered permanent. This is a consideration of what Boles and Young characterizes as

³⁴⁵ Tr. of Evidence, p. 49-50, November 6, 1975, submitted in *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

³⁴⁶ Sarah Koonts, "Franklin County Records," State Archives of North Carolina Blog, accessed April 2, 2014, <http://ncarchives.wordpress.com/2014/01/08/franklin-county-records/>

the “value-of-information.”³⁴⁷

A fourth category of records that the State Archives prioritizes in recovery efforts include records that directly relate to the existing collection. The presence of records with the same provenance in the state’s collection is justification for the state’s claim that an alienated record belongs in state custody. While Mitchell confessed that he was interested in the Salisbury bills of indictment because their recovery would be leverage in regaining the George Washington letter, he and his staff argued that the bills belonged with the Salisbury court records in the collection so that researchers could view them within this context.³⁴⁸ The recovery of records that fill a gap in the evidence is, in all three states examined in this dissertation, an aim.

During the court case against West and the episode involving the George Washington letter, members of the Manuscript Society and media outlets focused on the ethics and legality of the position that Robert House first espoused: that the state would not purchase alienated records.³⁴⁹ This objection recalls discussions about an unconstitutional government taking, or a governmental seizure of private property for public good without compensation. The state is mindful, as discussed above, of asserting the public ownership of the records they claim and refraining from an acknowledgement that the private party ever owned the materials. In the case involving the First State General Assembly Document, Crow wrote to the president of the auction house and maintained: “Public records created by North Carolina government agencies are the property of the people of the State of North Carolina. North Carolina General Statute section 121-5(b) prohibits the transfer of title to a public record to anyone, including a bona fide

³⁴⁷ Kyna Herzinger, “How do you decide what to keep?.” *G.S. 132 Files* (official records management blog of the State Archives of North Carolina), February 12, 2014, accessed April 2, 2014, <http://ncrecords.wordpress.com/2014/02/12/how-do-you-decide-what-to-keep/>

³⁴⁸ Mitchell, “Another View of the West Case,” 130.

³⁴⁹ Easley, “Lost and Found,” 8

purchaser for value, without the specific consent of the North Carolina General Assembly...Under these circumstances, the property law of this State considers the possessor of the manuscript to be a converter.”³⁵⁰ A “converter” describes a party who is guilty of conversion, the unlawful withholding or use of property belonging to another.³⁵¹

As the cases above illustrate, today’s private collectors and auction houses are largely cooperative in their responses to the state’s replevin claims, most likely the consequence of the state’s reputation and success in such cases. Some private parties, however, suggest that they will elect to donate the record in question to the State Archives. In such instances, neither the state nor the private party in such cases fully acknowledges the ownership rights of the other. In the few cases when the state recognized a transfer as a “donation,” there was arguably some blurring of the line that divides public and private property. Individuals, of course, cannot donate something that never belonged to them; they do not possess those rights. It is a compromise, however, that can help both parties avoid litigation and the costs associated with it. Such a solution has not influenced the state’s strength in recovering alienated records. The Department of Cultural Resources and the State Archives have a number of tools that work to their favor: a history of and reputation for successes, a strong public records statute that includes civil and criminal remedies for recovering property, a case law that could be drawn upon in court, and, perhaps most importantly, a collection of staff who are committed to reuniting the people of North Carolina with their property.

³⁵⁰ Jeffrey J. Crow to President of Auction House, February 13, 2008; First State General Assembly Document File, from the records of Special Deputy Attorney General, obtained October 12, 2012.

³⁵¹ *Black's Law Dictionary* 332 (6th ed. 1990).

V. THE PENNSYLVANIA CASE

“Private citizens ought not be involved in the sale or purchase of public records...I hope you understand that the Commonwealth cannot set a precedent to purchase the records of its political subdivisions.”³⁵²

In this dissertation on replevin, the selection of the Pennsylvania State Archives as a case was motivated by the *absence* of environmental factors. The researcher anticipated that its absence of a replevin statute and absence of replevin case law would serve as a foil for the environment that exists in the State of North Carolina. This chapter is the second of three that examines the replevin process at a government archives. For this particular case study, archival records and interviews with individuals who represent two eras of leadership at the Pennsylvania Historical and Museum Commission (PHMC) were particularly important in building an image of replevin activities and the replevin processes in Pennsylvania.

V.A. THE MEANING OF PUBLIC RECORD IN PENNSYLVANIA

The starting point for the discussion about replevin is, as in the previous chapter, the meaning of “public record” in the state. This section points to differences among categories of public records

³⁵² Roland M. Baumann, Chief of the Division of Archives & Manuscripts, to Ben Yarosz and Bob Miller, private collectors, September 8, 1983; Ben Yarosz file; unaccessioned records of the PHMC, Harrisburg, PA.

and probes what these differences mean for replevin actions. While the archival community associates replevin with the recovery of public records in private hands, it is more appropriate and correct to conceive of replevin as the recovery of *selected* public records in private hands. It is not the case that the Pennsylvania State Archives either has the authority or the interest in targeting all government records that are outside of government custody.

There are a number of statutes that address the management of public records in the Commonwealth of Pennsylvania, with the Administrative Code of 1929, the History Code, the County Records Act of 1963, and the Municipal Records Act of 1968 among the most relevant pieces of legislation. Within this set of laws, the County Records Act and the Municipal Records are the most overt in their defining of “public record” on a local level.³⁵³ The clearest and most direct definition of public record in the context of the business of the state government is located in *Management Directive 210.5 Amended: The Commonwealth of Pennsylvania State Records Management Program*. The aim of the *Management Directive*, issued by the Governor of Pennsylvania’s Office of Administration, is “to establish policy, responsibilities, and procedures for the State Records Management Program,” guidelines that are intended to support conformity to the law and public employees’ understanding of proper records management practices.³⁵⁴

³⁵³ County Records Act of 1963, 16 P.S., § 13001-13006 (1963); Municipal Records Act of 1968, 53 PA C.S.A., § 1381 – 1389 (1968). The County Records Act of 1963 defines “country records” as follows: Municipal Records Act of 1968 defines “public record” as “Any papers, dockets, books, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received in any office of county government in pursuance of law or in connection with transactions of public business in the exercise of its legitimate functions and the discharge of its responsibilities.” § 1382 of the Municipal Records Act defines “public records” as “any papers, books, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by an entity under law or in connection with the exercise of its powers and the discharge of its duties.” The latter definition contrasts with its predecessor in the County Records Act and the definition in the *Management Directive 210.5 Amended* in that its use of the phrase “entity under law” is, in the view of this author, less clear as a descriptor for a government entity.

³⁵⁴ The Office of Administration is a Pennsylvania state agency that provides “responsive business support” to employees in its fellow state agencies. Among this support is the provision of guidance on records management to state employees in the form of management directives and manuals. See “Records and Directives,” Pennsylvania Office of Administration, accessed October 11, 2013, http://www.portal.state.pa.us/portal/server.pt/community/records_directives/484; Pennsylvania Office of

It defines a state agency record as “information, regardless of physical form or characteristics, that document a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.”³⁵⁵ For the employees of the Pennsylvania State Archives, this is the definition of record that guides their actions.

Section 524 of the Administrative Code of 1929, which was added in 1937 and amended in 1947, created three types, or states, of public records: records that are active and necessary for government operations, records that are not permanent and that the PHMC authorizes for destruction, and records that the PHMC determines are no longer active but of long-term value.³⁵⁶ There is “nothing in that scheme,” a Commonwealth judge observed, that “provided for private ownership of public documents.”³⁵⁷ This interpretation is in line with the principle of inalienability. Under a strict interpretation of the Administrative Code, a private party cannot hold title to a record created by the state.

There is a fourth category of public or government records that falls outside of the PMHC's purview. Licenses, deeds and outgoing correspondence from a public official to a private party, Haury notes, are representative of these record types. The Commonwealth, for example, licenses plumbers and maintains a record of this action. The licenses themselves become the property of the licensed individuals. In considering whether these licenses retain their status as “government records,” Haury suggests that this would be dependent on “whether

Administration, Office of Enterprise Records Management, *Management Directive 210.5 Amended: The Commonwealth of Pennsylvania State Records Management Program* (Harrisburg, PA: Commonwealth of Pennsylvania, 2010): 1, accessed October 11, 2013, http://www.portal.state.pa.us/portal/server.pt?open=512&objID=711&PageID=228891&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/cop_general_government_operations/oa/oa_portal/omd/p_and_p/management_directives/management_administrative_support/items/210_5_records_management.html.

³⁵⁵ Pennsylvania Office of Administration, *Management Directive 210.5 Amended*, 3.

³⁵⁶ 71 P.S. I Chapter 2 Article V § 524.

³⁵⁷ *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 482 M.D. 2008 (Pa. Commw. 2009).

possession enters into the definition.”³⁵⁸ In his capacity as State Archivist, his interpretation is this: the issued records are neither archival nor the government’s property. Instead, the Commonwealth is the owner of the license book or ledger; this is the record that is subject to retention and disposition schedules. If the book or ledger escapes the custody of the state, this record could be subject to a recovery attempt.

However, there is a connotation surrounding “public record” in Pennsylvania that contributes to a double meaning. Pennsylvania’s New Right to Know Law, effective January 1, 2009, defines “public record” as:

A record, including a financial record, of a Commonwealth or local agency that:

- (1) is not exempt under section 708;
- (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or
- (3) is not protected by a privilege.³⁵⁹

The act’s use of the term has colored its meaning outside of the statute; David Haury explains that “public record” is commonly equated with “open record.” In this understanding of “public record,” records that are restricted by federal law or the exemptions codified by the state’s Right to Know Law are not public.³⁶⁰

For the purpose of this chapter, “public record” is synonymous to “government record.” This is not inaccurate. The Pennsylvania State Archives’ online notice about the sale of records illustrates the synonymous use of the terms. The page title in the menu reads, “Sale of Public Records,” while the title on the page itself is “Sales of Government Records.” Two adjacent sentences on the page further point to the interchangeability of the terms: “*Government records* are paid for by public funds and belong to the citizens of the communities that create them. The

³⁵⁸ David Haury, State Archivist, interview with author, July 5, 2013, Pennsylvania State Archives, Harrisburg, PA.

³⁵⁹ *Pennsylvania's Right to Know Law*, 65 P. S. §67.102.

³⁶⁰ David A. Haury, interview with author, July 5, 2013.

sale of *public records* is an issue that has become problematic in recent years.”³⁶¹ Either term, then, is appropriate in describing recovery efforts in the Commonwealth of Pennsylvania, as evidenced by the Pennsylvania State Archives’ own usages of both in this context.

V.B. THE REPLEVIN PROCESS IN PENNSYLVANIA

The impetus for the selection of this case was the matter of *absence*: absence of case law and absence of statute relating to recovery of government records. Interviews with Roland M. Baumann, Chief of the Division of Archives and Manuscripts from 1977 to 1987, and David Haury, the current Pennsylvania State Archivist, reveal that the omission of an explicit reference to replevin in public records statutes has, in turn, contributed to the absence of a universal understanding of the term within the PHMC. On how the PHMC defined *replevin* during his tenure, Baumann explained, “I can’t say that I went to the Administrative Code of 1929, which was our Bible, and that there was something there for us to hang on...I would say the PHMC did not use [the term].”³⁶² The theme of absence is even more present in Haury’s description of the PHMC’s contemporary understanding replevin. He maintained, “In some ways, replevin doesn’t exist in Pennsylvania because we don’t have a replevin law. In a technical sense, we don’t initiate replevin actions because we don’t have a law that defines what it is. In Pennsylvania, it would purely be a common law issue.”³⁶³ Both remarks suggest that it is statute, a statute that explicitly speaks to replevin in the context of public or government records, that gives concrete meaning to the term. Even with the absence of an official or codified understanding of replevin as it relates

³⁶¹ “Sales of Government Records,” Pennsylvania Historical and Museum Commission, accessed October 4, 2013, http://www.portal.state.pa.us/portal/server.pt/community/about_the_archives/3177/sales_of_public_records/276505

³⁶² Roland M. Baumann, former Chief of the Division of Archives & Manuscripts, interview with author, July 24, 2013, Oberlin College, Oberlin OH.

³⁶³ David A. Haury, interview with author, July 5, 2013.

to Pennsylvania records, archival records reveal that PHMC employees have and do use the term. For this reason, this chapter uses the term replevin to describe efforts by the Pennsylvania State Archives and its parent agency, the PHMC, to recover public records (or, in one instance, government-owned private records) improperly in the possession of a private party.

Archivists assign the term "replevin" to cases that attorneys may not characterize as such. Even among archivists, however, the term may have different limits and inclusions. There does not appear to be a totally consistent definition of replevin that transcends eras of PHMC leadership. This was made apparent in the interviews with Baumann and Haury, two individuals who are particularly notable in the story of replevin in Pennsylvania. During his tenure with the Pennsylvania State Archives, Baumann's use of the term replevin did not exclude the attempts to recover records that were alienated from the archives as a consequence of theft.³⁶⁴ For Haury, the recovery of records stolen from the archives and the recovery of those that escaped government custody through some other means are different actions. Pennsylvania Archives employees and private dealers and collectors alike view the former as ambiguous; the private actors generally recognize the legitimacy of the Commonwealth's claim to the stolen property, even in cases in which the records had since entered the hands of a party who had no involvement with the theft. Replevin, Haury said, is a term that encompasses cases in which a government archives seeks to regain public records that escaped government custody before a transfer to the state repository.³⁶⁵

This chapter examines the nuances of replevin actions in Pennsylvania through a study of five cases. There is a general shape to these cases, with the six stages addressed in the preceding chapter remaining relevant to the discussion (see figure 4). Two Pennsylvania State Archives leaders, one past and one present, feature particularly prominently in this section.

³⁶⁴ Roland M. Baumann, interview with author, July 24, 2013, Oberlin College, Oberlin OH.

³⁶⁵ David A. Haury, interview with author, July 5, 2013, Pennsylvania State Archives, Harrisburg, PA.

Baumann, Chief of the Division of Archives and Manuscripts from 1977 to 1987, is notable in that he looked to the replevin efforts in North Carolina and drew upon the precedent that his colleagues in the south were setting in an attempt to achieve recovery successes in his own state. Haury, who became Pennsylvania's State Archivist in 2004, has distinguished himself as a notable contributor to the professional and scholarly discussion on replevin; he has presented on the topic at several conferences and is an oft-referenced voice in Elizabeth H. Dow's *Archivists, Collectors, Dealers, and Replevin: Case Studies on Private Ownership of Public Documents*.³⁶⁶

Discovery: *Discovery* is the stage in which a government archives learns of records that are potentially public in nature and in private custody. In Pennsylvania, there are two primary ways in which the Pennsylvania State Archives learns of the alienated records. First, a PHMC staff member may be the first party to observe an out of custody record, generally one that listed for sale. Today, Haury says, the Pennsylvania State Archives staff "monitor[s] eBay and catalogs to some degree but not comprehensively." The case of the Lancaster County Excise Book is an example of this course of identification; as Baumann recalled, an archivist on staff saw this item listed in a catalog as an estate auction lot.³⁶⁷

The second, more common, means of discovery occurs when an external party provides the Pennsylvania State Archives with a lead. Haury explained, "There are so many people out there who are buying Pennsylvania state materials and some of them are conscientious enough

³⁶⁶ David A. Haury, Wayne C. Moore, and David Cheever "Replevin: The View from the State Archives" (presentation at the Joint Annual Meeting of the SAA and the Council of State Archives (CoSA), Austin, Texas, August 11-16, 2009); David A. Haury, Menzi L. Behrmd-Klodt, Karen A. Blum, and David L de' Lorenzo, "Replevin: What's Mine is Mine (Unless It's Yours)" (presentation at the Joint Annual Meeting of Annual Meeting of CoSA, NAGARA, and SAA, Washington, DC, August 10-15, 2010); David A. Haury, "Replevin, Pros and Cons" (presentation at Mid-Atlantic Regional Archives Conference Fall 2010, Harrisburg, Pennsylvania, November 11-13, 2010); Elizabeth H. Dow, *Archivists, Collectors, Dealers, and Replevin: Case Studies on Private Ownership of Public Documents* (Lanham, MD: Scarecrow Press, 2012).

³⁶⁷ Roland M. Baumann, interview with author, July 24, 2013.

that when they see a government document for sale they let us know.”³⁶⁸ About half of these public notifications pertain to records of the local government, which the Pennsylvania State Archives today punts to the county prothonotary, archivist, or local historical society. In these instances, the contemporary practice is for the Pennsylvania State Archives staff to act as consultants to the local government employees, advising them on the replevin process that is followed by state officials.³⁶⁹ Most of the cases discussed in this chapter illustrate this means of discovery; in one, the party in the possession of minutes of the PHMC contacted the Pennsylvania State Archives himself to learn whether the state would be an interested buyer. Like in North Carolina, there are “conscientious” partners to the state in the collector community.

Identification: What records, when discovered, may be identified as targets for recovery efforts in Pennsylvania? In the stage of the replevin process that this dissertation terms the *identification* stage, the government archives will first determine whether the record or records in question are indeed government property. Importantly, there are certain categories of records that, though produced by the government, are not recoverable. First, as addressed above, government records that were intended for public dissemination would not be the subjects of a recovery effort; with their transfer, the records are no longer the Commonwealth’s property, nor are they archival. If the archives identifies the records as outgoing records of the state, county, or local governments, it will halt the replevin process at the *Identification* stage.

There is a second exempt category, one that is aligned with Sparling’s discussion of neglect and willful abandonment of title to the WPA prints in Chapter 2.³⁷⁰ The PHMC’s *State Records Management Manual*, a publication intended to aid state employees in observing proper

³⁶⁸ David A. Haury, interview with author, July 5, 2013.

³⁶⁹ David A. Haury, interview with author, July 5, 2013.

³⁷⁰ Sparling, “The Resolution of Title to WPA Prints,” 131-152.

records management procedures, states that when records are authorized for destruction, “the primary object ... is to reduce the information to an illegible condition.”³⁷¹ Haury explained that, for analog formats, this destruction can be achieved by shredding records, an approach that is preferable to leaving the records “bundled up ... outside the backdoor of the government office building.”³⁷² In the latter approach, wherein the records remain intact, Haury says that private individuals often salvage these discarded records. By discarding the records, the government is relinquishing its title to them. The Commonwealth, in turn, is unable to reclaim custody and ownership of the records. Since beginning at the Pennsylvania State Archives in 2004, Haury has not often encountered state employees discarding records in such a way, but has seen instances of this action on the county level.

During an interview with Haury, he referenced a case study that illustrates the implications of this method of disposal for the ownership of the records. He said, “We have one particular county here [in Pennsylvania] that actually threw away a lot of their one hundred plus year old records. And they come on the market all the time. And then people say, ‘Aren’t you going to recover this for the county?’ And we say, ‘We can’t. The county knowingly threw these away or gave them away.’”³⁷³ There is, however, a critical point to acknowledge here. Even if the Pennsylvania State Archives had the ability to recover the records, it would not act on that ability. If the records were indeed authorized for destruction, the Pennsylvania State Archives would have already determined that they were not archival.

There are, then, two categories of Commonwealth of Pennsylvania records that can be privately owned: those records that the government deliberately issues to private parties and

³⁷¹ Pennsylvania Historical and Museum Commission. *State Records Management Manual: M210.7 Amended* (Harrisburg, PA: PHMC, 2004): Chapter 7-2.

³⁷² David A. Haury, interview with author, July 5, 2013.

³⁷³ David A. Haury, interview with author, July 5, 2013.

those records that enter private possession after the government (state, county, or municipal) deliberately discards of them. The division that can separate archivists from manuscripts collectors and dealers becomes apparent early in the replevin process, at the *Identification* stage. Disparate perspectives surround the legitimacy of government claims to other record types. Dow speaks to two areas of discord, explaining that “most” dealers and collectors “reject claims against those materials for which governments can show no evidence that the archives ever held them.”³⁷⁴ If the archives is able to produce evidence that demonstrates the records in question were once in the archives, there is less room for dispute of the government’s ownership.

Dow’s second area of discord relates to the creation date of the disputed record. She writes, “In light of governments’ poor history of caring for public documents, some dealers take the position that because the National Archives did not come into existence until 1934, it should not have the right to lay claim to materials created before then, unless it can prove that the materials actually made their way into some sort of government repository. They can easily extend that logic to state archives and their founding dates.”³⁷⁵ A year that is relevant to this chapter is 1903; this was when the Commonwealth saw the establishment of the Division of Public Records as a bureaucratic entity.³⁷⁶ The recovery of records identified as predating 1903 will be considered in this chapter.

Selection: There are two categories of Commonwealth of Pennsylvania records that can be privately owned: those records that the government deliberately issues to private parties and those records that enter private possession after the government (state, county, or municipal) deliberately discards of them. Beyond these record types, leadership at the Pennsylvania State Archives use their discretion to select which alienated records the agency will pursue. There is

³⁷⁴ Dow, *Archivists, Collectors, Dealers, and Replevin*, 70.

³⁷⁵ Dow, *Archivists, Collectors, Dealers, and Replevin*, 70.

³⁷⁶ Posner, *American State Archives*, 231; Waddell, “The Emergence of an Archives for Pennsylvania,” 198.

indeed a selection process here, as the Pennsylvania State Archives does not pursue all government records in private hands. This stage in the replevin process, then, is characterized as the *selection* stage.

Haury, speaking to contemporary replevin efforts, draws a direct link between archival appraisal and contemporary recovery efforts, explaining, “We have process we go through where we would look at a record and first establish that it is a government record and then we would do our normal appraisal. Is it an archival record? Because obviously there wouldn’t be any reason for the archives to try to recover a record that isn’t archival.”³⁷⁷ The PHMC reports that less than five percent of state agency records enter the Pennsylvania State Archives; for the majority of Commonwealth records, the final disposition is destruction.³⁷⁸ It follows, then, that officials at Pennsylvania State Archives have little interest in recovering all records that improperly escape the government’s custody.

For the Pennsylvania State Archives, working without a case law precedent or statute, the physical location of the item in question can have a bearing on the negotiations. For Haury, “the worst scenario of all is if it is an out-of-state dealer who has a document he is selling for a couple of hundred dollars.”³⁷⁹ If this individual is unwilling to turn over the document, Haury says it is unlikely that the Pennsylvania State Archives would be able to persuade the state’s Office of Attorney General to pursue legal action against the out-of-state party. Pessimism about the outcome, the consequence of the absence of relevant legislative enactments and judicial opinions, is one factor that would contribute to this anticipated reluctance.

³⁷⁷ David A. Haury, interview with author, July 5, 2013.

³⁷⁸ Pennsylvania Historical and Museum Commission. *State Records Management Manual*, Chapter 7-1.

³⁷⁹ David A. Haury, interview with author, July 5, 2013.

The determination as to whether records are archival is tied to an evaluation of their continuing value for research.³⁸⁰ The archival community has decidedly separated archival appraisal from the popular understanding of appraisal as monetary valuing; research value cannot be judged in dollars or, as Richard J. Cox succinctly remarks, “the market is hardly rational, and financial worth does not equal historical worth.”³⁸¹ Still, the financial element does creep into selection decisions pertaining to replevin actions in Pennsylvania at times, largely when it is necessary to obtain the approval of government officials outside of the PHMC to pursue legal action. Haury explained, “Depending on the situation – and I have to say, all of these are case by case – the nuances vary considerably as to who we’re dealing with and ... [whether it is] a \$200 document or a \$2,000 document and that has a huge bearing on whether we are willing to pursue litigation to get it back.”³⁸² Because it would be necessary to invest resources to hire an attorney who could work in the out-of-state jurisdiction, the Office of Attorney General would likely measure the financial value of the record against the resources that would be required to pursue litigation.³⁸³

The State Archives is unlikely to select a record to pursue if the staff is unable to demonstrate that it is indeed the government’s property. Moreover, it is unlikely to convince the Attorney General’s office to enter into litigation if the record is out of state or if the record is of low financial value. Baumann cites a third source of hesitation at this stage, one related to the

³⁸⁰ While Richard J. Cox and others have challenged T.R. Schellenberg’s hard distinction between evidential and informational values, Jennifer Marshall and Kimberly Anderson’s dissertation studies both speak to the continuing influence of Schellenberg’s taxonomy on contemporary American archivists; Richard J. Cox, *No Innocent Deposits* (Lanham, MD: The Scarecrow Press, 2004): 152; Jennifer Alycen Marshall, “Accounting for Disposition: A Comparative Case Study of Appraisal Documentation at the National Archives and Records Administration in the United States, Library and Archives Canada, and the National Archives of Australia (PhD diss., University of Pittsburgh, 2006); Kimberly Doris Anderson, “Appraisal Learning Networks: How University Archivists Learn to Appraise Through Social Interaction” (PhD diss., University of California Los Angeles, 2011).

³⁸¹ Cox, *No Innocent Deposits*, 9.

³⁸² David A. Haury, interview with author, July 5, 2013.

³⁸³ David A. Haury, interview with author, July 5, 2013.

emotional dimension of records recovery. He explained that as a government archivist, “You’re always concerned about overreaching [in recovery cases]. You’re always concerned that people may not understand... their own rights, and the role of the public side, like a state archival agency, in making sure that records aren’t taken like this.”³⁸⁴

The History Code places "the ultimate responsibility for all government documents" with the Pennsylvania State Archives. There could be a legal means, Haury said, for the state to claim a county or municipal record for the State Archives. This, however, is not the typical practice of the state.³⁸⁵ The case of Arthur Patterson's excise book is an example in which the Pennsylvania State Archives seized an item that was a public record, but one that was either a state record or a county record -- this was a disputable distinction. Although the state was the entity that interceded and halted the sale, the Pennsylvania State Archives initially placed the book on loan to the Lancaster County Historical Society before gifting it outright in 2012.³⁸⁶ While the Pennsylvania State Archives will assist county officials who attempt to recover local records, public officials employed by the PHMC prioritize Commonwealth records in the state's replevin activities.

Negotiation: Once the Pennsylvania State Archives determines that it will pursue the record or records, the agency will issue an initial request for the transfer. This is the beginning of what is termed the negotiation phase in this study. Today, there is a decidedly standard way in which the Pennsylvania State Archivist initiates the negotiations with the private custodian and this standard is shaped by the absence of a statute or precedent in the Commonwealth. Because he does not have a legal basis to cite, Haury said that he first attempts to appeal to the individual's concern for the public interest. He informs the party that the “document is part of

³⁸⁴ Roland M. Baumann, interview with author, July 24, 2013.

³⁸⁵ David A. Haury, interview with author, July 5, 2013.

³⁸⁶ David A. Haury, interview with author, July 5, 2013.

Pennsylvania's heritage" and that it is "best for the public if those documents stayed in one place and were available to the public."³⁸⁷ In the cases analyzed below, it is apparent that Baumann, too, uses the same tactic in his initial communications with the party in possession of the record.

There is one notable difference in the negotiations that occurred under Baumann's leadership and the shape of the process today. As evidenced in the below case involving the PHMC minutes, Baumann pulled the court decision in *State of North Carolina v. B.C. West, Jr.* into his negotiations with the party after the public interest appeal was met with resistance. In doing so, he used North Carolina's success to bolster the legitimacy of the Commonwealth's replevin request. Today, the case is more removed in time and, as such, less on the minds and tongues of the records community; collectors and dealers may be less aware of the court opinion today than they were twenty-five years ago. In truth, its legal reach is restricted to North Carolina's jurisdiction; its influence on the ownership of Pennsylvania's records is null.

Because of the absence of a favorable legal setting for recovery, concessions often arise within the negotiations with the private party. The most frequent concession is monetary in nature. The preceding discussion on the selection stage addresses the difficulty of convincing the officials within the Office of Attorney General to litigate a case in which the record is out of state and financially. "Our best bet" in negotiating this type of situation, Haury said, is for the Pennsylvania State Archives to offer to buy the record. Important, however, is the precise language that both Baumann and Haury used to describe the payment. Haury explained, "Since we're buying our own property back, we like to word it that we are providing a finders' fee rather than actually buying the document back. Because our claim is that we own it, we don't really want to say that we are buying it back. But since they 'found' our document, we'll give

³⁸⁷ David A. Haury, interview with author, July 5, 2013.

them” a nominal sum.³⁸⁸ Baumann’s negotiations in the cases of the Baynton, Wharton, and Morgan papers and the PHMC minutes, described below, exhibit this same avoidance of the implication that the Pennsylvania State Archives was purchasing another party’s property.

This concession, to offer payment in the negotiation stage, can be situated within the framework of property theory and government takings. Under the United States Constitution’s “Takings Clause,” the government must compensate a party if private property is seized for public use.³⁸⁹ When the Pennsylvania State Archives chooses to recover a record, it does so because the Pennsylvania State Archivist and his staff have identified the record to be public property. The compensation is not made in order to satisfy the constitutional requirement. By describing the payment as a “finders’ fee,” the Pennsylvania State Archives avoids recognizing any private ownership of the record. Instead, the language serves as a subtle assertion of the public nature of the record. Compensation enters the negotiation phase because of a legal environment, which obstructs the state’s ability to simply demand the record’s return. At this time, payment is often an inevitable concession if the State Archives wants the record. As the North Carolina case suggests, the passage of a replevin statute or a favorable court opinion would likely lessen the necessity and frequency of this negotiation tactic.

Peterson and Peterson cite another concession that may occur in the negotiation stage: the acceptance of a copy of the record in lieu of the original.³⁹⁰ Dow explains that there are some replevin statutes that require the state archivist to recover the original record, but Pennsylvania is not among those states with this stipulation – or with a replevin law of any kind, for that matter. For those archivists who are able to accept a copy, Dow says that their decision to do so will be

³⁸⁸ David A. Haury, interview with author, July 5, 2013.

³⁸⁹ Commonly referred to as the “Takings Clause,” the final line in the Fifth Amendment states, “Nor shall private property be taken for public use, without just compensation.”³⁸⁹

³⁹⁰ Peterson and Peterson, *Archives & Manuscripts: Law*, 92-93.

based on “1) whether the AG’s [Attorney General’s] office shows an interest in the case, and 2) the monetary and symbolic value of the document.”³⁹¹ Neither interviews with Archives staff past and present nor the archival records revealed this consideration to be part of the replevin process in the state of Pennsylvania. The Pennsylvania State Archives either successfully recovers the record, or it does not. Haury was unable to recall a case during his tenure in which the issue of the copy entered into the negotiations with the private party.³⁹²

Difficulties in the negotiation phase can prompt the state to double back to the selection stage. An example here, one recent to the time of this writing, is a useful illustration. In 2013, employees of the Pennsylvania State Archives learned that there was an eBay posting for a set of glass slides dated from the 1940s. An employee of the Turnpike Commission’s publicity office photographed the construction and early days of the Pennsylvania Turnpike for promotional purposes and retained them as his personal property. When he died, the photographs were included in an estate sale and purchased by the individuals who would later place them on eBay. Recognizing the photographs to be state agency records, the Pennsylvania State Archives initially attempted to negotiate for the transfer of the photographs but were met with resistance. The state archivist and his staff determined that while they could continue their efforts and likely would have a strong case to present in a civil proceeding, the Pennsylvania State Archives already had very similar photographs in the collection. Haury explained, “They were old and historical and had archival value. If they hadn’t been duplicates, we would have gone after them.”³⁹³ In this case, the Pennsylvania State Archives learned of the existence of the photographs through an eBay posting, decided to seek their recovery, and engaged in discussion and bargaining with the holders. When it became clear that the individuals were unwilling to turn

³⁹¹ Dow, *Archivists, Collectors, and Replevin*, 60.

³⁹² David A. Haury, interview with author, July 5, 2013.

³⁹³ David A. Haury, interview with author, July 5, 2013.

over the photographs, the Pennsylvania State Archives staff reappraised the targeted materials. Based on this reevaluation, the state officials determined that they would not move forward with the replevin process, which would have involved going to court for the *custody determination*.

Custody determination: A *custody determination* may be reached with or without the involvement of the courts. The latter scenario is the more common. In Pennsylvania, resistance in the negotiation phase can prompt the Pennsylvania State Archives to reassess the decision to pursue the record (*selection*) and, in doing so, lead to a de facto custody determination that favors the private party. If the Pennsylvania State Archives is successful in negotiating for a favorable custody determination, it may be accompanied by the negotiated monetary agreement.

The PHMC has taken one dispute to the Commonwealth Court of Pennsylvania. The 2009 case of *Pennsylvania Historical and Museum Commission, Petitioner v. E.G. Marshall & Associates, Respondents*, analyzed below, illustrates the complexities of the ownership question. The court did not issue a custody determination; instead, a settlement was reached between parties. The Pennsylvania State Archives remains without a case law precedent to bolster (or alternatively, impede upon) the state's recovery efforts.

Archival Accessioning: If a government archives is successful in recovering an alienated record, archives staff must decide how that record will be integrated into the collection. In North Carolina, there is a defined practice in place – recovered records are remembered as such by their arrangement and description. In Pennsylvania, recovered records are generally not segregated from the original record group and instead rejoin.³⁹⁴ Haury explained that there might be instances in which this is not the case, though the recovery effort he cited was a recovery of stolen property, rather than a replevin case. He referenced a string of thefts that one patron

³⁹⁴ Linda A. Ries (Head, Arrangement and Description Section), telephone conversation with author, August 16, 2013.

carried out in 1986 and 1987 and said that the Pennsylvania State Archives is “still dealing with the fallout” of the thief’s actions and discovering stolen records.³⁹⁵ When records are recovered, Haury said that the Archives might arrange and describe them in such a way that users are informed that they had been out of custody. He said, “In general we would try to put the records back into the same record group and record series, but it might involve filing them slightly differently to recognize that they’d been stolen. Especially if we had only recovered part of the record and knew some were still missing, we’d probably want to note in the finding aid: ‘here is a series of records, here are the records we’ve recovered, [and that] we think some other records are still missing.’ We’d write that up so that anyone doing research with those records would be aware that the original order of the series had been tampered with by this thief.”³⁹⁶ This practice differs from that seen in North Carolina, where a duplicate is returned to the record group and original segregated.

V.C. CASE STUDIES OF REPLEVIN IN PENNSYLVANIA

This section examines a series of recovery efforts in Pennsylvania as means for understanding the replevin process in the state. Archival records and interviews were particularly important data sources for the discussion and analysis that follows. The selection of these cases was based on the accessibility of record sources.³⁹⁷

³⁹⁵ David A. Haury, interview with author, July 5, 2013.

³⁹⁶ David A. Haury, interview with author, July 5, 2013.

³⁹⁷ The researcher submitted a records request in April 2013. The PHMC’s determination is included in Appendix B. The request was “granted in part and denied in part.” The PHMC determined that the request lacked specificity and the communication between the PHMC and the Attorney General was exempt based on attorney-client privilege. As a consequence of this decision, the researcher focused on cases that could be studied through archival records and interviews.

The Baynton, Morgan, and Wharton Papers and the PHMC Minutes

In June 1977, North Carolina Supreme Court ended the dispute between the state of North Carolina and manuscripts dealer B.C. West, Jr. by upholding the decision of the appeals court and finding in favor of state ownership. This dispute, which began in the early months of 1975, coincided with Roland M. Baumann's completion of his doctoral degree and his entry to the archival profession.³⁹⁸ The court case, he said, sparked conversation about replevin at professional meetings, particularly at NAGARA, and shaped his own understanding of the meaning of the term in the context of his work. Informed by the professional conversation and the precedent set by the State of North Carolina, Baumann successfully embarked on successful replevin claims in during his employment with the PHMC.³⁹⁹

Two of Baumann's cases are discussed in this section, one as a necessary prelude to a more focused consideration of a second action. They are included in this study for a few reasons. First, while it is possible that there were prior instances of replevin efforts by the Pennsylvania State Archives, these are the earliest examples located through this dissertation's research. Second, both cases are examples of recovery that occurred outside of courts, with documentation and interview data helping to reveal a path of identification, selection, negotiation, and outcome. Finally, these are instances in which a government archivist, working outside of North Carolina, drew upon and referenced the case law precedent of *State of North Carolina v. B.C. West, Jr.* -- and achieved success in doing so.

Baumann's recollection of his earliest involvement with a replevin case centers on the Baynton, Wharton, and Morgan papers, a manuscript group at the Pennsylvania State Archives

³⁹⁸ Scope and Contents Note; North Carolina vs. West; General Correspondence, 1974-1978; Archives and Records Section; North Carolina State Archives, Raleigh, NC.

³⁹⁹ Roland M. Baumann, interview with author, July 24, 2013, Oberlin College, Oberlin, OH.

consisting of the business records of a colonial Philadelphia trading firm.⁴⁰⁰ The subject of an NHPRC-funded microfilming program in the 1960s, the Baynton, Wharton, and Morgan papers “fall into the shadowy dividing line between public records and private papers,” a characterization that evokes the title of Oliver H. Holmes’s 1960 article “ ‘Public Records’ – Who Knows What They Are?”⁴⁰¹ The blurriness originated with the Commonwealth’s “sequestration,” or seizure, of the papers for civil proceedings against Peter Baynton, who served as state treasurer from 1797-1801.⁴⁰²

Surprisingly, the ambiguity surrounding the public or private nature of these papers, however, is not the root of the replevin action. As Baumann remembers it, his first replevin case was a straightforward one. An external party contacted the Pennsylvania State Archives after seeing that the papers were being sold in a Miami, Florida based auction.⁴⁰³ Baumann identified these papers as alienated state property easily: the Pennsylvania State Archives had microfilmed the Baynton, Wharton, and Morgan manuscript collection and the advertised papers matched items in the microfilm. Baumann was emboldened by the success in North Carolina and the Pennsylvania State Archives was able to demonstrate that the papers had been in the collection and removed without the permission of the state. The papers were returned.⁴⁰⁴ Baumann was able to secure his first replevin success with this case, a success that would influence his decision to act on recovering the minutes of the PHMC.

⁴⁰⁰ Scope and Contents Note; Manuscript Group 19, Sequestered Baynton, Wharton, and Morgan Papers, 1725-1827; Pennsylvania State Archives, Harrisburg, PA.

⁴⁰¹ Donald H. Kent, Martha L. Simonetti, and George R. Beyer, *Guide to the Microfilm of the Baynton, Wharton, and Morgan Papers in the Pennsylvania State Archives (Manuscript Group 19)* (Harrisburg, PA, Pennsylvania Historical and Museum Commission, 1966), 3.

⁴⁰² Kent, Simonetti, and Beyer, *Guide to the Microfilm*, 3.

⁴⁰³ Roland M. Baumann, telephone conversation with author, May 10, 2013; Roland M. Baumann, interview with author, July 24, 2013.

⁴⁰⁴ Neither the staff at the Pennsylvania State Archives nor the researcher was able to locate recorded evidence of this recovery case. The researcher relied on the memory of the former state employee.

The case involving the PHMC minutes began with a phone call. Ben Yarosz, a man living in Williamsport, PA, contacted the Pennsylvania State Archives and informed Baumann that he had the board minutes of the PHMC spanning the period of 1924 to 1932 that he would be willing to sell to the Commonwealth.⁴⁰⁵ This is an unusual beginning to a replevin case, with the party in possession of the records revealing his custody through direct communication with the state archives. Yarosz's initial communication suggests that while he recognized that the records were relevant to the archives, he either did not anticipate that the state would make a claim or did not view them as the state's rightful property at the time. Now in his custody, Yarosz evidently viewed the records as his to possess or to sell. The negotiations that followed serve as evidence of Yarosz's resistance to accepting the legitimacy state's claim.

The Pennsylvania State Archives' discovery of the alienated records, then, was achieved through Yarosz's voluntary contact. As discussed above, once the Pennsylvania State Archives discovers the records in private custody, the staff must perform an appraisal of sorts, determining whether the records are government property and, if they are, whether they are archival and whether to pursue them. As Chief of the Division of Archives and Manuscripts, Baumann was able to use his own informed discretion in making these decisions. The documentation related to the replevin cases during his tenure and discussion with Baumann suggest that it was not necessary for him to obtain the approval of individuals holding other leadership positions within the PHMC before moving forward with this recovery effort.⁴⁰⁶

Conversation with Baumann revealed the motivating factors behind his decision to recover the minutes in Yarosz's possession. Baumann, as already stated, was aware of the replevin activity in North Carolina and informed by the court decision in *State of North Carolina*

⁴⁰⁵ Roland M. Baumann, interview with author, July 24, 2013.

⁴⁰⁶ Roland M. Baumann, interview with author, July 24, 2013.

v. B.C. West, Jr. He had recovered the Baynton, Wharton, and Morgan papers and, as he tells it, was inspired by his success in doing so in his decision to approach this case. Baumann also spoke to the responsibility that government archivists have in ensuring that the public has access to records of the government; in instances in which records escaped public custody “at no fault of the staff,” recovery is the appropriate action, one in keeping with good stewardship.⁴⁰⁷ This notion of a moral imperative recalls Kevin Cherry’s discussion of what drives replevin actions by the North Carolina Department of Cultural Resources.

The nature of the materials, however, appears to have been the primary factor in pushing Baumann to move forward with the claim. The Pennsylvania State Archives is an entity within the larger agency of the PHMC and so there was an absurdity to Yarosz’s phone call and offer to sell the PHMC minutes. Baumann recalled, “The last thing I want[ed] to do is buy back the records that rightfully belong to the Commonwealth of Pennsylvania – particularly the records of my own agency. My own agency!”⁴⁰⁸ The phone call provoked Baumann’s intent to recover the materials, but before explicitly claiming them as state property, he requested that Yarosz mail the minutes to Harrisburg so that the archives could examine them. In his letter to Yarosz following this initial transfer, Baumann said that the review revealed the records to indeed be public property. In light of this, Baumann told Yarosz that the Pennsylvania State Archives would offer him a small honorarium of twenty-five dollars as thanks for bringing the minutes to the state’s attention.⁴⁰⁹ Baumann was soft in his tone but assertive in what he expressed here. He did not *request* the transfer of ownership to the state. Maintaining that the minutes are indeed public records of the Commonwealth, Baumann invited no further negotiation from Yarosz. Instead,

⁴⁰⁷ Roland M. Baumann, interview by author, July 24, 2013.

⁴⁰⁸ Roland M. Baumann, interview by author, July 24, 2013.

⁴⁰⁹ Baumann to Yarosz, January 4, 1980, Ben Yarosz file; unaccessioned records of the PHMC; Roland M. Baumann, interview with author, July 24, 2013, Oberlin College, Oberlin OH.

Baumann expressed his appreciation for Yarosz’s “public spirit and interest” in ensuring that the records were reunited the PHMC minutes already in the collection of the Pennsylvania State Archives.⁴¹⁰ There was no threat of legal action; the language is conciliatory but expectant. In this case, negotiation began with Baumann’s direct assertion of state ownership and an expressed assumption that Yarosz would cooperate. In truth, however, Baumann said that when he made a claim for a public record or records as a government archivist, he anticipated that a party would likely defend his or her custody.⁴¹¹ Still, an invitation for Yarosz to justify his possession would have decidedly weakened the confidence that is present in Baumann’s letter.

As continues to be a practice today in Pennsylvania, this negotiation stage included discussion about compensation. Baumann, like his colleagues in North Carolina, was mindful about avoiding a precedent in which the Commonwealth purchased government records from private individuals. Baumann’s written correspondence, following Yarosz’s phone call, the source of the discovery, and the transfer of the records to the Commonwealth for inspection, stated that the Pennsylvania State Archives would provide Yarosz with \$25 as a finder’s fee and the postage costs incurred in sending the minutes to Harrisburg.⁴¹²

Yarosz’s response to Baumann’s initial assertion of state ownership suggests that he views himself as having an upper hand in the negotiations. Upon receipt of Baumann’s offer of \$25, Yarosz replied, ““At this time I cannot let you have the minutes of [the] Pa. Historical Commission for \$25.00. This item is jointly owned by me and another party. I spoke to him about the offer [and] he rejected it. An offer of \$75 would be accepted by both parties

⁴¹⁰ Roland M. Baumann, interview by author, July 24, 2013; Roland M. Baumann to Ben R. Yarosz, January 4, 1980; Ben Yarosz file; unaccessioned records of the PHMC; Pennsylvania State Archives, Harrisburg, PA. The Head of the Arrangement and Description Section at the Pennsylvania State Archives provided researcher with access to the Ben Yarosz file on May 30, 2013.

⁴¹¹ Roland M. Baumann, interview by author, July 24, 2013.

⁴¹² Roland M. Baumann, interview by author, July 24, 2013; Roland M. Baumann to Ben Yarosz, January 4, 1980, Ben Yarosz file; unaccessioned records of the PHMC.

involved.”⁴¹³ An application of Honoré’s incidents of ownership and the broader “bundle of rights” conception of property suggests that Yarosz continued to perceive himself as having private property rights and good title of the minutes. At this stage in the negotiations, Yarosz believes he has what Honoré called right to capital, or “the power to alienate the thing” through sale, gifting, or destruction.⁴¹⁴

Baumann, however, countered Yarosz’s confidence with a bolder, more direct assertion of the Commonwealth’s ownership. With his initial communication, Baumann first appealed to the party’s public responsibility and offered \$25.00 in exchange for Yarosz’s cooperation. The tone of the *negotiation* stage markedly shifts with Yarosz’s dismissal of the offer. Baumann wrote,

With regard to the minutes of the Pennsylvania Historical Commission, please be reminded that you are asking me to purchase records that, under the law, rightfully belong to the Commonwealth of Pennsylvania. My offer of \$25.00, which is unsatisfactory to you and your partner, was made with this fact in mind. Dealers need, however, to be made aware of the broad implications of the recent North Carolina Supreme Court case, B. C. West vs. State of North Carolina (1976).

At this writing the Commonwealth of Pennsylvania has not contemplated the replevin of any documents because most dealers and manuscript librarians in Pennsylvania have been fairly responsive to this decision. We thought you would be responsive as well.⁴¹⁵

With this letter, Baumann made clear that there could be legal ramifications for the legal consequences to Yarosz’s resistance and challenged Yarosz’s perception that he had “right to capital,” which would enable him to establish the price. Here, Baumann employed the legal meaning of the term replevin, rather than the more colloquial use of the term within the records community.

⁴¹³ Ben Yarosz to Roland Baumann, January 8, 1980, Ben Yarosz file; unaccessioned records of the PHMC.

⁴¹⁴ Honoré, “Ownership,” 118.

⁴¹⁵ Roland M. Baumann to Ben R. Yarosz, January 10, 1980; Ben Yarosz file; unaccessioned records of the PHMC.

Interestingly, Baumann suggested that the State of North Carolina's success in court against the dealer West had broad reach for state archives as a whole and cited the Commonwealth's willingness to file a replevin suit and take the custody dispute to court if negotiations failed.⁴¹⁶ In his reflections today on the case, however, Baumann indicated that there was some element of bluff behind his assertion, as there was no certitude that the Office of Attorney General would actually take the matter to court.⁴¹⁷ By pointing to the court decision in *State of North Carolina v. B.C. West, Jr.*, Baumann, however, raises the question as to whether state archives can draw upon replevin case law in other states to bolster a claim. In reality, North Carolina's success does not establish precedent for other jurisdictions. Under the common law system and the principle of *stare devises*, a judicial decision issued by a court must guide future decisions made by the same a court or lower courts in the same jurisdiction. The ruling in North Carolina, however, serves as only "persuasive authority," not "binding authority."⁴¹⁸ Outside of the jurisdiction in which a ruling was made, a decision "is only persuasive, to be taken as a starting point for judicial reasoning so far as it appeals to the court."⁴¹⁹ Were the PHMC to have sued Yarosz, there is no certainty that the Pennsylvania court would arrive at the same decision as the judge in *State of North Carolina v. B.C. West, Jr.*, though the court may have referenced the decision.

⁴¹⁶ Roland M. Baumann to Ben R. Yarosz, January 10, 1980; Ben Yarosz file; unaccessioned records of the PHMC.

⁴¹⁷ Roland M. Baumann, email to author, March 25, 2014.

⁴¹⁸ For an explanation of the distinction between binding and persuasive authority, see Thurgood Marshall Law Library Instructional Group, "Introduction to Legal Authorities and Legal Research," in *Thurgood Marshall Law Library Guide to Legal Research, 2013-2014* (Baltimore, MD: Thurgood Marshall Law Library), accessed January 1, 2014, <http://www.law.umaryland.edu/marshall/researchguides/tmllguide/>. Denise Johnson describes the distinction in this way: "A common law system emphasizes consistency and predictability, while also allowing for modification of rules when necessary. No state law decision is binding on any other state, but it is common practice for state courts to look to other state courts as persuasive authority. Such decisions can be very influential, especially when the facts presented are similar." Denise Johnson, "Reflections on the Bundle of Rights," *Vermont Law Review* 32 (2007): 249.

⁴¹⁹ Roscoe Pound, "What of Stare Decisis?" *Fordham Law Review* 10, no. 1 (January, 1941), 6;

There is a lesson to draw from this aspect of the case's negotiation stage. Even though the decision in North Carolina does not portend the PHMC's success in court, Baumann's allusion was to the benefit of the negotiations and had value to the PHMC in its efforts to settle the ownership question with the private party. The confidence that Yarosz demonstrated in his earlier communication was tapered by Baumann's more litigious tone. Today, when there is greater temporal distance separating replevin cases and the court case, a state archives official may be less inclined to cite the decision or even may be unaware of its relevance. If the state official outside of North Carolina does indeed reference the nearly thirty year-old court decision, it is unlikely that it would similarly persuade a private party to transfer the record in question to the government.

Although Baumann hinted at the Commonwealth's readiness to go to court should Yarosz continue to resist, the PHMC also demonstrated a willingness to compromise, to some extent, on the matter of monetary compensation. Upon learning that Yarosz and another party were in possession of the minutes, the PHMC raised the finder's fee, with Baumann asserting, "we are now prepared to make a final offer of \$50.00 for your willingness to bring these records to our attention. In the event that this amount is unsatisfactory to your and your partner[,] we plan to deal, for the first time, with the matter of replevin (recovery of public records through legal or other processes) with the Commission's Deputy Attorney General."⁴²⁰ There is no vacillating from or weakening of the Commonwealth's claim to the minutes. The conciliation was couched in an assertion of potential legal consequences for Yarosz and his partner and the language that Baumann uses to describe the compensation again avoids the suggestion that the PHMC is purchasing the minutes from the party.

⁴²⁰ Roland M. Baumann to Ben R. Yarosz, January 10, 1980; Ben Yarosz file; unaccessioned records of the PHMC.

The parties reached a custody determination, with Yarosz and his partner accepting the finder's fee of \$50.00 from the Commonwealth in exchange for transferring the minutes to the PHMC. Yarosz, however, did not relinquish control of the records without criticizing the government officials' historic and neglectful treatment of public records. Yarosz wrote, "I will not question the legal right to the minutes. I only want to say that these minutes would have been destroyed at least 15 years ago had we not salvaged them. I wish to say that there are a lot of public records destroyed by careless officials in our government ... There seems to be an indifference to what is and should be kept. I have bought a lot of paper items in my time which should have been retained by local State and Federal bodies."⁴²¹ He did not chance the Commonwealth's threat of legal action by furthering the negotiations and defending his rights to the minutes. Instead, Yarosz returned the records without a total acknowledgement of the Commonwealth's rights to them and with, instead, restrained condemnation of governmental stewardship of records. To use Honoré's terminology, the mode of loss and the mode of acquisition of the minutes are ambiguous. Yarosz implied that the former was the consequence of agency neglect and that, by acquiring the records, he rescued them from otherwise destruction. He, however, provided no evidence to support the state's abandonment of title that would, in turn, legitimize his rights to the records.⁴²² Baumann, on behalf of the PHMC, simply thanked Yarosz for "his role in preserving Pennsylvania's rich heritage" and does not respond to his criticism of public records management.⁴²³

With the physical recovery of the records, the PHMC completed the final stage in the replevin process outlined in this dissertation: archival arrangement. The minutes were integrated into the record group for PHMC agency records and, specifically, the series titled "Minutes and

⁴²¹ Ben R. Yarosz to Roland Baumann, January 14, 1980; Ben Yarosz file; unaccessioned records of the PHMC.

⁴²² Honoré, "Ownership," 134.

⁴²³ Roland M. Baumann to Ben R. Yarosz, January 17, 1980; Ben Yarosz file; unaccessioned records of the PHMC.

Agenda of the Historical and Museum Commission.” While the finding aid does indicate that the records in this collection came to the Pennsylvania State Archives through different accessions, there is no indication that the minutes spanning the years of 1924 to 1932 were once outside of state custody.⁴²⁴

This was a case in which the Pennsylvania State Archives successfully recovered records, even though the state officials were unable to track the moment of and circumstances behind the loss. In contrast to the private party in a later Pennsylvania case involving convict affidavit books, Yarosz did not resist returning the records on this basis. There is no way of knowing whether the PHMC would have taken the matter to court if there was resistance, nor if the agency would have met a favorable outcome if it had. This case falls within the archival definition of replevin, but Baumann, reflecting years later, characterized his actions more broadly: he was simply carrying out his responsibility as a public official. The tack Baumann took in this particular case is in line with his *modus operandi* when confronted with similar circumstances. He explained, "I wouldn't call what I was trying to do other than doing my job, using persuasion, and letting the person down easily by saying 'we can take care of this between the two of us and we're not going public. If you're a dealer in other stuff, we're not going to bother you.' "

Arthur Patterson's Book of Excise

During Baumann's employ, the Pennsylvania State Archives halted an auction sale of a government record, in the third case of replevin considered in this chapter. In this instance, collection management records of the PHMC, those records that document the accession and

⁴²⁴ Minutes and Agenda of the Historical and Museum Commission, 1924-1996, RG-13
Records of the Pennsylvania Historical and Museum Commission, Pennsylvania State Archives, Harrisburg, PA.

deaccession of items in the agency's care, provide insight into this case. This case is one in which the Pennsylvania State Archives was successful in exercising its authority as custodian of public records, despite not having a specific replevin statute to guide its actions. In this alone, it is a notable case. However, the Pennsylvania State Archives' decision-making following the recovery is equally notable as it is an instance of cooperative behavior among archival repositories in appraisal and reappraisal practices.

This case began with the discovery of the alienated record by a third party, though the source of the tip is not captured in the records.⁴²⁵ In an undated memo, an associate archivist at the Pennsylvania State Archives informed Baumann, the Chief of the Division of Archives and Manuscripts, of an impending estate auction that included what appeared to be Lancaster County tax records. In the memo chronicling his discovery, the archivist revealed the first steps that followed his discovery, indicating that he contacted the attorney for the estate after seeing the advertised lots. This communication can be classified as part of the *identification* stage of this replevin case, as the archivist aimed to learn more about the provenance of the records. He reported to Baumann that the items slated for auction included “a leather-bound volume identified as the excise tax, 1747-1748. The entries contain the following data: name, amount of tax, and method of payment. In addition, there are approximately 40 loose slips that contain tax information.”⁴²⁶ A February 13, 2012 record identifies Arthur Patterson, a Lancaster-based man who served as the county collector of excise tax on alcohol, as the volume's author.⁴²⁷

⁴²⁵ Baumann recalled that a Lancaster-based museum alerted the PHMC to the auction. Roland M. Baumann, interview by author, July 24, 2013.

⁴²⁶ Harry Parker, Associate Archivist, to Roland M. Baumann, Chief of Division of Archives & Manuscripts, memo titled “Auction of Lancaster County Tax Records,” undated, collections management records of the PHMC, Harrisburg, PA. The Head of the Arrangement and Description Section at the Pennsylvania State Archives provided researcher with access to this collections file on May 30, 2013.

⁴²⁷ PHMC, Deaccession Recommendation for Accession Number 1489, Arthur Patterson's Book of Excise, February 13, 2012, collections management records of the PHMC, Harrisburg, PA.

As becomes apparent in reviewing the collection management records, the "book of excise," as the agency calls the volume in question and the papers within, was the subject of a successful recovery effort by the state. The accession registrar for the excise book reveals that the PHMC received the item on April 26, 1986, the scheduled date of the aforementioned auction, and formally accessioned it into the PHMC's collection in July of the same year. At this time, it joined Record Group 21 (RG-21), the Records of the Proprietary Government.⁴²⁸ What the PHMC collection records fail to offer is more information regarding the seizure. It is evident that individuals at the Pennsylvania State Archives first learned of the impending auction and, as indicated above, communicated with the attorney with the estate who provided information about the records but maintained that the sale would continue.⁴²⁹ There is no indication in this particular memo that the PHMC intended to recover the records; the memo's purpose was to summarize the steps already taken.

There is little evidence that reveals the decision-making behind the seizure and what was the nature of communications between the PHMC and the private party following the halting of the sale. Presumably the age of the excise book and its status as a provincial record was a motivating factor. Just ten years prior, North Carolina was successful in recovering a colonial record from dealer B.C. West, Jr. and Baumann was aware of this case. If the estate attempted to dispute the Commonwealth's claim on April 26, 1986, it is not apparent from the records.

The PHMC identified the book of excise as a public record and seized it, but there are statements within the collections management records that raise questions as to whether the

⁴²⁸ PHMC, Accession Registrar record for Accession Number 1489, Arthur Patterson's Book of Excise, collections management records of the PHMC, Harrisburg, PA. RG-21 includes the records of the colonial government in Pennsylvania from 1682-1776. A description of the series can be located at PHMC, "Pennsylvania State Archives, RG-21, Records of the Proprietary Government, accessed July 11, 2013, <http://www.phmc.state.pa.us/bah/dam/rg/rg21.htm>.

⁴²⁹ Parker to Baumann, "Auction of Lancaster County Tax Records."

record should be classified as a record of the state or a record of the county. This ambiguity and the irrefutable connection between the book of excise and Lancaster County led to a loan agreement in 1987 between the PHMC and the Lancaster Country Historical Society and the PHMC's ultimate donation of the record to the regional historical organization. This is an instance in which the PHMC acted on both its own behalf and the behalf of the county government in recovering the record, an act that ultimately was to the particular benefit of the Lancaster Historical Society.

After recovering the book of excise, the PHMC obtained approval from its legal counsel to provide twenty-year loan to the Lancaster County Historical Society.⁴³⁰ The document loan agreement, in no uncertain terms, maintains that this is local government record. The agreement reads, "Not only is this a public record for Lancaster County, but also it is in the best interest of Pennsylvania history and existing institutional relationships to place it at the local level."⁴³¹ The PHMC was evidently focused on what would be the most appropriate repository for the excise book and most advantageous to the researchers of Lancaster County history. Cooperation, it appears, trumps the lure of possessing the original colonial record. While the PHMC did not relinquish title at this time, the agency photographed the book of excise and made it available in microfilm to researchers at the Pennsylvania State Archives.⁴³²

This is a case in which the state was successful in its replevin efforts in 1987, in spite of an absence of information about the modes of loss and acquisition. The decisions that followed the recovery offer insight into the motivations behind the replevin action. The reality that the

⁴³⁰ Larry E. Tise, Executive Director of the PHMC, to Debra D. Smith, Assistant Director of the Lancaster County Historical Society, January 27, 1987, collections management records of the PHMC, Harrisburg, PA.

⁴³¹ PHMC, Document Loan Agreement with Lancaster County Historical Society, approved by parties on dates of July 1987 through November 1987, collections management records of the PHMC, Harrisburg, PA.

⁴³² PHMC, Accession Registrar record for Accession Number 1489.

PHMC considered what would ultimately be the best repository for the record is suggestive of the notion that was is not greed but rather a concern for public access that promoted the replevin actions. F. Gerald Ham, in a speech to the meeting of the American Association for State and Local History, argued for a “ ‘need to change our perspective, from our egocentric need to build up our own archival institutions to a common concern to build up information linkages between institutions.’ ”⁴³³ The actions by the PHMC in the aftermath of the seizure embodies the ideas that Ham expresses. In 2012, twenty-five years after the recovery of the book of excise, staff at the PHMC decided that to “make it official and complete the transfer to the LCHS,” gifting the loan to the historical society.⁴³⁴

The Harmony Society and Old Economy Village

Unlike the previous cases examined in this chapter, the “mode of loss” and the “mode of acquisition” are discernible in the archival records. In this section, there is attention given to how the records got out of custody and how that impacted the state’s efforts to recover them. This is a case that centers on the custody and ownership of the papers of a religious separatist society, one that strove to achieve utopia through communal living and is now remembered through the preservation of a historic site eighteen miles northwest of Pittsburgh. The items in question in this case are not records created during the transaction of government business. They are not, as such, public records. Instead, this case focuses on records and personal papers that were created by members of a religious group. The materials, though originating as private papers, became government property when the Commonwealth of Pennsylvania acquired them in 1937, an

⁴³³ Betty Doak Elder, “Collecting the 20th Century,” *History News* 36 (November 1981): 11.

⁴³⁴ Email from David W. Shoff, Chief of the State Archives Division, to Jonathan Stayer, Supervisor of Reference Services, and Linda Ries, February 1, 2012, collections management records of the PHMC, Harrisburg, PA.

acquisition described below in further detail. This case, as such, very quickly transforms our understanding of replevin. The provenance of the Harmony Society papers is private in nature and, as such, the PHMC appropriately maintains and describes the materials as non-governmental records. However, the 1937 acquisition rendered these papers as Commonwealth-owned property.

Such a case is an anomaly in Pennsylvania. Haury remarked, “This replevin and recovery – the only time it applies to private papers would be if they already were given to the archives and someone stole them. And that’s pretty rare.”⁴³⁵ Still, while the existing archival literature on replevin, along with the dissertation proposal for this study, uses the term to describe governmental efforts to recover public records in private hands, this case study suggests that there are instances in which replevin actions include governmental efforts to recover government-owned property records in private hands.

The records creators themselves are not the focus of this discussion, but an interesting backdrop to this case of misplaced trust, a loan, a documentary editor, and recovery. Religious separatism is a concept introduced to even the youngest of school-aged children in the United States, who learn, often every November, of the Pilgrims and their voyage to America in search of religious freedom. John Archibald Bole, author of the 1904 publication titled *The Harmony Society: A Chapter in German American Culture History*, characterizes religious separatist groups as communities that sever ties with an established church.⁴³⁶ Like the Pilgrims before them who broke from the Church of England and found a spiritual home in America, the German followers of pastor George Rapp departed their homeland and settled in Pennsylvania. There, in February of 1805, the members of the Harmony Society penned and signed the first iteration of

⁴³⁵ David Haury, interview with author, July 5, 2013.

⁴³⁶ John Archibald Bole, *The Harmony Society: A Chapter in German American Culture History* (Philadelphia: Americana Germanica Press, 1904), 5.

the group's "articles of association," a set of agreements that codified a practice of communal living.⁴³⁷ Two years later, in 1807, Rapp's Harmonists decreed that members should live a celibate existence, with married couples residing together as, essentially, brother and sister.⁴³⁸ During their active years, the Harmonists met with this prosperity in the three locations that they made home: Harmony, Pennsylvania (1804 to 1815), New Harmony, Indiana (1815 to 1824), and Economy (now Ambridge), Pennsylvania (1824 to 1905).^{439,440} Rapp, who lived until 1847, served as the leader of the Harmonists at each of the three sites, but decision-making powers were also extended to a string of designated trustees.⁴⁴¹ John S. Duss (1860-1951) and Susanna C. Duss (1859-1946) were the final two individuals to hold trustee positions; the former, an individual who figures in the story of the alienated records, was the Senior Trustee during the period of 1892 to 1903, while his wife held the office from 1903 to 1905.⁴⁴²

Over time, membership in the Harmony Society dissipated dramatically, an unsurprising consequence of the Harmony Society's adoption of celibacy. The group, now in single numbers, formally dissolved in 1905. In 1910, legal proceedings and negotiations commenced to determine the party or parties that would secure the ownership of the Harmony Society's property. In 1919, the state of Pennsylvania procured the Harmonists' land in Ambridge and

⁴³⁷ Bole, *The Harmony Society*, 6-7.

⁴³⁸ Robert M. Dructor and Roland M. Baumann, "Introduction," in *Guide to the Microfilmed Harmony Society Records: 1786-1951*, ed. Roland M. Baumann (Harrisburg, PA: Commonwealth of Pennsylvania, Pennsylvania Historical and Museum Commission), 2.

⁴³⁹ Dructor and Baumann, "Introduction," 3

⁴⁴⁰ As this dissertation is not the appropriate space for a historical account of the Harmony Society and their settlements, readers may choose to reference the PHMC's brief guide to the historic site of Old Economy Village: Daniel B Reibel, *Old Economy Village: Pennsylvania Trail of History Guide* (Mechanicsburg, PA: Stackpole Books, 2002). Bole's text, cited above, is notable as the first written history of the communal group. The works of two others, John S. Duss and Karl J.R. Arndt, both players in this replevin case study, are additional resources. It is necessary to note, however, that Reibel and Arndt call into question claims made by Duss, one of the final surviving members of the Harmony Society, in his *The Harmonists: A Personal History* (Harrisburg, PA: Pennsylvania Book Service, 1943).

⁴⁴¹ Reibel, *Old Economy Village*, 22-23.

⁴⁴² Reibel, *Old Economy Village*, 25.

opened the grounds to the public in 1921.⁴⁴³ Today, the PHMC continues to administer the Harmony Society settlement as a historic site named Old Economy Village.⁴⁴⁴

Robert M. Dructor and Roland M. Baumann's introduction to the *Guide to the Microfilmed Harmony Society* provides a historical account of the communal society's records, which is useful for its discussion of the Harmonists' recordkeeping practices and, particularly, the custodial history of the records. While the state of Pennsylvania acquired the Ambridge land and buildings in 1919, the records (and artifacts) were a later acquisition, an acquisition that was likely delayed by John S. Duss's sense of personal ownership of the records as one of the last living Harmonists and his desire to have exclusive access to the records until he was able to publish his memoirs and history of the Harmonists. However, Dructor and Baumann characterize the 1930s as "an important decade for the records;"⁴⁴⁵ it is during these years that there is a loosening of Duss's control over the records, though, as this case study demonstrates, this control is not totally relinquished by John Duss during his lifetime.

When John S. Duss and Susie C. Duss granted an individual permission to borrow records for Old Economy Village's publicity purposes in 1921, the loaned materials found their way into the Historical Society of Western Pennsylvania's collection. The series of negotiations that followed between John Duss and Solon J. Buck, then Executive Director of the Historical Society, are a prelude to the character that would mark the records' custodial history. Duss made an agreement with Buck that required the return of the records related specifically to the Harmony Society and the Historical Society's retention of records that dealt more broadly with

⁴⁴³ Reibel, *Old Economy Village*, 5.

⁴⁴⁴ "Harmonist History," *Old Economy Village*, accessed July 18, 2013, <http://oldeconomyvillage.org/history-research/history/harmonist-history/>.

⁴⁴⁵ Dructor and Baumann, "Introduction," 6.

the history of the western region of the state.⁴⁴⁶ Most notable in the decade's occurrences in relation to the records, however, was the involvement of the Works Projects Administration (WPA) in their arrangement and preservation. It was the WPA's work at Old Economy Village, coupled with the Commonwealth's appeals, which contributed to the Dusses' decision in 1937 to sell the records and artifacts to the Commonwealth at the sum of one dollar.⁴⁴⁷ In 1940, the records on loan to the Historical Society of Western Pennsylvania were reunited with the others, now the property of the Commonwealth.⁴⁴⁸

Karl J. R. Arndt, then a professor of German at Louisiana State University, entered the narrative as the WPA project was in residency at Old Economy Village. The scope and content notes for the Karl Arndt Collection of Harmony Society Materials, now part of the PHMC's collection, provide limited insight into the eponymous collector. Arndt was born in 1905, coincidentally the same year of the Harmony Society's dissolution, and lived until 1991. An academic with research specialties in utopian communities and German linguistics, Arndt, the

⁴⁴⁶ Dructor and Baumann, *Guide to the Microfilmed Harmony Society Records*, 6-7.

⁴⁴⁷ These materials now compose Manuscript Group 185, Harmony Society Papers, 1742-1951, but those materials that were loaned to Arndt from this collection and recovered decades later are included within the Karl Arndt Collection of Harmony Society Materials, 1794-1949. Original records are housed at Old Economy Village in Ambridge, Pennsylvania and microfilmed copies are in Harrisburg.

⁴⁴⁸ Dructor and Baumann, *Guide to the Microfilmed Harmony Society Records*, 7. Even with this transfer, however, Duss continued to feel a sense of ownership over the records. This was evidenced when Margaret Lindsay, leader of the WPA records project at Old Economy Village, suggested that the Commonwealth had an obligation to make the Harmony Society records available for researchers' use. Duss balked, responding, "I note what you write about the papers being Commonwealth property and the Commission therefore not in position to deny to research applicant [sic] the privilege of examining said papers. However I happen to be still laboring under the impression that Mrs. Duss and I have not as yet turned over the collection to the Commonwealth. (I am speaking morally not legally as to Major Melvin's [the Chairman of the PHMC] imperfect and misleading contract)." (John S. Duss to Margaret Lindsay, January 22, 1940, MG-310 John Duss Papers, Box 4 Incoming and Outgoing, Folder 43 Correspondence Margaret Lindsay, Old Economy Village, Ambridge, PA.) To Duss, the signed agreement did not invalidate his hold over the materials; "morally," the papers remained his shared property with his wife, though the papers themselves documented a community that totaled 1,050 members over its century-long lifetime. (See Bole, *The Harmony Society*, 34.) The possessiveness he feels toward the materials is signified in his desired name for the collection. He corrects Arndt's reference to the papers, remarking, "Pardon me, but I don't like the 'Harmony Society Archives' ... All the books and papers at 'Old Economy' were personal property. And, as specified in the contract twixt the Dusses and the Commonwealth, the entire collection is to be known as 'The Duss Exhibit.'" (John S. Duss to Karl J.R. Arndt, January 21, 1941, MG-310 John Duss Papers, Box 2 Incoming and Outgoing, Folder 14 Correspondence: Karl J. Arndt, Old Economy Village, Ambridge, PA.)

PHMC states in the finding aid, collected the Harmony Society records, “during the course of his research and publication of documentary histories of the Harmony Society (1805-1905) of Harmony, Pennsylvania; New Harmony, Indiana; and Economy, Pennsylvania.”⁴⁴⁹ It is his role of collector that makes this figure relevant to the study.

A June 25, 1939 letter from Arndt is among the earliest records in the PHMC collection that points to his scholarly interest in the documentation of the communal group. Addressed to the Harmony Society “Custodian of Records,” the letter reveals Arndt’s discovery of records created by another German separatist group, this one consisting of former Harmonists and located in Louisiana. Arndt essentially submitted a reference request, asking for information about the records in Harmony and noting an interest in visiting the site, should there be material relevant to his scholarship.⁴⁵⁰ Arndt’s scholarly curiosity was evidently kindled by the response he received from John Duss, one of the last living members of the Harmony Society and a Harmonist leader. He made plans to travel to Pennsylvania that same summer.⁴⁵¹ The correspondence subsequent to his initial inquiry, however, provides insight into an involved relationship that Arndt would form with the Harmonist records, a relationship that would move beyond one in which Arndt saw himself as simply a records user. Upon learning of the holdings in Harmony, Pennsylvania, Arndt immediately suggested that his knowledge of the German language might prove to be an asset to Duss and the group convened by the WPA to arrange the Harmonist records.⁴⁵² Arndt would later stress to his readers the instrumental role he played in the efforts to organize the Harmonist materials. His hands, time, and expertise were lent to the

⁴⁴⁹ “Manuscript Group 437.”

⁴⁵⁰ Karl J. Arndt to Custodian of Records, Harmony Society, June 25, 1939, MG-310 John Duss Papers, Box 2 Incoming and Outgoing, Folder 14 Correspondence: Karl J. Arndt, Old Economy Village, Ambridge, PA.

⁴⁵¹ Karl J. Arndt to John S. Duss, July 10, 1939, MG-310 John Duss Papers, Box 2 Incoming and Outgoing, Folder 14 Correspondence: Karl J. Arndt, Old Economy Village, Ambridge, PA.

⁴⁵² Arndt to Duss, July 10, 1939.

early efforts to process the papers, which likely served to legitimize his later expressions of perceived ownership of them.

Arndt did not delay in requesting physical custody of the original Harmonist records for use in his research. In October 1939, Arndt wrote to Duss and said that while he had commissioned photographs of records taken in Pittsburgh, the quality was such that the surrogates were of no use to him. Awaiting the arrival of re-developed photographs from Pittsburgh, Arndt writes to Duss, “I wonder whether you could not arrange to have the manuscripts sent here [Louisiana State University] so that I may use them here? I am still hoping that I will get the photographs, but if the new photographs are as dark as those that I have[,] it will be impossible to read them. I fully appreciate the value of manuscripts, but I do believe they ought to be used by those who can read them in the original.”⁴⁵³ Duss expresses regret that Arndt’s photographs are illegible but replies that he does not have the necessary “authority” to send the originals. He was pessimistic that Arndt will be successful in this request, remarking, “I doubt your being able to secure permission to have them sent.”⁴⁵⁴ Duss proved to be incorrect in his prediction; with State Historian S.K. Stevens as an advocate, Arndt was able to arrange for the PHMC to loan the records in 1940. This transfer was the mode of loss for the PHMC and the mode of acquisition for the scholar.

“Hand in glove. It was all hand in glove stuff,” said Roland M. Baumann, of the loan agreement between the Pennsylvania Historical Commission and Arndt.⁴⁵⁵ The Harmony Society records strayed from government custody directly because of special privileges that Stevens, along with WPA project director Margaret Lindsay, extended to Arndt. Documentation that

⁴⁵³ Karl J. Arndt to John S. Duss, October 24, 1939, MG-310 John Duss Papers, Box 2 Incoming and Outgoing, Folder 14 Correspondence: Karl J. Arndt, Old Economy Village, Ambridge, PA.

⁴⁵⁴ John S. Duss to Karl J. Arndt, November 1, 1939, MG-310 John Duss Papers, Box 2 Incoming and Outgoing, Folder 14 Correspondence: Karl J. Arndt, Old Economy Village, Ambridge, PA.

⁴⁵⁵ Roland M. Baumann, interview by author, July 24, 2013.

reveals the arrangements between the Pennsylvania Historical Commission (now the PHMC) and Arndt is accessible in the accessions folder for the Karl Arndt Collection of Harmony Society Materials, in the Pennsylvania State Archives' collections management records in Harrisburg.⁴⁵⁶ accessions folder for the Karl Arndt Collection of Harmony Society Materials, 1794-1949. There is a definite suggestion that the curator at Old Economy Village thought the loan would cultivate a relationship with Arndt, a potential donor. Lindsay wrote to Stevens, "I'm very anxious that Dr. Arndt feel disposed to deposit his collection of books and papers discovered in Louisiana with us rather than with a library where they will not have such a close relationship to materials on hand. I know that Dr. Arndt feels inclined to do this at the moment and would not care to see him change his mind."⁴⁵⁷ It is likely that there were dual motives at play for lending Arndt the papers: for Stevens, he was helping a fellow historian move forward with his research, for Lindsay, she was nurturing a relationship with a party who possessed a rich record collection that was relevant to the historic site.

The literature pertaining to archival theft points to the perils of extending privileges to trusted researchers. Charles Merrill Mount, who was arrested and tried in the 1980s for stealing manuscripts valued at more than \$100,000 from the Library of Congress and NARA, used friendships with staff and a resultant insider status to secure special accommodations; his belongings, for example, were not inspected by Library of Congress guards, who were told by staff that Mount was "okay."⁴⁵⁸ Unlike Mount, Arndt did not hide the Harmony Society records under his clothing in order to remove them from government custody. Like Mount, he

⁴⁵⁶ Interestingly, the site administrator at Old Economy Village was unaware that there was documentation of the loan between the Pennsylvania Historical Commission and Karl J.R. Arndt. She requested that I provide the digital photographs that I took of these records to her for her files.

⁴⁵⁷ Margaret Lindsay to S.K. Stevens, September 6, 1940, MG-185 Accessions Folder--Karl Arndt, Pennsylvania State Archives.

⁴⁵⁸ Theresa Galvin, "The Boston Case of Charles Merrill Mount: The Archivist's Arch Enemy," *American Archivist* 53, no. 3 (1990): 449.

was able to gain initial possession of the records in 1940 because of a privileged status and arrangements that are not commonly given to archival researchers. Even today, the PHMC and its researchers remain unable to access the state's complete collection of Harmony Society records because of a decision in 1940 to loan archival records to Karl J.R. Arndt, the historian and documentary editor. The PHMC recovered some of the loaned records from Arndt and in the aftermath of Arndt's death in 1991 from his widow. Some of the records remain alienated from government custody.

The natural question to ask is why the Commonwealth allowed Arndt to retain the records for as long as he did. A letter from Lawrence Thurman, then curator of Old Economy Village, to John W. Oliver, University of Pittsburgh history professor and Pennsylvania Historical and Museum Commissioner suggests that there was not universal knowledge of the approved loan within the agency or certainty of Arndt's role in the papers' displacement.⁴⁵⁹ Thurman highlights notable Harmonist items that were included in the WPA's finding aid of the collection but that, at the time of his letter in 1954, could no longer be located at Old Economy Village. "I have the strongest feeling," Thurman writes, "that they [the missing papers] were here after the WPA left."⁴⁶⁰ He explains, however, that this "feeling" is indeed just that – a hunch that Thurman has as a consequence of his familiarity with Old Economy Village's records and a verbal account he heard only indirectly. Thurman said that he understood that a foreman of maintenance at Old Economy Village, deceased at the time of his writing, sent numerous "boxes and bundles of records" to Arndt. He goes on to maintain, "Loan slips were not made, and to my knowledge this sending of documents was a matter between Mr. Arndt" and the referenced

⁴⁵⁹ Roy F. Nichols, *The Pennsylvania Historical and Museum Commission: A History* (Harrisburg, PA: Pennsylvania Historical and Museum Commission, 1967): 44-45.

⁴⁶⁰ Lawrence Thurman to John W. Oliver, August 18, 1954, the administrative files of Old Economy Village, folder titled "Archives," Old Economy Village, Ambridge, PA.

employee.⁴⁶¹ There was, indeed, non-specific and little documentation surrounding the loans. Moreover, the collections management records held in Harrisburg challenge the notion the materials found their way into Arndt's custody as a sole consequence of loans and raise the possibility that he took even more than what the Commonwealth sent to him.

In the 1960s, Daniel B. Reibel, Director of Old Economy from 1965 to 1981, compared the WPA's catalog of Harmonist records with citations in Arndt's books and found that records that were supposed to be in Old Economy Village archives were not.⁴⁶² Reibel wrote to Stevens, now the Executive Director of the PHMC, and recounted his interactions with the scholar and his concerns:

When asked about these Dr. Arndt states categorically that these documents were here in 1939 and imagined that Duss had destroyed them... Within two months of denying he knew where these letter books were, he gave them to the State Archives with the statement to me that he had to take them to keep Duss from burning them. Along with them he gave some loose letters. He did not give all the letter books mentioned in his citations... This raises the question in my mind of just how much did Dr. Arndt take from the Archives and what he intends to do with it. He has a large collection of material on the Harmony Society which he has tentatively offered to several institutions. I suspect a great deal of our liberated material is among this collection. I wanted to ask him about this before allowing him into our archives again.⁴⁶³

The discovery and identification stages in this particular replevin case involved a number of challenges. First, Old Economy Village and the PHMC were confronted with the reality that the loan agreements were vague and that Arndt apparently took more than what the public officials transferred to him. Second, the PHMC had to attempt to distinguish which records in Arndt's

⁴⁶¹ Lawrence Thurman to John W. Oliver, August 18, 1954, the administrative files of Old Economy Village, folder titled "Archives," Old Economy Village, Ambridge, PA.

⁴⁶² Kyle R. Weaver, Editor's Preface to *Old Economy Village: Pennsylvania Trail of History Guide* (Mechanicsburg, PA: Stackpole Books, 2002), 4.

⁴⁶³ Daniel B Reibel to S.K. Stevens, October 26, 1968, the administrative files of Old Economy Village, folder titled "Archives," Old Economy Village, Ambridge, PA.

possession were government property and which were records that Arndt acquired through honest means.

The inconsistency in the understanding of the loan agreement across the agency and over time likely prolonged the period in which the records remained in the scholar's custody. Although Reibel was successful in recovering some records from Arndt, the negotiations in this replevin case primarily occurred later, following the scholar's death in 1991. Upon learning of the death of her husband, the Executive Director of the PHMC wrote to Blanca H. Arndt and requested the transfer of the government-owned papers back to the state. Mrs. Arndt's response revealed that she felt she exercised some rights over the records and, namely, held "the power to alienate the thing" to a chosen party. She replied that she intended to transfer the Harmony records, including now on loan for half a century, to another professor of German, Dr. Gerhard Freisen, and stated, "I am fully aware of the fact that Dr. Arndt's papers contain materials which were graciously loaned to him by the Commission. I also realize that these papers should be returned the Commission. However, Dr. Friesen will require these papers in order to complete Dr. Arndts' [sic] work."⁴⁶⁴ The PHMC, however, was unwilling to extend the length of the loan any further but still demonstrated a readiness to compromise during the negotiation phase of this replevin case. Brent D. Glass, PHMC Executive Director, said that although Mrs. Arndt could not transfer the records to the professor, they would, after receiving the records that were on loan to Arndt, "identify those items necessary for Dr. Freisen's continued research and determine the most appropriate way to reproduce those items for Dr. Freisen at no charge."⁴⁶⁵

⁴⁶⁴ Blanca H. Arndt to Brent D. Glass, PHMC Executive Director, January 22, 1992, Administrative Files of Ray Shepherd, "Arndt Folder," Old Economy Village, Ambridge, PA

⁴⁶⁵ Brent D. Glass, PHMC Executive Director, to Blanca H. Arndt, February 28, 1992, MG-185 Accessions Folder--Karl Arndt, Pennsylvania State Archives, Harrisburg, PA.

Staff of the PHMC, and specifically the administrators at Old Economy Village, did not recover all of the loaned materials directly from Arndt's widow. There are papers that have an even messier custodial history, finding their way into academic archives and the possession of other private parties through transfers by the Arndts. A receipt signed by Shepherd in 1991 reveals 67 documents from the materials on loan to Arndt first entered the University of Southern Indiana's archival collections before returning to Ambridge. It reads, "These materials had been in the temporary custody of USI. I [Shepherd] agree to place them immediately in their original repository with the Pennsylvania Historical and Museum Commission."⁴⁶⁶ The Commonwealth was forced to not only negotiate with Mrs. Arndt, but also to engage in discussion the University of Southern Indiana, which had collections from Arndt, and Clark University in Massachusetts, which was considering acquiring collections from Arndt. In these secondary replevin cases, however, the institutions cooperated fully with the Commonwealth. The archivist at the latter institution said that university policy would require the library to return any property to its rightful owner that Arndt did not possess title to should they enter the university's collection; Linda A Ries, remarking on her communications with the Clark archivist said, "Apparently they have acquired in the past papers of other professors who 'borrowed' materials from other institutions, and are familiar with this type of situation."⁴⁶⁷

Today, there is no indication in the finding aid that suggests that there are items in the Karl J. R. Arndt collection that were in the Commonwealth's custody and placed on loan to the scholar. When materials were recovered from Arndt, they re-entered the PHMC's collection as part of PHMC Manuscript Group 437, the Karl Arndt Collection of Harmony Society Materials,

⁴⁶⁶ Receipt of Transfer between Raymond Shepherd, Old Economy Village and Bette Walden, University of Southern Indiana, February 14, 1992, the administrative files of Old Economy Village, folder titled "Archives Correspondence – 1990-91," Old Economy Village, Ambridge, PA.

⁴⁶⁷ Memo from Linda R. Ries to Robert M. Druator, November 19, 1991, MG-185 Accessions Folder--Karl Arndt, Pennsylvania State Archives.

1794-1949 rather than rejoining PHMC Manuscript Group 185, the Harmony Society Papers, 1742-1951.⁴⁶⁸ This latter collection contains the materials that the PHMC (then the Pennsylvania Historical Commission) acquired from the surviving Harmonists in 1937, an acquisition that included those materials lent to and retained by Arndt. Arndt's perception of the records originally loaned to him as part of his personal collection of Harmony Society papers is partly perpetuated by the PHMC's processing decisions. The finding aid reads, "The majority of the materials in this collection were obtained by Dr. Arndt through a series of interlibrary loans, 1941-1943, from the Old Economy Village historic site while the remainder was collected independently by Dr. Arndt."⁴⁶⁹

This is a replevin case in which the creators of the records are private individuals and, because of this provenance, they are private papers. With the Commonwealth of Pennsylvania's acquisition of the Harmony Society papers in 1937, however, the papers became government property. As discussed above, this transfer did not eliminate John S. Duss's sense of personal ownership of the materials, nor did Arndt display recognition of Pennsylvania's ownership in his failure to return the loaned items during his lifetime. Instead, his actions are those of an individual who sees himself as the rightful owner and custodian. Having succeeded in persuading Stevens to loan the materials needed for his research, Arndt proceeded to treat the records from the PHMC's collection no differently than those he collected independently and through more legitimate means. This case provides insight to the psychology of collecting. Arndt's possessive disposition toward the records that he retained in his custody was born from the time he spent studying them and the connection that he felt with the material.

⁴⁶⁸ "Manuscript Group 437, Scope and Content Note, Karl Arndt Collection of Harmony Society Materials, 1794-1949," *PHMC*, accessed July 18, 2013, <http://www.phmc.state.pa.us/bah/dam/mg/mg437.htm>.

⁴⁶⁹ Manuscript Group 437, Scope and Content Note, Karl Arndt Collection of Harmony Society Materials, 1794-1949," *PHMC*, accessed July 18, 2013, <http://www.phmc.state.pa.us/bah/dam/mg/mg437.htm>.

The Eastern State Penitentiary Convict Affidavit Book

In 1821, the Commonwealth of Pennsylvania legislature approved the construction of a prison in the city of Philadelphia. Eight years later, the famed Eastern State Penitentiary opened, with its unique – and criticized – system of solitary confinement and hard labor.⁴⁷⁰ The focus of this replevin case is a “convict affidavit book” that spans the years of 1839-1850 and includes “inmates’ names, numbers and offenses, when they were released[,] and signatures from the inmates and the warden.”⁴⁷¹ The case of the alienated convict affidavit book is notable in that it is the sole example, located during this research, in which the PHMC involved the state court in its replevin efforts. Ultimately, the PHMC and E.G. Marshall & Associates, the private party in possession of the book, reached an agreement on custody. The agreement is probed in this section.

A brief that E.G. Marshall & Associates submitted to the court for summary judgment captures the circumstances under which the book came into the Philadelphia-based antiquities dealer’s possession. In 1999, the party purchased the convict affidavit book at an auction held by the auction house Samuel T. Freeman & Co. for \$800 and had no “notice of any claimed defect in seller’s title.”⁴⁷² In September of 2008, E.G. Marshall & Associates decided to list the book on eBay, with a starting bid price of \$5,000. It was then that the PHMC learned of book and its location.⁴⁷³

⁴⁷⁰ Negley K. Teeters, “The Early Days of the Eastern State Penitentiary at Philadelphia,” *Pennsylvania History* 16, no. 4 (1949): 262; Barbara Belbot, “Eastern State Penitentiary,” in *Encyclopedia of Prisons & Correctional Facilities*, ed. Mary Bosworth (Thousand Oaks, CA: Sage Publications, Inc., 2005), 272-274

⁴⁷¹ Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷² Respondent’s Memorandum of Law in Support of Motion for Summary Judgment, September 8, 2009, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷³ Respondent’s Memorandum of Law in Support of Motion for Summary Judgment, September 8, 2009, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

An event that followed the e-Bay posting and preceded the PHMC's seizure of the book exemplifies the inconsistent understanding of public records and ownership issues associated with them. Identifying the Eastern State Penitentiary as a potential bidder, E.G. Marshall & Associates contacted the Executive Director of the site via email and sent a link to the eBay post. The Executive Director responded with interest in the item and an expression of disappointment that E.G. Marshall & Associates had not contacted Eastern State Penitentiary prior to the e-Bay listing. She wrote, "We regularly purchase items that aid our interpretation of the historic site. This record book belongs in our collection." She does not suggest that the book is a public record of the state or encourage E.G. Marshall & Associates to contact the PHMC to inquire. Instead, the Eastern State Penitentiary placed a bid of more than \$10,000.⁴⁷⁴ It is unlikely that the Eastern State Penitentiary would have attempted to purchase the book if the staff considered the prospect of a state replevin action. Ignorance as to the possibility of the book's public nature is surprising, given that the site's staff would certainly be aware that the prison was a state institution.

Another party, however, outbid the Eastern State Penitentiary: the Commonwealth of Pennsylvania, using an eBay handle that effectively disguised the true identity. Upon the closure of the bidding period, two men arrived at the E.G. Marshall & Associates' place of business. Revealing themselves as Pennsylvania State Police officers and the parties behind the winning eBay bid. The officers requested to see the book and, upon Marshall's consent, they informed him that the book "was a historical record demanded by the Commonwealth of Pennsylvania."⁴⁷⁵ The officers seized the book and placed it in the custody of Pennsylvania State Police.⁴⁷⁶

⁴⁷⁴ Respondent's Memorandum of Law in Support of Motion for Summary Judgment, September 8, 2009, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷⁵ Respondent's Memorandum of Law in Support of Motion for Summary Judgment, September 8, 2009, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷⁶ Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

The decision by the PHMC to pursue the book, resulting in its seizure, is best deduced through the court opinion that dismissed the motions for summary judgment and called for a full hearing. “He indicated that the Commonwealth had never assented to any transfer, sale or abandonment of the Book, and never gave it to any party, and therefore, could not be rightfully possessed by a private party.”⁴⁷⁷ The “mode of loss,” in which the book escaped Commonwealth custody was, the PHMC argued, simple to surmise. “Because there was no evidence that the Book was stolen – not entrusted to another – or that it was in the Commonwealth’s possession after 1937 when the provision relating to the retention of records was added, Marshall contends that it is a good faith buyer in the ordinary course of its business, and its title is superior to that of the Commonwealth.”⁴⁷⁸

As the court acknowledged, this was a case in which there was no question that the convict affidavit book was a public record at the time of its creation.⁴⁷⁹ The Eastern State Penitentiary was a state prison and the records of the prison were state records. For the Commonwealth Court, however, there were two sticking points. First, the date of creation predated the origin of public records laws in Pennsylvania. Second, this is a case in which the private party’s “mode of acquisition” is known, but the PHMC’s “mode of loss” is based on limited evidence. The latter had implications for the PHMC’s ability to convince the Commonwealth Court to grant the agency summary relief.⁴⁸⁰

⁴⁷⁷ Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷⁸ Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁷⁹ Respondent’s Memorandum of Law in Support of Motion for Summary Judgment, September 8, 2009, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁸⁰ Rule 1532 of the Pennsylvania Code describes “summary relief” as follows: “At any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.” 12 Pa. Code §1532. A party who files a motion for summary relief is proposing to the court that the matter is clear and uncontested under the law and that a judgment should be filed in advance of a full hearing. In the case of *Pennsylvania Historical and Museum Commission v. E.G. Marshall &*

The judge's memorandum opinion indicates that the PHMC first learned that the defendant was in possession of the book through a listing on eBay. The PHMC argued that the aforementioned section 524 of Pennsylvania's Administrative Code, enacted in 1937, gives the agency the authority to determine the disposal of public records and identifies two potential fates for these materials: preservation as archival records or destruction. In the PHMC's interpretation of the law, private ownership of public records is not possible.⁴⁸¹

This case was complicated by the fact that the convict affidavit book is nearly a century older than Pennsylvania's codified retention and disposal procedure for public records. For this reason, the defendant argued that the Administrative Code is irrelevant. Unless the PHMC could demonstrate that the book was removed from the Commonwealth's custody or stolen from the Pennsylvania State Archives, the defendant argued that the court should recognize E.G. Marshall & Associates as a good faith buyer and rightful owner. Both parties sought summary relief from the judge, which would allow for a decision without a trial. The judge determined that he was unable to offer the summary relief either party requested and said it would be heard in a formal hearing.⁴⁸² Instead, the parties chose to reach an out of state settlement in December of 2009.

In the settlement, both parties asserted ownership of the book but agreed to file for the litigation to be dismissed with prejudice, meaning that neither would be able to bring the same matter before court in the future. The core of the agreement involved compensation. The PHMC consented to pay E.G. Marshall & Associates five thousand dollars as "settlement funds." The language in the settlement agreement refrains from characterizing this monetary transfer as

Associates, the PHMC petitioned the court to issue a summary judgment in favor of the Commonwealth's claim of ownership. E. G. Marshall & Associates also filed a motion for summary relief from the court, which would support the private party's ownership of the book and dismiss the PHMC's claims to it.

⁴⁸¹ Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

⁴⁸² Memorandum Opinion by Judge Pellegrini, *Pennsylvania Historical and Museum Commission v. E.G. Marshall & Associates*, 2009 Pa. Commw. 482.

payment for purchasing the book. In exchange for the settlement funds, E.G. Marshall & Associated agreed to “relinquish any and all legal or equitable interests or rights they have or claim to have in the Book.”⁴⁸³

V.D. SUMMARY

One state’s victory is not another state’s victory. Prior to the North Carolina Supreme Court decision in *State North Carolina v. B.C. West, Jr.*, autograph dealer Charles Hamilton predicted the demise of private collections should North Carolina successfully recover the bills of indictment bearing Hooper’s signature.⁴⁸⁴ This, of course, did not happen. Still, the influence of the *State of North Carolina v. B.C. West, Jr.* case was strong in the years following the North Carolina Supreme Court’s decision. There were instances in which state officials were able to recover records in the absence of case law and statute, even without a complete sense of the mode of loss. Dealers and collectors were aware of the ruling during the period when Baumann was employed by the state. Just as David Gracy mused about the impact of the opinion on the Texas State Archives’ recovery of a letter, it is not certain that North Carolina’s victory was the primary reason that the PHMC was able to recover The Baynton, Morgan, and Wharton Papers, the PHMC Minutes, and the book of excise in the years following.⁴⁸⁵ It is certainly doubtful, however, that it harmed the state’s claim.

⁴⁸³ Settlement Agreement and Mutual Release, Agreement between the PHMC with the Pennsylvania State Police and E.G. Marshall & Associates, November 20, 2009, obtained April 22, 2013 via records request to the PHMC.

⁴⁸⁴ Charles Hamilton, Autograph Dealer, to unnamed colleagues, December, 22, 1976; folder titled “Reaction after Supreme Court Decision,” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

⁴⁸⁵ David B. Gracy II, Director to the Texas State Archives, to William S. Price, Jr., December 1, 1977; folder titled “Correspondence;” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, State Archives of North Carolina, Raleigh, NC.

Given the replevin successes in Pennsylvania in the years after North Carolina's success, it would seem that the Commonwealth would benefit from case law of its own to draw upon. Case law, however, could hinder state replevin efforts if the court does not find in favor of the Commonwealth; such a ruling would influence future court decisions related to replevin and public records. Haury and his fellow officials were wise to settle the Eastern State Penitentiary case in the aftermath of the judge's dismissal of summary judgment. Based on the judge's Memorandum Opinion, victory for the Commonwealth was not a certainty.

There is a sharp difference in the case study of replevin in North Carolina and the case study presented in this chapter. The issue of monetary compensation, decidedly blocked from the replevin negotiations in North Carolina, is present in Pennsylvania and, in fact, appears to have become a more prevalent aspect of the replevin process in recent years. In the 1980 case involving the PHMC board minutes, Baumann was mindful of the language he used in reference to the \$50 compensation; it was a finder's fee. Three years later, in negotiating with Yarosz and his partner about another set of records, Baumann reasserted that the state was unwilling to purchase papers of a public agency. The language associated with such a payment was and remain deliberate. Even when the Commonwealth paid E.G. Marshall & Associates the considerable sum of five thousand dollars for the Eastern State Penitentiary convict book, it was called a "settlement fund" and not a payment.

Figure 4, which represents the replevin process, includes an arrow that points backwards from the *negotiation* to *selection* stages. The Commonwealth today has encountered cases in which it was necessary to reevaluate the decision to pursue a record because of resistance met in the negotiation stage. This was not observed in the North Carolina case, where the state

consistently succeeded in recovering the records that state employees identified as important to the collection.

There are two factors that aid North Carolina in its recovery efforts that would benefit Pennsylvania. The PHMC needs a cheerleader in the Office of Attorney General, one who is willing to, with the State Archivist, serve as a principal player in communicating and negotiating with private parties in possession of alienated records. In communications with private record holders, the North Carolina officials often succeeded by simply citing the statutory definition of “public record” and applying it to the records in question. Although they do not often implement the remedies provided for in sections 132.5 or 132-5.1, these sections add teeth to the ownership claims. Haury certainly recognizes the value that a replevin statute would lend to the Commonwealth’s recovery efforts. He expressed this in 2012, asserting, “The Commonwealth should pass a replevin or recovery of government records law which allows both state and local governments to recover their records which have been stolen or otherwise alienated from government custody.”⁴⁸⁶ For this, he needs more cheerleaders, individuals in both chambers of the Commonwealth’s legislature who are willing to advocate for the PHMC.

⁴⁸⁶ *Pennsylvania State Archives* 11 (Winter 2012), accessed August 3, 2012, http://www.portal.state.pa.us/portal/server.pt/community/access_archives_newsletter/20578/volume_11,_winter_2012/1060471#State%20Archivist%27s%20Message.

VI. THE VIRGINIA CASE

“Indeed, we know how difficult it is to obtain the return of archival materials in private hands.”⁴⁸⁷

The Library of Virginia is the third case in this study, selected largely because of the level of access to archival records that provide insight into the replevin tradition and processes in the Commonwealth of Virginia. This chapter is largely a historical look at replevin, a consequence of a dip in replevin activities that followed a Virginia court opinion in the early 1990s.

Like North Carolina and in contrast to Pennsylvania, Virginia is working within a legal environment that should be beneficial to replevin efforts. George Bain, in his 1983 analysis of state public records laws, categorized Virginia’s replevin law as “explicit, thorough, and forthright in nature.”⁴⁸⁸ Unlike replevin in North Carolina however, efforts to recover records in the Commonwealth of Virginia are, today, infrequent. While the Pennsylvania State Archives may indeed benefit from having a replevin statute to bolster claims, what emerges from this study is an observation that statute and case law are not an antidote to the complexities that characterize the question of ownership.

⁴⁸⁷ William J. Van Schreevan, Head Archivist of the State Library of Virginia, to Randolph G. Adams, Director of William L. Clements Library at the University of Michigan, February 3, 1941; Box 3, Replevin Files, 1914-1992; Virginia State Library and Archives, Office of the State Archivist; Library of Virginia State Records Center, Archives Annex, Richmond, VA (collection hereafter cited as Replevin Files, 1914-1992).

⁴⁸⁸ Bain, “State Archival Law,” 164, 167.

VIA. THE MEANING OF PUBLIC RECORD IN VIRGINIA

Like the chapters before, the law is the starting point for examining the meaning of public record in Virginia. The Public Records Act (Title 42.1, Chapter 7 of the Code of Virginia) establishes the Library of Virginia's authority as it relates public records management and attempts to define both what a public record is and what it is not. This latter aspect of the statute has not eliminated the variances in interpreting the public and private divide, but is addressed here, along with the court opinions that have played a further role in fixing the meaning of "public record."

Virginia's public records statute differs from those that guide the actions of the other two states in that it defines both "private record" and "public record." Both definitions are included here for comparison:

'Private record' means a record that does not relate to or affect the carrying out of the constitutional, statutory, or other official ceremonial duties of a public official, including the correspondence, diaries, journals, or notes that are not prepared for, utilized for, circulated, or communicated in the course of transacting public business...

'Public record' or 'record' means recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business. The medium upon which such information is recorded has no bearing on the determination of whether the recording is a public record.

For purposes of this chapter, 'public record' shall not include nonrecord materials, meaning materials made or acquired and preserved solely for reference use or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications.⁴⁸⁹

The definition of "private record" codifies what may seem self-evident: a person who holds a public office is able to produce documentation that is of a personal nature. Just as a federal court

⁴⁸⁹ Code of Virginia § 42.1-77.

determined that William Clark’s journals, kept during his famed expedition, were his personal records, contemporary government employees in the Commonwealth of Virginia have ownership over documentation that falls outside of the responsibilities designated by law, policy, and official position guidelines. Captured in this definition is the criterion used in determining whether a public official’s records are public or private: the context under which it was created.

“Public record,” as defined by this chapter of the code, includes elements common to statutory definitions of the term.⁴⁹⁰ A public record documents an official action by a public employee or by a Commonwealth agency and can be recorded on any medium. Neither of these aspects of the definition is unique to the Commonwealth of Virginia’s use of the term. In a pamphlet published by the Library of Virginia, the agency crafts a series of questions to use in identifying whether a record is public or private:

- “Did the agency require creation or submission and maintenance of the document?”
- Was the document used to conduct or facilitate agency business?
- If the document is a draft or preliminary document created for background or a similar purpose, does it contain unique information that explains formulation of significant program policies and decisions?
- Was the document distributed to other offices or agencies for formal approval or clearance?
- Is the document part of an electronic information system used to conduct government business?”⁴⁹¹

If any of these questions are answered in the affirmative, the Library of Virginia advises the pamphlet user that the record is public property.

⁴⁹⁰ The Code of Virginia includes additional chapters in which “public record” is defined. The Virginia Freedom of Information Act (Title 2.2, chapter 37 of the Code) provides a definition of public record that differs from the Public Records Act definition in language, but not content. The Commonwealth of Virginia avoids using “public record” as a synonym for “open record,” as is the case in Pennsylvania’s Right to Know Law.

⁴⁹¹ Library of Virginia, “A Guide to the Virginia Public Records Act” (Richmond, VA: Library of Virginia, c. 2006): 7-8.

Notably, the Virginia Public Records Act characterizes a “nonrecord” as constituting duplicates and publications printed by the agency. The above definitions apply to the Commonwealth of Virginia’s replevin statute, found in sections 42.1-89 and 42.1-90. Exempt from these sections would be two categories of documentation: private records and “nonrecords.”⁷

The statutory definition in section 42.1-77 of the Virginia Public Records Act, however, was enacted in 1976 and this date of codification has implications for the Library of Virginia and county repositories in their recovery efforts. In the 1992 opinion in the case of *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, Judge William J. Person, Jr. cited case law affirming that a statute does not apply retroactively if doing so “would impair vested rights,” unless the Virginia legislature includes an express provision in the statute.⁴⁹² The Virginia Public Records Act definition, Person asserted, is “broader” than the common law definition, which he determined was created by 19th century case law – specifically, the 1874 case of *Coleman v. Commonwealth*. Because the 1976 statutory definition is more encompassing than the common law definition, the court found that it could not apply the former to the question of ownership of seventeenth and eighteenth century records, presented in the case of *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*.⁴⁹³

While section 42.1-77 of the Virginia Public Records Act defines public records as records “produced, collected, received or retained” in carrying out the official activities of a government office, *Coleman v. Commonwealth* focuses on the act of keeping as the litmus test in identifying whether a record is public in nature. Person interpreted the common law as follows:

[A public record] is ‘a written memorial made by a public officer authorized by

⁴⁹² Person cited the ruling in *Booth v. Booth*, 7 Va. App. 22, 26, 371 S.E.2d 569, 572 (1988).

⁴⁹³ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

law to perform that function and intended to serve as evidence of something written, said or done.’ He must have authority to make it; but that authority need not be derived from express statutory enactment. Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and *when kept, it becomes a public document* - a public record belonging to the office and not the officer; is the property of the state and not of the citizen and is in no sense a private memorandum.⁴⁹⁴

Under the principle of *stare decisis*, Judge Person’s opinion has implications for the definition of public records used in future cases heard before the Virginia courts. The concepts of “binding authority” and “persuasive authority” are relevant here. A decision in a circuit court, the 9th circuit of Virginia in this case, binds those courts within the same circuit and lower district courts; Person’s decision regarding the definition of public record must guide these courts if a similar dispute reaches them.⁴⁹⁵ For those courts above the circuit courts – the Virginia Court of Appeals and the Virginia Supreme Court – the circuit court opinion will have persuasive, but not binding, authority.⁴⁹⁶ As a result, if a replevin dispute reaches a Virginia court, the act of creation or receipt by a public official may not be sufficient enough to demonstrate that a record is public in nature. If a Virginia court abides by the principle of *stare decisis*, records that predate the 1976 VRPA definition of “public record” should be evaluated against the common law definition, which focuses on the act of retaining a record as the determinant of its public status.

Over time, there have been changes to the requirements that guide what county clerks must

⁴⁹⁴ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992). Emphasis added by author.

⁴⁹⁵ Virginia circuit courts hear both criminal and civil cases. With civil proceedings, “the circuit court has concurrent jurisdiction with the general district court over claims from \$4,500 to \$25,000 and exclusive original jurisdiction over almost all claims exceeding \$25,000.” General district courts are lower trial courts for civil and criminal cases. Office of the Executive Secretary, Supreme Court of Virginia, “The Circuit Court,” last revised July 2011, accessed January 29, 2014, <http://www.courts.state.va.us/courts/circuit/circuitinfo.pdf>.

⁴⁹⁶ Roscoe Pound, “What of Stare Decisis?” *Fordham Law Review* 10, no. 1 (January, 1941): 6; Robyn Painter and Kate Mayer, “Which Court is Binding? Mandatory vs. Persuasive Claims” (Washington, D.C.: Georgetown University Law Center, 2004), accessed January 28, 2014, http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/WHICH_COURT_IS_BINDING_Painter-and-Mayer-FINAL.pdf.

retain. Public officials must consider the requirements that existed at the time of the record creation.

The context and the laws under which the records were created are key to identifying whether a record meets the parameters under the common law definition. In deposing State Archivist Manarin, Hamilton's attorney focused on the law at the time of record creation and consciously steered the testimony away from the law at the time of the replevin dispute:

Reiss: Did the law specifically require the clerk to retain plots or surveys.
Manarin: No, they were retained, and they are required by law to be retained now.
Reiss: No sir. I'm not talking about now...
Reiss: Other than original copies of wills, Doctor, do you know of any other document that the clerks were required by law to retain?
Manarin: Not in Middlesex, no, sir.⁴⁹⁷

The attorney for the defendant placed the onus on the local government to demonstrate that the records are public and not his client's responsibility to demonstrate that the records are private. Judge Person asserted this in his *Middlesex* opinion, stating that "In order to prevail under the Virginia Public Records Act, petitioners must prove, by a preponderance of evidence that each individual document is a public record." He expected the petitioner, Middlesex County, to situate the records within the elements of the test.⁴⁹⁸ Conversations with a party at the Library of Virginia affirmed that the burden falls to the government to demonstrate ownership if a case reaches court, rather than the burden resting on the defense.⁴⁹⁹

Person applied the common law definition to the 81 records that Middlesex County claimed as the property of the public. For example, when determining the rightful owner of a bill that the county claimed, Person found that it "is a memorandum of a transaction between private

⁴⁹⁷ Manarin Dep. 28:20-24, 29:22-25, April 30, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Box 1, Replevin Files, 1914-1992.

⁴⁹⁸ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

⁴⁹⁹ Lyndon H. Hart, III, Director of Description Services at the Library of Virginia, interview with author, December 17, 2013, Library of Virginia, Richmond, VA.

parties” and that the petitioners failed to demonstrate “by a preponderance of the evidence, that the document was kept in and wrongfully removed from the clerk's office.”⁵⁰⁰ The clerk’s docketing on the bill was evidence only that it had passed through his hands. It was not, in the eyes of the court, sufficient evidence to illustrate the clerk was required to retain bills. This item was among those returned to Hamilton. Person’s application of the definition to the records resulted in some of the materials returning to the petitioner, Middlesex County. The judge returned three accounts to the county, which he defined as records that were “created by individuals empowered by and sworn to the court to administer estates.”⁵⁰¹ He cited the statute contemporary to the creation of the accounts that required them to be filed with the court.⁵⁰²

In short, the judge, who had to carefully review the records individually in their relevant statutory and definitional context, is evidencing that the identification of public records can be complex, a process in which an individual may have to assume the role of a legal historian. Person, by issuing his opinion, does provide a guide that both public officials and private collectors can draw upon in claiming or defending ownership. If another county clerk in Virginia learns that a dealer is selling accounts similar to those Middlesex County recovered, he or she can use the judge’s decision to support a request for return. A private party can use the judge’s opinion regarding the ownership of the bill to counter a public official’s claim to a similar record.

The advantage of having this case law, for both the Library of Virginia and private collectors, is that it ameliorates some of the ambiguity that surrounds the public versus private

⁵⁰⁰ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

⁵⁰¹ *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

⁵⁰² *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

nature of certain record types. “Some,” however, is the operative word here. Even if a public official is able to claim that a record meets the conditions of Person’s test, the party in possession of the record can argue that a public official willingly discarded or transferred ownership of the record.

VI.B. THE REPLEVIN PROCESS IN VIRGINIA

The issue of alienated records has concerned library leadership in Virginia for more than a century. In 1905, John P. Kennedy, a former State Librarian, made his first report to the Library Board concerning the newly formed Division of Archives and History. Kennedy identified two groups of private parties who were then in possession of state records. The first, he said were the descendents of the “prominent men” of Virginia’s formative years who “in many instances value [the records] highly and have preserved them with the greatest care.”⁵⁰³ Kennedy praised the voluntary contribution of these individuals to the formation of Virginia State Library’s “present rich collection of manuscripts.”⁵⁰⁴ He spoke less warmly of the members of the second group, lamenting that “papers (imperishable monuments to a great man, if properly cared for) have been sold to Northern collectors for small sums and scattered to the four winds, destroying forever their value as a historical unity, and precluding permanently their use to the student.”⁵⁰⁵ Whereas Kennedy implied that the Library had cultivated relationships with the preceding group members, knew what records were in these private collections, and trusted the records were well

⁵⁰³ John P. Kennedy, *Virginia State Library: Calendar of Transcripts, Including the Annual Report of the Department of Archives and History* (Richmond, VA: Davis Bottom, Superintendent Public Printing, 1905): 5, accessed through Google Books.

⁵⁰⁴ Kennedy, *Virginia State Library*, 5.

⁵⁰⁵ Kennedy, *Virginia State Library*, 5.

preserved, he did not say the same for the latter. In his mind, the records that entered the anonymous private collections were lost to the state for good.

There is no explicit use of the term “replevin” in Virginia statute and it is not expressly used in the court documents from the Middlesex County case. Seldom does the word actually appear in the records that form the Office of the State Archivist’s “Replevin Files, 1914-1992” series. When it does occur, it is primarily observers from outside the Library of Virginia who are using it.⁵⁰⁶ The Library of Virginia’s processing of the Office of State Archivist’s papers is revealing of the institution’s interpretation of the term “replevin.” The files that are included in the “Replevin” series tell stories of the attempted or successful recovery of public records, stories that follow the legal process outlined in sections 42.1-89 and 42.1-90 and stories that do not involve the circuit court system.. The creators of the records within the series vary in the language they use to describe recovery cases; in addition to recovery of public records, phrases like “retrieval of public records,” “laying claim to public records,” “securing public records,” and “attachment” emerge from the records.⁵⁰⁷ There is some reference, albeit limited, to recovery on the Library of Virginia’s website. Figure 5 highlights examples of records that “recently appeared for public auction, but have returned to the appropriate government agency.”⁵⁰⁸

⁵⁰⁶ For example, a bookseller wrote to Manarin about the Middlesex County case and said, “If you are aware of any other state archivists who have been involved in replevin cases in recent years, I would like to make contact with them as well.” To the outside collector, the case had the characteristics of a replevin action. Jennifer S. Larson, Yerba Buena Books, to Louis H. Manarin, October 22, 1991; Box 1, Replevin Files, 1914-1992.

⁵⁰⁷ Black’s Law Dictionary defines “attachment” as “the act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons, or other judicial order, and bringing the same into the custody of the court for the purpose of securing satisfaction of the judgment ultimately to be entered in the action” Black’s Law Dictionary 126 (6th ed. 1990). As a legal concept, it differs from replevin in two primary ways. Replevin technically involves a claimant paying a bond and holding the property until the court determines ownership. When property is attached, it is not necessary for the claimant to pay a bond and the court holds the property until a decision about ownership is made. Brian A. Blum, *Bankruptcy and Debtor/Creditor: Examples and Explanations*, 4th ed. (New York: Aspen Publishers, 2006): 48-50.

⁵⁰⁸ Library of Virginia, “Examples of Virginia Public Records, accessed February 10, 2014, <http://www.lva.virginia.gov/public/examplespr.htm/>



Examples of Virginia Public Records

Examples of records required by law to be held by the Commonwealth of Virginia or local government that recently appeared for public auction, but have been returned to the appropriate government agency.

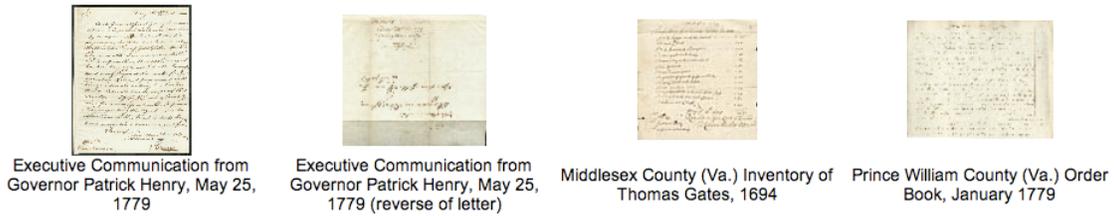


Figure 5: Screenshot of Library of Virginia’s “Examples of Virginia Public Records,” a set of four images of three documents that have been recovered. The identifying information seen here is the extent of what visitors to this page can learn about the records.

When classifying cases as “replevin,” the Library of Virginia does not draw a line between recovery of public records stolen from a repository and public records that escaped the custody of a government office through another means. This is in contrast to the State Archivist of Pennsylvania’s exclusion of the recovery of stolen public records from his use of the term. When asked in a deposition whether he had “any experience with the retrieval of records” that were created by the colonial government, he cited the case of Larry Ivan Vass, a man who removed records from the Library of Virginia and county courthouses, and the recovery of records he stole.⁵⁰⁹ The catalog entries for records that Vass stole and that the Library of Virginia recovered are marked with references to “replevin.”

Replevin of public records is, as a practice, constitutional in the Commonwealth of Virginia. In the early 1990s, the Virginia court system was asked to weigh the constitutionality

⁵⁰⁹ Manarin Dep. 41, April 30, 1991; Box 1, Replevin Files, 1914-1992.

of sections 42.1-89 and 42.1-90 of the Virginia Public Records Act, the sections that empower the Commonwealth to seize public records in private hands. In *Middlesex County et al. vs. Jack Hamilton d/b/a Hamilton's Book Store*, Rick Reiss, attorney for the Williamsburg-based dealer, argued that the Virginia Public Records Act is unconstitutional in that it “authorizes a taking but makes no provision for just compensation.”⁵¹⁰ He continued, “Clearly there’s been a taking [in this case]. When a sheriff comes into your place of business with an order and walks out with 81 documents that are yours, there’s certainly been a taking. The Supreme Court has defined the taking as when the government substantially disturbs the owner’s use and possession of his property.”⁵¹¹ Judge William L. Person, Jr., however, did not subscribe to Reiss’s argument. He found that the Virginia Public Records Act does not violate the United States Constitution or Virginia Constitution, both of which require that the government compensate a private party when his or her private property is seized for public use. Person determined that “The Virginia Public Records Act does not provide for the taking of private property[;] it simply demands that materials are returned to the Commonwealth and proper custodians upon a determination that they are public records.”⁵¹² A public official’s authority to seize a record under section 42.1-90 is not in violation of personal property rights.

To the Library of Virginia and custodians of public records in Virginia, “replevin” refers to a constitutional practice. It is a term that encompasses any effort by a public official to recover public records that are outside public custody. This section generalizes the shape of the replevin process in the Commonwealth. Unlike the preceding chapters, replevin activities in Virginia have

⁵¹⁰ Trial Tr. 10:20-21, February 26, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Box 1, Replevin Files, 1991-1992; Library of Virginia, Office of the State Archivist; Library of Virginia, Richmond, VA (collection hereafter cited as Replevin Files, 1991-1992).

⁵¹¹ Trial Tr. 10:23-25, 11:1-3, February 26, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Box 1, Replevin Files, 1991-1992.

⁵¹² *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, 28 Va. Cir. 283 (Cir. Ct. of City of Williamsburg and James City County 1992).

largely focused on county records, but as anticipated, there are few, to use the words of the Director of Description Services “real cases” involving recovery. A “real case” would involve the Office of the Attorney General or a county attorney and would take the form outlined in section 42.1-89 and, if seen as necessary, section 42.1-90. There has not been a court case in Virginia focused on the recovery of public records since *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store* in 1992.

The more informal cases, those that do not involve the court, are today relatively rare as well. Lyndon H. Hart, III, Director of Description Services at the Library of Virginia, estimated that there are two or three recovery cases in Virginia annually.⁵¹³ A survey of fifty current circuit court clerks supports Hart’s comments about the rarity of these cases.⁵¹⁴ Of the eighteen who responded, only one clerk described an experience in which she recovered a public record that was in private custody.⁵¹⁵

This section and the case studies that follow are largely built from an analysis of archival records and discussions with Lyndon H. Hart, III, Director of Description Services at the Library of Virginia. A caveat is necessary here. While there is the statute that outlines how a public official can petition the court for ownership of a record, there is no internal, written procedure to guide how public officials should move forward with recovery that does not involve an application of section 42.1-89 and section 42.1-90 of the Virginia Public Records Act. Practices

⁵¹³ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵¹⁴ The researcher emailed fifty Virginia circuit court clerks on February 2, 2014 and inquired whether they had been involved in any efforts to recover public records in private hands and, if they had, to describe the case or cases. There were large variances in the range of years that the respondents held office. One clerk said she became clerk on January 1, 2012, while another has held office for 25 years.

⁵¹⁵ The Nottoway Circuit Court clerk recounted the following case: “The closest occurrence that I recall is having to request an individual to produce an original Last Will and Testament of a man who resided in Nottoway County prior to his death. If memory serves me, the man had been living with a girlfriend, and his children from a prior marriage informed me that he had a Last Will and Testament located in his home or in a safety deposit box, both of which were shared with the girlfriend. I wrote a letter to the girlfriend and requested that she bring the will into my office by a certain date - she complied and the will was probated.” Nottoway Circuit Court Clerk, Email to author, February 3, 2014.

change and decisions vary when they are not bound by policy. It was evident, however, in studying the archival records, that there are elements that have carried over from earlier cases to modern day practice – namely, the “care and keeping” compensation that is often included as part of the negotiation phase.

Discovery: Like the states in the preceding chapters, discovery today occurs when a public official sees a record that he or she believes to be public property for sale in an auction house catalog or on eBay. Whether the individual who makes the discovery is an employee of the Library of Virginia or is a county clerk can influence the steps that follow. At the Library of Virginia, it is generally the collections development archivist who spends time with auction catalogs and eBay. If he discovers what he believes is a state record, he will alert the Director of Description Services, who will work to identify whether the questionable record is public property. If the record appears to be a local record, the collections development archivist will notify the Head of Local Records at the Library of Virginia. The individual in this position either passes the discovery onto a relevant local official, such as the clerk in the county where the record was either created or received, or does research to identify whether the record is public property.⁵¹⁶

If it is a clerk who discovers a circuit court record, he or she can, under the Virginia Public Records Act, file a motion with the court system for its recovery or attempt to recover the record without a formal filing. They may choose, however, to seek guidance from the Library of Virginia staff upon making the discovery. One circuit county clerk who has held office for eight years said that she has not been involved in any recovery cases, but offered insight into the course of action she would take upon discovering an out-of-custody record. She would determine

⁵¹⁶ Lyndon H. Hart, III, interview with author, December 17, 2013. At the time of this research, the position of Head of Local Records was vacant.

whether the record is a record that belongs in her custody and, if it is, she would reach out to the Library of Virginia staff for guidance about moving forward with a claim.⁵¹⁷

There are cases in which the party in possession of the questionable records brings them to the attention of the Commonwealth directly. A dealer, for example, may approach the Library of Virginia to inquire about the provenance of a record because he or she may want to avoid getting embroiled in a later dispute. Former State Archivist Manarin, for instance, made reference to dealers who contacted him out of “apprehension” that they may be holding public records.⁵¹⁸ Alternately, a dealer may not be aware of laws that may pertain to records in his or her custody and view the Library of Virginia or locality as a potential buyer. The case of the Journal of the Virginia Convention, probed in detail below, is an example of the latter.

Identification: The discovery of a suspicious record and the confident identification of it as public property do not occur concurrently. Hart explained that if the Library of Virginia discovers a record that appears to belong in the archives, the staff contacts the seller and request a photocopy of the reverse side of the document. He remarked, “Oftentimes in the catalog [or on the eBay posting], they’ll only show the front side. The docketing information is generally on the back. That’s where we might see something that identifies [it as a public record].”⁵¹⁹ A photocopy, then, can be used as an aid for identifying a record as either public or private. Docketing, generally located on the back of paper, can serve as a clue that supports a claim for public ownership, though the judge’s decision in *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store* suggests that a court may require additional evidence that the record meets the definition of public record.⁵²⁰

⁵¹⁷ Culpeper County Circuit Court, Email to author, February 4, 2014.

⁵¹⁸ Manarin Dep. 11:11-14, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵¹⁹ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵²⁰ Docketing, as used in this context, refers to the clerk’s notation on the record.

The depositions entered into evidence in the *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store* provide historical insight into how public officials approached determining whether records are public and the resources that can assist them in doing so. Louis H. Manarin addressed modes of discovery and the initial steps toward identification. He stated, “If I am informed of the sighting of a record that may be public in a catalog for sale or if I, in examining a catalog of documents for sale, discover what I feel is to be a public record, then we will initiate correspondence to the dealer to inquire and to seek copies of the documents to verify if they are public records.”⁵²¹ The photocopy is again touted as a tool for identification, though it is the only a preliminary tool and not a substitute for an examination of the original. The attorney for the defense questioned Manarin about the steps taken if, upon viewing copies, his suspicions as to the public nature of the records is confirmed. Manarin said he or the appropriate public official would ask the private party to facilitate an examination by the Library of Virginia or the locality, either by bringing the records to the public office or transferring them for a period.⁵²² Seizure was, during Manarin’s tenure, the tack that was taken only if the private party refused to cooperate with the Library of Virginia’s request to examine the records.⁵²³ The importance of viewing the original was raised in case heard in the Middlesex County circuit court. The county’s attorney stressed the necessity to have the records transferred from the courthouse, where they were held, to the Library of Virginia for a period of 60 days.⁵²⁴ While Manarin saw the records in Hamilton’s store, he did not have the opportunity to conduct a sufficient examination of the originals and “definitively identify them as being public records.”⁵²⁵

⁵²¹ Manarin Dep.11:15-21, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵²² Manarin Dep. 11:22-25, 12:2-5, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵²³ Manarin Dep. 12:10-13, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵²⁴ Trial Tr. 2:16-25, February 26, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Replevin Files, 1991-1992.

⁵²⁵ Manarin Dep. 15:5-10, April 30, 1991; Box 1, Replevin Files, 1914-1992; Trial Tr. 14:11, February 26, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Box 1, Replevin Files, 1991-1992.

The Hart and Manarin depositions, along with an internal memo from Hart to Manarin, provide insight into identification approaches and tools. Hart’s memo outlines an authentication approach, a diplomatics strategy for first determining whether a local record in question is an original. With local records, Hart’s approach involves a consideration whether the clerk’s name on the record is contemporary to the purported date, whether there are original seals present, and whether there are handwritten phrases such as “examined, order recorded, [and] recorded and examined.”⁵²⁶ He offered similar testimony in court. When Hamilton’s attorney questioned whether there is a “step-by-step protocol” for determining whether records are public, Hart referred to his method of physically examining the records for authenticity and context and framed his response within identification of local records. Upon identifying a record as an original, Hart’s focus is directed to evidence of recordation, or evidence that the clerk filed the records.⁵²⁷

In his deposition, Manarin responded to a similar question as follows: “In determining whether they are public records, there are things that you examine the document for: recordation, information, the nature of the document as to whether it’s a will, a deed, emancipation, an inventory, and the styling of the document, and the laws as to whether it’s required by law to be maintained, and also if it had, by any action of the Court, been maintained and retained by the Court.”⁵²⁸ Here, Manarin pointed to the record’s structure and content as tools for identifying whether it is public or private in nature, but pointed to the importance of relevant statute as well. The noting of statutes contemporary to the origin of the record was, in the Middlesex County case, among the most pertinent tools in arguing the public nature of the contested records and

⁵²⁶ Memo, Lyndon H. Hart to Louis H. Manarin, February 14, 1991; Box 4, Replevin Files, 1914-1992.

⁵²⁷ Hart Dep. 8:17-23, April 30, 1991; *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*; Box 1, Replevin Files, 1914-1992;

⁵²⁸ Manarin Dep. 8:22-25, 9:1-4, April 30, 1991; Box 1, Replevin Files, 1914-1992.

demonstrating that clerks were required by law to retain them. In addition to using the Code of Virginia, Hart described referencing *Hening's Statutes at Large* and *Shepherd's Continuation of Hening's Statutes*, published collections of colonial and early American statute and case law.⁵²⁹

Selection: The 1970s was a decade of activity in the area of replevin. State legislatures in Virginia and North Carolina alike added replevin statutes to state records laws and the landmark case of *State of North Carolina v. B.C. West, Jr.* sparked discussion about ownership and public records in publications and on the conference circuit. In the case against Larry I. Vass, who was found guilty of grand larceny of historical documents in 1972, Church offered testimony on the Library of Virginia's decisions to pursue Commonwealth records in private hands. During this decade of replevin activity, it would seem that Church's position was comparable to the one espoused in North Carolina today: if the Commonwealth discovered a Virginian record for sale, the Library of Virginia would pursue that record. He testified, "Any paper that comes up for sale at an auction house in New York that is clearly the Commonwealth or the State[']s], we lay claim to it and it is returned...Any dealers' catalogs that we find that lists a document that is ipso facto property of the Commonwealth we lay claim to."⁵³⁰ While it may have been the case then that the Library of Virginia claimed only those records that the archives staff viewed as having long-term archival value, Church did not reference the nuances of selection in his testimony. The State Archivist's administrative records do not provide faithful evidence of the frequency of replevin actions during Church's tenure; it is not possible to know whether there are more stories from the 1970s than those recorded and preserved in the Library of Virginia.

⁵²⁹ Hart Dep. 8:17-23, April 30, 1991; Box 1, Replevin Files, 1914-1992; Wm. H. Martin, "Hening and the Statutes at Large," *The Virginia Law Register* 13, no. 1 (1927): 25-37. Hening's volumes were published in the years between 1809 and 1823 and focused on the period of 1619 to 1792. Shepherd's *Continuation*, published in 1835 and 1836, is a three-volume supplement to the period covered in Hening's *Statutes at Large*.

⁵³⁰ Tr. 66:12-14, 20-22; November 13-15, 1974; *Commonwealth v. Larry I. Vass*, Box 3, Larry I. Vass Case Files; Office of the State Archivist; Library of Virginia, Richmond, VA (collection hereafter cited as Vass Case Files).

Twenty years later, in another court testimony in the case against Jack Hamilton, Manarin expanded the issue of selection, this time adding parameters to what records the Library of Virginia pursued. The dealer's attorney aimed to learn "what guidelines are established to tell the Archives and Records Division which specific documents to seize."⁵³¹ Manarin responded by citing records retention and disposition schedules, explaining, "there are guidelines through these retention and disposition schedules as to which records are permanent."⁵³² While Manarin stopped short of explicitly stating that his agency targeted only permanent records in private hands, he implied as much by drawing a connection between the records schedules and the "guidelines" for record claims. When asked about guidelines that help public officials determine which records to pursue, Hart, in his deposition for the same case, stated, "If they're public records, we would want them...Either we want them or to see them in the courthouse."⁵³³ Like Manarin, however, he went on to reference records schedules and their influence on selection. He explained that, in Virginia, any public record created prior to 1904 is characterized as archival and would therefore be a recovery "priority."⁵³⁴

Manarin's same testimony in 1991 bound the criteria for selection even further. When questioned by Hamilton's attorney about whether Colonial Williamsburg and the Virginia Historical Society possessed Commonwealth public records, Manarin responded in the affirmative.⁵³⁵ The attorney further pressed to learn whether the Library of Virginia had made any attempt to secure the transfer of the records from the repositories.⁵³⁶ "No," said Manarin, indicating that in these cases either he, the State Librarian, or the locality decided not to pursue

⁵³¹ Manarin Dep. 7:6-8, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³² Manarin Dep. 8:6-8, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³³ Hart Dep. 26:13-14, 17-18, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³⁴ Hart Dep. 27:12-15, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³⁵ Manarin Dep. 13:10-17, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³⁶ Manarin Dep. 13:23-25, 14:1-4, April 30, 1991; Box 1, Replevin Files, 1914-1992.

the records.⁵³⁷ He continued, “Those records are in the possession of a repository and are accessible to the public, and they’re being cared for.”⁵³⁸ The decision to allow records in archival collections to remain in those archival collections is reflective of the replevin priorities that Peterson and Peterson outline in their *Archives & Manuscripts: Law*. In instances in which the government archives learns of a private repository’s possession of a public record, Peterson and Peterson suggest that the former should ensure that the record is available for research and, if it is, may consider leaving it in the latter’s custody.⁵³⁹ This continues to be the practice of the Library of Virginia.⁵⁴⁰

Hart’s discussion of the Library of Virginia’s approach for selecting which records to pursue is reminiscent of Boles and Young’s black box model. Archivists, Boles and Young argue, should consider the value-of-information, the costs-of-retention, and the implications-of-the-appraisal-decision. In his discussion of the recovery priorities, Hart described the Library of Virginia’s focus on the evidentiary value of alienated records through a hypothetical example. If the public officials learn of a land grant that Thomas Jefferson signed and that is in private custody, they likely would not pursue it. For Boles and Young, an assessment of the value-of-information involves considering whether there is repetition of the record content in other materials.⁵⁴¹ The official record of a land grant is the copy that the clerk transcribed and recorded; if the clerk’s copy is in public custody, a duplicate that bears Jefferson’s signature – though it would have financial and intrinsic value -- would not be a priority for recovery. Hart

⁵³⁷ Manarin Dep. 14:22-23, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³⁸ Manarin Dep. 14:7-10, April 30, 1991; Box 1, Replevin Files, 1914-1992.

⁵³⁹ Peterson and Peterson, *Archives & Manuscripts: Law* (Chicago: SAA, 1985): 92. It should not be assumed that cases involving recovery of public records in private collections do not occur. A letter from the State Archivist of Indiana to Manarin made reference to Indiana’s success in recovering state records that were in the University of Chicago Library’s collection in 1946, a recovery effort that had the support of Indiana’s Governor and Attorney General. John J. Newman, State Archivist of Indiana, to Louis H. Manarin, State Archivist of Virginia, October 12, 1977; Box 5, Replevin Files, 1914-1992.

⁵⁴⁰ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁴¹ Boles and Young, “Exploring the Black Box,” 125.

summarized this core aspect of the selection decisions with a question: “is this information available elsewhere in the archives?”⁵⁴² Building a collection of signatures is not the mission of the Library of Virginia.

Boles and Young conceptualize “costs-of-retention” as an evaluation of the costs of storage and processing of the records; it involves “an estimate of the potential costs of the repository of the appraisal recommendations.”⁵⁴³ For replevin decisions, there is a different cost-benefit consideration. Because, as described below, the replevin process in Virginia typically involves a “care and keeping fee,” the available purse is a factor in the decision. Hart said, “If we had unlimited funds then, we’d go after everything we thought was ours. But since we don’t, we try to go after things that are the best use of our money.”⁵⁴⁴

As addressed above, rarely do archives staff at the Library of Virginia and circuit court clerks engage in replevin activities today. There are instances when staff at the Library of Virginia learns that there is what they believe to be a public record for sale and choose to purchase the record from the eBay seller or the dealer if the cost is low. The thinking behind this practice is that the cost of the record outweighs the cost of the efforts to negotiate for the recovery, particularly when the record is out of state and outside the reach of sections 42.1-89 and 42.1-90 of the Virginia Public Records Act.⁵⁴⁵ Such a purchase is distinct from what this dissertation understands as a replevin action and is an alternate path to the course of recovery outlined here. It is similarly distinct from the practice of offering a “care and keeping” compensation to the private party, discussed below as a negotiation tactic.

⁵⁴² Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁴³ Boles and Young, “Exploring the Black Box,” 133.

⁵⁴⁴ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁴⁵ Lyndon H. Hart, III, interview with author, December 17, 2013.

Negotiation: It was and remains the preferred practice to settle ownership disputes without the involvement of the Virginia courts. In a 1949 letter to then State Librarian Church, Virginia's Attorney General J. Lindsay Almond Jr. conveyed the position of his agency, which merits quoting here:

Upon learning of the location of public records of archival character which have been removed from the custody of the legal custodians, I suggest that you endeavor to initiate negotiations on an amicable basis asserting title in the Commonwealth with the request that such records be returned to the State Librarian, or his duly accredited representative... In our conference you and I were in complete agreement that we should avoid litigation in every instance whenever possible to reach amicable adjustment consistent with the best interests of the Commonwealth. I feel certain that the Governor, and the Library Board, would approve a course of procedure designed to avoid, if possible, any deterioration of the relationship of comity[,] which exists to the mutual advantage of Virginia and any State, institution or agency which may be in possession of records as to which Virginia could assert lawful title. Instead of making a written demand, I am inclined to the view that, where practice, it would be better to first seek to arrange a personal interview with some one in authority to deal with the matter.⁵⁴⁶

The record is part of an unprocessed collection and the circumstances that prompted this particular letter can only be surmised; some months after Almond's writing, Church communicated with a Philadelphia-based dealership about records in its catalog that the Library of Virginia believed to be state records.⁵⁴⁷

While it is unclear what the impetus for the letter was, the passage is revealing in a number of ways. First, both agency heads wanted to maintain external relationships with entities in possession of private records. However, the men recognized that litigation, or even the threat of litigation, could damage these external relationships – a notable assessment given that Almond's writing predated the Manuscript Society's vocal protests to replevin cases like *United States of America v. First Trust Company of Saint Paul* (1958) and *State of North Carolina v.*

⁵⁴⁶ J. Lindsay Almond, Jr., Attorney General, to Randolph W. Church, State Librarian, February 14, 1949; Box 3, Replevin Files, 1914-1992.

⁵⁴⁷ Memo, William J. Van Schreeven, Head Archivist, to Randolph W. Church, State Library, October 11, 1949; Box 3, Replevin Files, 1914-1992;

B.C. West, Jr. (1976). The best approach to negotiating is a conciliatory approach. Like former Pennsylvania employee Roland M. Baumann, the Virginia public officials viewed compromise and soft language as the best course of action for recovery of public records.

Almond's letter is evidence that there were public officials outside of the Library of Virginia and the clerks' offices who were attentive to replevin activities in the Commonwealth and who were participants in crafting recovery approaches for cases that occurred outside of court. Almond even sent Virginia's Governor William M. Tuck a copy of his letter and Tuck later wrote in response, "I concur in the comments of the Attorney General."⁵⁴⁸ In contrast, today's archival staff members at the Library of Virginia engage and involve the Office of the Attorney General and, even, the State Librarian only when they want to take a private party to court, which has not occurred since 1993.⁵⁴⁹

Additionally, the Attorney General expressed a preference for verbal negotiations with private parties and, today, unwritten interactions remain characteristic of recovery cases.⁵⁵⁰ This historical and continued practice has consequences for research on replevin in Virginia. There are archival records that provide insight into the process, but there are gaps; isolated letters, like a 1950 communiqué between State Librarian Church and a Duke University librarian, tell incomplete replevin stories.⁵⁵¹ Moreover, it is difficult for a researcher to grasp, from a study of the archival record, the frequency of replevin cases in Virginia.

The same letter from Almond to Church provides insight into the compensation aspect of replevin negotiations occurring at that time. He wrote, "Whenever the person or agency from

⁵⁴⁸ Wm. M. Tuck, Governor, to Randolph W. Church, State Librarian, February 21, 1949; Box 3, Replevin Files, 1914-1992.

⁵⁴⁹ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁵⁰ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁵¹ B.E. Powell, Librarian at Duke University, to Randolph W. Church, June 29, 1950; Box 3, Replevin Files, 1914-1992; A. Hollis Eden, President of Duke University, to B.E. Powell, Librarian at Duke University, June 22, 1950; Box 3, Replevin Files, 1914-1992.

whom custody is sought asserts, in good faith, a claim for compensation for recovery, and preservation during the interim in which the records have been lost to the Commonwealth, the matter should be referred to the Attorney General with your recommendation as to whether the claim should be compromised. The Attorney General, with the approval of the Governor first obtained, would have authority to effect a compromise.”⁵⁵² What Almond described here is not payment for the record, but payment for a service – the care of the record. The distinction here is important. By avoiding the suggestion that the Commonwealth is purchasing the record, the Library of Virginia and the Office of the Attorney General do not muddy their position that the record in question is Commonwealth – and not private -- property.

Compensation as part of the negotiation stage was a practice that predated Almond’s letter and one that continues today. Just as the Pennsylvania State Archivist uses the phrase “finders’ fee” to describe compensation to private parties in acknowledgement of the transfer of a record to the Commonwealth, past and present public officials have used terminology that is similarly measured. There is reference in the records to the Library’s payment of a “care and custody” compensation to the private party as early as 1914.⁵⁵³ “Care and keeping,” the descriptor currently used, appears to have originated during Manarin’s tenure as State Archivist.⁵⁵⁴ Although the language has remained consistent, there has been a shift with regard the players involved in compensation decisions. As Almond’s letter indicates, the matter of compensation was, in 1949, under the purview of the Office of Attorney General and even involved the Governor’s approval. Today, the Library of Virginia and the localities have greater

⁵⁵² J. Lindsay Almond, Jr., Attorney General, to Randolph W. Church, State Librarian, February 14, 1949; Box 3, Replevin Files, 1914-1992.

⁵⁵³ Receipt of records from Anderson Auction Company signed by State Librarian Henry R. McIlwaine, June 9, 1914; Box 3, Replevin Files, 1914-1992.

⁵⁵⁴ Manarin Dep. 12:17, April 30, 1991; Box 1, Replevin Files, 1914-1992.

leverage to make monetary determinations as part of the negotiations; the Office of the Attorney General is not required to approve this payment.⁵⁵⁵

Finally, an issue that may arise in the negotiation stage concerns the sufficiency of a copy. The current Director of Description Services suggests that, in some instances, the Library of Virginia has agreed to accept a copy. The decision occurs when the alternative is to secure no record at all. Hart explains, “We don’t like the original to stray, but the informational content is what is really important. If we’ve got that, at least people can access the evidence it provides.”⁵⁵⁶ This stands in contrast to the testimony of Thornton Mitchell, one of the most impassioned crusaders of replevin activities, in the case against West. If the Library of Virginia had photocopies of a document that is in private hands, Manarin said that the state would consider it a “hindrance...insofar as it violates the archival integrity of the records.”⁵⁵⁷

Custody Determination: Today, a custody determination is generally finalized when the parties reach an agreement regarding the care and custody compensation and the transfer is made. A replevin dispute is rarely brought to a conclusion with a donation, Hart said, but it has occurred; he implies that a custody determination that concludes in such a way is distinct from a transfer and care and custody compensation. Hart recalled one case in which a private party had spent a considerable amount of money on records that the state later identified as alienated public records. He said, “I understand that person not wanting to give it up but it was too much money for the document for us to pay and we worked out something where, for a tax write off, they

⁵⁵⁵ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁵⁶ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁵⁷ Tr. of Evidence, p. 48, November 6, 1975, submitted in *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

donated it, to our Foundation. They got a tax deduction and we got the item.”⁵⁵⁸ A record acknowledging this donation formalizes the resolution.

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Call Number	Barcode number 1177668.
Author	Henrico County (Va.). Circuit Court.
Title	Henrico County (Va.) Court Records, 1846
Acc. Restrictions	There are no restrictions.
Use Restrictions	There are no restrictions.
Material	2 p.
Gen. note	This item forms part of the Local Government Records Replevin Collection.
Summary	Henrico County (Va.) Court Records, 1846. The collection contains a document removed from Henrico County chancery court records. The document is a notice to take depositions, 1846 Jan. 8, and the affidavit of Jefferson Wallace, 1846 Jan. 17. The notice and affidavit are part of the Henrico County Circuit Superior Court of Law and Chancery cause Theodorick Robertston vs. Mayo B. Carrington and James G. Morris.
Cite As	Henrico County (Va.) Court Records, 1846. Local government records collection, Local Government Records Replevin Collection. The Library of Virginia, Richmond, Va. 23219.
Related	For additional information concerning the replevin of these items see Larry I. Vass Case records, 1781-1973, found at the Library of Virginia. Additional Henrico County court records can be found on microfilm and on the Chancery Records Index at the Library of Virginia. Consult "A Guide to Virginia County and City Records on Microfilm" and the Chancery Records Index, both found on the Library of Virginia web site.
Biog./Hist. Note	Henrico County was named for Henry, Prince of Wales, the oldest son of James I. It was one of the eight original shires established in 1634. These records were replevined by the Library of Virginia following the trial entitled Commonwealth of Virginia vs. Larry I. Vass heard in Henrico County Circuit Court in November 1972.
Subject - Corporate	Henrico County (Va.). Circuit Court.
Subject - Topical	Equity. -- Virginia -- Henrico County. Replevin -- Virginia.
Subject -Geographic	Henrico County (Va.) -- History -- 19th century.
Genre/Form	Affidavits -- Virginia -- Henrico County. Chancery causes -- Virginia -- Henrico County. Judicial records -- Virginia -- Henrico County. Legal notices -- Virginia -- Henrico County. Local government records -- Virginia -- Henrico County.
Added Entry	Henrico County (Va.) Circuit Superior Court of Law and Chancery.
Series	Local government records collection; 41209.

Figure 6: Screenshot of Library of Virginia catalog entry for 1846 Henrico County records that were stolen by Larry I. Vass and recovered by the Library of Virginia in 1972. (Courtesy of the Library of Virginia)

Archival Accessioning: When local records are recovered in Virginia, they return to the custody of the circuit court clerk. Under the Virginia Public Records Law, local records that are archival may remain in the locality or may be deposited at the Library of Virginia.⁵⁵⁹ Figure 6 is a sample entry for two Henrico County records that were among the materials stolen by Larry I. Vass and recovered by the Commonwealth in 1972. Today, they are in the collection at the

⁵⁵⁸ Lyndon H. Hart, III, interview with author, December 17, 2013.

⁵⁵⁹ Code of Virginia § 42.1-87.

Library of Virginia. The catalog entry includes reference to the replevin of the records as part of the descriptive notes and with a subject term of “Replevin -- Virginia.”⁵⁶⁰ As described in the cases below, not all recovered records are indicated accordingly in the catalog entries, but there does appear to be a frequent practice of informing the user of replevin as part of custodial history.

VI.C. CASE STUDIES OF REPLEVIN IN VIRGINIA

The cases in this section offer a historical look at replevin in Virginia, with a century separating the first and the final examples. Like the states above, the availability of records that provided insight into these narratives was a main impetus for their selection. Moreover, by examining cases that both preceded and followed the court opinion in *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, the influence of the case on the replevin activities in the state may be considered.

The Lossing Estate Papers

The earliest located replevin case in Virginia – and, in fact, in all three of the states studied -- involves a custody dispute with the heirs of Benson J. Lossing, a prolific historian and engraver who was born in 1813 and died in 1891.⁵⁶¹ The State Library of Virginia (now the Library of Virginia) pursued records in the custody of the Lossing estate on two occasions, first in 1892 and again in the months between 1912 and 1914. Because of the availability of documentation, the

⁵⁶⁰ Henrico County (Va.) Court Records, 1846, LVA Catalogs, accessed April 5, 2014, http://lva1.hosted.exlibrisgroup.com/F/QCKYX3RYHTB81PMYYQ57YCKPL59UNKCX8MK3QUC7VEX74VLUMK-16287?func=full-set-set&set_number=003676&set_entry=000001&format=999

⁵⁶¹ “Guide to the Benson J. Lossing Papers, 1861-1891,” Vassar College Libraries, accessed February 3, 2014, http://specialcollections.vassar.edu/findingaids/lossing_benson.html.

latter replevin effort is the primary focus of this section, with the analysis based on a study of archival records and contemporary newspaper reports about the dispute. The case suggests that a recovery negotiated between the state archives and the private party has limited influence on future cases, particularly when there is a change in administrations. Despite the State Librarian's hope that the successful recovery of the Lossing papers would provide a valuable precedent for Virginian replevin efforts, the case appears to be lost to the archives.⁵⁶² There is little reference to the Lossing case, outside of quick allusions in court transcripts, in the records that make up the "Replevin Files" series at the Library of Virginia.

War dramatically altered the custodial history of the Lossing records. The wartime fate of records held in Richmond connects to a larger narrative concerning the vulnerability and displacement of historical and cultural materials during periods of unrest and transition. There is no question that the Civil War had devastating effects on Virginia's recorded history. Troops pillaged government buildings for trophies of war, Union troops burned courthouses and their records within, and as parts of Richmond burned in April 1865, so too did much of Richmond's documentation.⁵⁶³ During this period of unrest, public officials later came to believe that some of Virginia's records left Richmond in Lossing's hands.

In their coverage of the second replevin case, newspapers, including *The New York Times* and the now defunct New York publication *The Sun*, aimed to address how Lossing became the custodian of the disputed records. While there are similarities in the newspaper accounts, namely with regard to the timing of Lossing's acquisition, they are largely speculative. No records exist that document a transfer of title to Lossing or that prove that the records had been in a state

⁵⁶² Henry R. McIlwaine, State Librarian of Virginia, to H. Snowden Marshall, New York Attorney, March 15, 1913; Replevin Files, 1914 – 1992.

⁵⁶³ Posner, *American State Archives*, 279; Library of Virginia, *Lost Records Localities: Counties and Cities with Missing Records* (Richmond: Library of Virginia, n.d.), accessed February 17, 2014, http://www.lva.virginia.gov/public/guides/rn30_lostrecords.pdf

office prior to their removal. A *New York Times* reporter placed Lossing in Richmond in 1862 for a research trip, explaining, “it was during the days of Reconstruction, the Virginia authorities allege, that Dr. Lossing obtained possession from the Provisional Government of Virginia of the valuable State documents whose ownership is now disputed.”⁵⁶⁴ Both *The New York Times* and *The Sun* indicated that Lossing carried letters from federal government officials to Virginia that were intended to assist him in obtaining access to historical records.⁵⁶⁵ Lossing, one reporter posited, likely felt “justified” in taking the records and was confident that he could more effectively ensure their safety during turbulent years marked by loss in Virginia.⁵⁶⁶ Newspaper accounts also suggested that the record keepers may not have recognized the value of the materials in their care and willingly turned them over to Lossing.⁵⁶⁷

There was at least one letter to the editor, however, that described a different mode of acquisition, one that placed Lossing in a more questionable light. Although the letter is based on hearsay, it is notable that there was enough attention and concern about the displaced records to prompt even a single response from a member of the public. A reader of the *Abingdon Virginian* recalled that Lossing – or perhaps, he said, it was a representative for Lossing – visited the former clerk of his county in order to study local records. The letter writer maintained, “After Lossing or his agent left, [the clerk] found these valuable records were missing and his idea was that they had been taken by this man without leave from any one. This may throw light on how the records from Richmond were gotten.”⁵⁶⁸ The public officials involved in second of the two recoveries, however, did not substantiate the account of theft. Instead, the position of the

⁵⁶⁴ “Virginia Attaches the Lossing Mss.,” *The New York Times*, May 8, 1912, 22; Box 3, Replevin Files, 1914-1992.

⁵⁶⁵ “Virginia Attaches the Lossing Mss.,” *The New York Times*, May 8, 1912, 22; Box 3, Replevin Files, 1914-1992; “Confer To-Day Over Alleged State Papers,” *The Sun*, May 8, 1912, 9; Box 3, Replevin Files, 1914-1992.

⁵⁶⁶ “Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

⁵⁶⁷ “Confer To-Day Over Alleged State Papers,” *The Sun*, May 8, 1912, 9; Box 3, Replevin Files, 1914-1992.

⁵⁶⁸ L.T. Cosby, Letter to Editor, *Arlington Virginian*, May 17, 1912; Box 3, Replevin Files, 1914-1992.

Commonwealth was that the transitional government in place during the historian's visit did not have the authority to transfer to Lossing title to the records.⁵⁶⁹

There are similarities in the two replevin cases involving records in the Lossing estate. In both cases, the records were outside of Virginia, first in Massachusetts and then in New York, and consigned to auction houses. Both predated the modern public records law and, namely, sections 42.1-89 and 42.1-90 of the Code of Virginia, which codify the process for filing a motion with the court system and requesting seizure of records. The Commonwealth was successful in negotiating with the Lossing heirs and arriving at a custody determination in 1892 and again in 1912 through 1914. The State Library had the legal support of the Office of the Attorney General as well as legal representation in Massachusetts and New York respectively in the recovery cases.

The *Journal of the House of Delegates of the State of Virginia* for the 1897-1898 session, along with archival records and newspaper articles created and published during the second replevin case, provide information of the 1892 events. Upon Lossing's death, his heirs commissioned a Boston auction house to sell items, including a collection of records, from his estate. How State Librarian Charles Poindexter learned of the records in Boston is unclear, as is the precise nature of the 68 papers that he identified as potentially public property. The sole description of the original lot comes from a dealer, who is quoted by *The Evening Post* as saying, "There were included fifteen Washingtons, thirty-one Lafayettes, a number of Rochambeaus and other Virginia state documents, many of them bearing signatures of the signers of the Declaration of Independence, old Members of Congress, and generals." ⁵⁷⁰ This description, however, is little help in understanding what made these records public in nature. Although the

⁵⁶⁹ "Virginia May Take Mss.," *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992; "Virginia Attaches the Lossing Mss.," *The New York Times*, May 8, 1912, 22; Box 3, Replevin Files, 1914-1992.

⁵⁷⁰ "Virginia May Take Mss.," *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

autographs may have been the primary interest of this particular dealer, the presence of public officials' signatures alone does not render a record public property.

The circumstances surrounding the 1892 discovery and the identification of the Boston records are hazy, but Poindexter evidently made a decision to act, calling upon Boston law enforcement to seize the records from the auction house. While *The Evening Post* reported twenty years later that “the Virginia authorities had no difficulty in establishing a legal title of ownership,” conflicting evidence suggests that it was a complex dispute.⁵⁷¹ Because the records were out of state, Poindexter hired Massachusetts attorney Moorefield Storey as legal representation for Virginia. Storey filed suit on behalf of the State Library and engaged in negotiations with the Lossing heirs in an effort to settle the matter of ownership.⁵⁷² Storey, in an 1897 letter to the Governor of Virginia, said that the Library of Virginia was unable to provide proof of title to the records that was sufficiently persuasive to the Lossing heirs and their attorneys. In the face of the difficult negotiations, The Library returned to the selection phase of the replevin process, reevaluating their interests in the records. According to Storey, he made the decision to push the replevin case forward, even without the support of the State Library.⁵⁷³ He wrote to the Governor, “The result [of the stalemate] was a direction to abandon the suit, on the ground that the State did not wish to incur expense. This instruction I did not follow, because I thought that the defendant was so weak that some compromise could be made, and the result of much negotiation was the division of the documents. As for my services, since my instruction to go no further, we have made no charge and propose to ask nothing save what was paid at the

⁵⁷¹ “Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

⁵⁷² Moorefield Storey, Attorney, to Charles T. O’Ferrall, Governor of Virginia, March 16, 1897, published in Virginia General Assembly, House of Delegates, *Journal of the House of Delegates of the Commonwealth of Virginia*, Session of 1897-1898 (Richmond: James E. Goode Publishing Co., 1897), 54.

⁵⁷³ Storey to O’Ferrall, July 13, 1897, in *Journal of the House of Delegates*, 54-55.

outset, \$100.”⁵⁷⁴ This was a replevin case that was ultimately brokered without the involvement of any public officials from Virginia. What it was not, as *The Evening Post* reported two decades later, was a seamless and uncomplicated recovery.

Thanks to Storey’s singular efforts in 1892, records did return to Virginia; the Massachusetts attorney mailed the items directly to the sitting Governor and not Poindexter. In his letter to the Governor O’Ferrall, Storey indicated that his negotiations were settled with a compromise.⁵⁷⁵ Decades later, during his pursuit of the second group of Lossing estate records, State Librarian McIlwaine recalled that Storey reached a custody determination that involved a division of records. The 68 records were divided into two groups, with the State Library and the Lossing heirs each receiving half.⁵⁷⁶ Because of the limited evidence available about what records were included in the 1892 auction, it is not possible to ascertain what the Virginia State Library recovered. There is no evidence, however, that Library staff described or processed them in a manner that would mark them as records that were once out of state custody.

State Librarian McIlwaine made his initial discovery of this second group of records when reviewing the Anderson Auction Company catalog, a familiar mode of discovery in replevin cases predating eBay, and subsequently contacted both the auction house and officials in the state, including then Governor William Hodges Mann.⁵⁷⁷ Following the discovery, McIlwaine, accompanied by Assistant Attorney General Richard B. Davis, traveled to New York City to meet with representatives of the auction house about 84 advertised records that the State Librarian suspected were Virginia property. The meeting on May 7, 1912, it was reported, was

⁵⁷⁴ Storey to O’Ferrall, July 13, 1897, in *Journal of the House of Delegates*, 55.

⁵⁷⁵ Storey to O’Ferrall, March 16, 1897, in *Journal of the House of Delegates*, 54.

⁵⁷⁶ H.R. McIlwaine to Armistead C. Gordon, Chairman of the Library Board, June 8, 1912; Box 3, Replevin Files, 1914-1992.

⁵⁷⁷ “Confer To-Day Over Alleged State Papers,” *The Sun*, May 8, 1912, 9; Box 3, Replevin Files, 1914-1992.

“of a wholly amicable and conciliatory nature” and resulted in the following statement from the auction house:

We will suspend the sale of any manuscripts claimed by the State of Virginia in order to permit the Commonwealth to make good its claim. We are merely acting as agents in this sale, and it will not be necessary for the Virginia authorities to attach the records which are claimed by them, although they may do so at their pleasure. We will certainly not surrender any of the documents in our possession until the title has been established. That is merely in justice to ourselves. If the documents claimed by Mr. Davis and Dr. McIlwaine really belong to the Commonwealth of Virginia, they will be surrendered upon proper proof of such a claim.”⁵⁷⁸

Anderson Auction Company did indeed act in accordance to this statement and, as no seizure was made, the Commonwealth evidently agreed that this was an unnecessary action.

Compromise between the auction house and the state government characterized the arrangement that followed the initial meeting. Because they planned to sell additional materials from the Lossing estate in subsequent sales, the auction house mailed catalogs to McIlwaine and agreed to pull records that the State Librarian flagged as potentially public in nature. This back and forth – the mailed catalogs and the notification of suspect records – continued into the following spring of 1913.⁵⁷⁹

Between 1892 and 1912, McIlwaine believed that the Lossing heirs sold the records they retained in the first replevin case as these particular materials were not included in the 1912 New York lot.⁵⁸⁰ Like the case before it, however, little evidence exists about the records themselves that can contribute to an understanding of the meaning of public record in the early 20th century. Neither do the archival records provide much insight into the identification approaches that

⁵⁷⁸ “Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992. The term “attach,” as indicated earlier in this chapter, refers to court-authorized seizure of property.

⁵⁷⁹ Emory S. Turner, Anderson Auction Company, to H.R. McIlwaine, State Librarian, May 15, 1912; Vice President of Anderson Auction Company to H.R. McIlwaine; Vice President of Anderson Auction Company to H.R. McIlwaine, June 3, 1912; Box 3, Replevin Files, 1914-1992.

⁵⁸⁰ H.R. McIlwaine to Armistead C. Gordon, June 8, 1912; Box 3, Replevin Files, 1914-1992.

McIlwaine and his staff employed. A newspaper report is the primary source for information about what records were among the original group of 84 claimed by the Commonwealth. The reporter's description, however, focuses on the autographs of historical figures that were present in the papers and not the context in which the papers were created, the latter being the basis for evaluating whether records are private or public.⁵⁸¹

At the heart of the Commonwealth's claim was an assertion that no individual or body had the authority to transfer records to Lossing at the time of his acquisition. Importantly, both the historian's acquisition of the materials and the State Library's efforts to recover them predated the state's modern public records law. A local paper explained the crux of the debate as follows: "Now, the status of documents, or any property, for that matter, belonging to a State is very different from that of property held by a private individual. A State cannot sell or give away its possessions without a special enabling act by the Legislature. Therefore, no matter how honestly he may have come by them, no person possessing Virginia State papers, without a special act from the Virginia Legislature transferring title over them to him, can establish the requisite title."⁵⁸² This is the same argument that North Carolina officials have cited in their recovery claims: in the absence of authorization from the appropriate body – in Virginia, the Legislature, in North Carolina, the General Assembly or North Carolina Historical Commission – a private party cannot have good title to a public record.

The rationale behind the Commonwealth's decision to pursue can only be inferred. This was a state that only a few decades prior to McIlwaine's discovery lost much of its recorded memory to fire and theft. Ernst Posner describes a slow recovery in the aftermath, remarking, "Between the Civil War and the turn of the century, very little was done to care for Virginia's

⁵⁸¹ Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

⁵⁸² “Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

records; for poverty, indifference, and a lingering defeatist attitude combined to retard both archival development and historical endeavor.”⁵⁸³ Lester J. Cappon points to the historical scholarship by McIlwaine and staff at the State Library of Virginia at the turn of the 20th century as representative of a growth in appreciation for Virginia’s records.⁵⁸⁴ The Commonwealth’s decision to pursue the records may be indicative of the deepening societal value of records during this period. In addition, McIlwaine’s own scholarly work as a documentary editor of state and local records may have acted as an impetus for his pursuit of the Lossing estate records.⁵⁸⁵ The age of the records and historical importance of the record creators were likely factors that pushed the Commonwealth officials forward in their recovery efforts; the first set of records that the state laid claim to were largely colonial materials and included letters by George Washington and Lafayette.⁵⁸⁶

While not ultimately followed, the negotiation approach that the Commonwealth and Lossing family attorney proposed is unique to any examined in this study. The parties expressed an interest in submitting the dispute to an arbitration body in New York, rather than to a judge or jury. The State Librarian suggested that this route would lead to a speedier resolution and be less expensive than the alternative.⁵⁸⁷ He wrote, “Instead of going before a jury, or before a Judge in a chancery proceedings, [the case will] be submitted to arbitration, one arbitrator to be named by the State of Virginia and one by the Lossing estate, and in the case of disagreement a third person to be called in by them to finally settle the matter, of course reserving to each part a right

⁵⁸³ Posner, *American State Archives*, 279.

⁵⁸⁴ Lester J. Cappon, “Two Decades of Historical Activity in Virginia,” *The Journal of Southern History* 6, no. 2 (1940): 192-193.

⁵⁸⁵ McIlwaine published the records of the House of Burgesses and Virginia’s colonial government in a series of volumes, as well gubernatorial papers. See, for example, H.R. McIlwaine, ed., *Official Letters of the Governors of the State of Virginia* (Richmond: State Library of Virginia, 1926) and H.R. McIlwaine, ed., *Legislative Journals of the Council of Colonial Virginia* (Richmond: The Colonial Press, Everett Waddey Co., 1918-19).

⁵⁸⁶ “Virginia May Take Mss.,” *The Evening Post*, May 7, 1912, 2; Box 3, Replevin Files, 1914-1992.

⁵⁸⁷ H.R. McIlwaine to Armistead C. Gordon, May 18, 1912; Box 3, Replevin Files, 1914-1992.

to appeal the decision of these arbitrators.”⁵⁸⁸ It is unclear from the records why this arrangement did not come to fruition, but it speaks to the variety – and, indeed, the inconsistency – in the ways one institution may choose to approach negotiations.

Although McIlwaine expressed a desire to come to a speedy resolution, this case continued into the spring of 1914, when the Commonwealth was able to secure the cooperation of the Lossing heirs. As is common with replevin in Virginia, the negotiations included an agreement concerning compensation for the “care and custody” of the documents.⁵⁸⁹ In exchange for withdrawing the records from sale and for conceding all rights to the records, the State Library of Virginia awarded the Lossing heirs \$750.00.⁵⁹⁰ With the signed receipt, a custody determination was reached. As was the case in 1892, these recovered records appear to have been reintegrated in the collection with no distinction made of their status of being out of state custody at one time.

Now a century old, the Lossing case reveals little about the contemporary replevin process in the Commonwealth of Virginia. What it reveals, however, is that a state can arrive at recovery through distinct negotiating tactics and agreements of very different shapes. Once there is a change in leadership, institutional memory about replevin often becomes hazy. There is a tendency for state leaders to develop their own approaches to recovery as a consequence. This means that, even when law remains unchanged, attempts to resolve ownership disputes may look different.

Court opinions have a decided influence on future litigation in the state. This dissertation argues that court decisions are the anomaly, raising the question of just how much impact a

⁵⁸⁸ H.R. McIlwaine to Armistead C. Gordon, May 22, 1912; Box 3, Replevin Files, 1914-1992.

⁵⁸⁹ Receipt for Recovered Lossing Manuscripts, H.R. McIlwaine to Anderson Auction Company, June 9, 1914, Box 3, Replevin Files, 1914-1992.

⁵⁹⁰ Receipt for Recovered Lossing Manuscripts, H.R. McIlwaine to Anderson Auction Company, June 9, 1914, Box 3, Replevin Files, 1914-1992.

settlement between parties can have on later replevin cases. With the Lossing affair, McIlwaine hoped and indeed anticipated that a positive outcome for the Library of Virginia would have lasting effects. Before the parties reached the custody determination in this case, McIlwaine wrote to the state's legal counsel in New York and referenced an advertisement he saw for a sale of a letter written by Patrick Henry to the Governor of Virginia in 1786. He said, "Beyond doubt, the letter is one belonging to the archives of the State of Virginia. However, I do not see that anything can be done about this now. If we can ever get the Lossing matter straightened out and the decision is favorable to the State of Virginia – as I am almost confident it will be – the precedent will go far toward inducing collectors to give up this class of material to the State without a struggle. I believe that a great deal may thus be recovered."⁵⁹¹ McIlwaine, undoubtedly, would have been discouraged and likely surprised by the outcome in the case against Hamilton brought to court decades later.

Journal of the Virginia Convention, May 1776

In the months between August of 1774 and July of 1776, Virginia delegates participated in a series of five conventions, the final beginning on May 6, 1776 in Williamsburg. Among the delegates' actions in the fifth convention was to formally separate from the Great Britain on May 15, 1776.⁵⁹² This second case focuses on the 1942 recovery of the original journal that chronicled the fifth Revolutionary-era convention. While only seven years later Virginia's Attorney General expressed a preference for resolving custody disputes verbally, this case is notable in that it is among the best-documented replevin cases encountered in this dissertation

⁵⁹¹ H.R. McIlwaine to H. Snowden Marshall, New York Attorney for State's Case, March 15, 1913, Box 3, Replevin Files, 1914-1992.

⁵⁹² Fifth Virginia Revolutionary Convention Called for Independence, May 15, 1776," Virginia Memory, Library of Virginia, accessed February 5, 2014, http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/convention_independence.

study. It is included here as a unique example of the successful recovery of a record that was held outside of the state and one that involved a larger set of players that generally characterizes replevin activities in Virginia today.

War likely shaped the custodial history of the convention journal. Accounts of how the journal escaped custody in Richmond, however, differ. The Library of Virginia's *Virginia Memory*, an online resource where users can access digitized collections, offers the following narrative: "In April 1865, shortly after the end of the Civil War, a Union soldier removed the journal from the state archives in the Capitol in Richmond and took it home with him. His descendants sold the manuscript journal in 1942 to a Philadelphia dealer in rare books and manuscripts."⁵⁹³ While it is interesting that the Library of Virginia highlights the displacement of the record, the documentation of the replevin efforts questions the definitiveness of this version of events. James Lewis Hook was indeed a Philadelphia-based party who was in possession of the journal but he doubtlessly acquired the journal prior to 1942. The Library staff began discussing Hook's custody of the journal in the early months of 1941 when they learned that he consigned the journal to a New York auction house in order for it to be sold. While the Head Archivist posited that a Union soldier could have taken the journal from Richmond, he also raises the possibility that the record could have been lost decades earlier, during Benedict Arnold's raid of Richmond.⁵⁹⁴ The consignor responded that he "surmised, also, that this Manuscript was probably lost during Benedict Arnold's raid on Richmond in 1780."⁵⁹⁵ The mode of loss, to use Honoré's terminology, is less clear than the description on the Virginia Memory

⁵⁹³ Fifth Virginia Revolutionary Convention Called for Independence, May 15, 1776," Virginia Memory, Library of Virginia, accessed February 5, 2014, http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/convention_independence.

⁵⁹⁴ William J. Van Schreevan, Head Archivist, to David Randall of the Scribner Book Store, March 14, 1941; Box 3, Replevin Files, 1914-1992.

⁵⁹⁵ David Randall to William J. Van Schreevan, March 17, 1941; Box 3, Replevin Files, 1914-1992.

site would suggest. Ambiguity concerning how a record escaped government custody can be the source of contention in replevin disputes; private parties may argue that a public official willingly discarded the record. There is, however, no indication that the uncertainty surrounding the mode of loss negatively influenced Virginia's case. It was not a focal point in the ownership dispute.

Instead, conflicting priorities are at the heart of the dispute in this case. James Lewis Hook, the party in possession of the journal had one interest: monetary profit. The State Library, conversely, was focused on seeing the record properly preserved and had no intention to pay anything beyond a nominal fee.⁵⁹⁶ Before seriously engaging Hook in negotiations, Van Schreeven explained to the College of William and Mary's librarian that the Commonwealth's preference was to purchase out-of-custody records rather than file a lawsuit. Van Schreevan remarked, "It has been our experience that the institution of legal proceedings for the return of Virginia archival material always leads into complications, and if within our means, we always try to purchase such material which is offered to us."⁵⁹⁷ Hook's price tag of \$25,000, however, was certainly not within the Library's means.⁵⁹⁸

Two institutions – the State Library of Virginia (today the Library of Virginia) and Colonial Williamsburg – learned of Hook's custody of the journal through Hook himself. Unlike the dealers that Manarin described as contacting him out of concern that they were in possession of a public record of Virginia, Hook contacted the repositories in an effort to find an interested buyer for the journal.⁵⁹⁹ Virginia State Librarian Wilmer L. Hall and Colonial Williamsburg

⁵⁹⁶ William J. Van Schreevan to James Lewis Cook, Dealer, August 13, 1941; Box 3, Replevin Files, 1914-1992.

⁵⁹⁷ William J. Van Schreeven to E.G. Swem, Librarian at the College of William and Mary, August 5, 1941; Box 3; Replevin files, 1914-1992.

⁵⁹⁸ William J. Van Schreevan to E.G. Swem, Librarian at the College of William and Mary, August 5, 1941; Box 3, Replevin Files, 1914-1992.

⁵⁹⁹ Manarin Dep. 11:11-14, April 30, 1991; Box 1, Replevin Files, 1914-1992.

President Kenneth Chorley compared their discovery of the journal and communication with Hook. Hall said that Hook had contacted the Library about the journal early in 1941, but “refused to let us see the book, being apprehensive that we would attach [seize] it while in our custody as an original archive to which the State retained title.”⁶⁰⁰ Hook informed Hall that he intended to offer it to Colonial Williamsburg for what Hall considered a “preposterous” price of \$25,000. His New York dealer contacted the living history museum and told Chorley that the Commonwealth knew of the journal, but could not afford its purchase. Hook’s dealer then traveled to Virginia to show the record to the Colonial Williamsburg staff, where the librarian conducted a cursory examination. In response, Colonial Williamsburg’s message to Hook and his dealer was clear: the record was the property of the Commonwealth of Virginia.⁶⁰¹

Hook, however, continued to court the site as a potential buyer, which Colonial Williamsburg used as a means of facilitating the Commonwealth’s examination of the journal. After securing a loan from Hook, Hunter D. Farish, Director of the Department of Research at Colonial Williamsburg, transported the journal to Richmond for study; this was arranged without Hook’s knowledge. In the capital, the focus was on authenticating the record as an original.⁶⁰² Among the tools that the State Library of Virginia used in its identification efforts was an existing record in its collection: the Journal of the Virginia Convention of December 1775. Equipped with the knowledge that one clerk maintained the records for both conventions, the State Library staff compared the handwriting from the journals and confirmed that it was the same.⁶⁰³

⁶⁰⁰ Wilmer L. Hall, State Librarian, to Kenneth Chorley, President of Colonial Williamsburg, Inc., to February 24, 1942; Box 3; Replevin files, 1914-1992.

⁶⁰¹ Kenneth Chorley to Wilmer L. Hall, February 28, 1942; Box 3; Replevin files, 1914-1992.

⁶⁰² William J. Van Schreeven to Kenneth Chorley, February 28, 1942; Box 3; Replevin files, 1914-1992; Kenneth Chorley to William J. Van Schreeven, March 3, 1942; Box 3; Replevin files, 1914-1992.

⁶⁰³ William J. Van Schreeven to Wilmer L. Hall, undated memo titled “Manuscript Journal of the Convention of May, 1776;” Box 3; Replevin files, 1914-1992.

The Library of Virginia, along with the Virginia Governor's Office and the Office of Attorney General, took interest in the journal because of the significance of the event that it chronicles. Archivist William J. Van Schreeven communicated the historic value of the journal to State Librarian Hall, articulating why the Commonwealth should pursue the record. He wrote, "The convention of May, 1776 was perhaps the most important of the revolutionary conventions. During its meeting were adopted the Declaration of Rights, the first Constitution and Resolutions which led to the Declaration of Independence. As an archive of the State it is extremely valuable."⁶⁰⁴ Van Schreeven appraised the record as having permanent archival value; this appraisal was an impetus for moving forward with the claim.

When staff at the Library of Virginia first learned of the journal and Hook's efforts to sell it to Colonial Williamsburg, Van Schreeven expressed a willingness to accept a photocopy if the historic site did indeed make the purchase.⁶⁰⁵ His interest was to have the journal properly preserved and available to the public. When the Colonial Williamsburg staff said they had no intention to buy the record because they recognized it to be state property, the Library of Virginia set aside the notion of acquiring a surrogate.⁶⁰⁶

There were other factors that influenced the Library of Virginia's pursuit of the journal. There was public pressure to recover the record and interest from the Governor's Office and the Office of the Attorney General. One private bibliophile, for example, wrote a series of impassioned letters to Governor James H. Price, appealing to him for action. "We should not have to purchase it, because it is State property," said the ardent citizen. She continued, "I am a Virginian...I have no words to express my resentment for this Yankee treachery to our State."⁶⁰⁷

⁶⁰⁴ William J. Van Schreeven to Wilmer L. Hall, undated; Box 3; Replevin files, 1914-1992.

⁶⁰⁵ William J. Van Schreeven to James Lewis Hook, August 13, 1941; Box 3; Replevin files, 1914-1992.

⁶⁰⁶ Kenneth Chorley to Wilmer L. Hall, February 28, 1942; Box 3; Replevin files, 1914-1992.

⁶⁰⁷ Lee Carter Boone to James H. Price, Governor, July 26, 1941; Box 3; Replevin files, 1914-1992.

This language is evocative of the positions of cultural nationalists in patrimony disputes over objects of cultural heritage.⁶⁰⁸ In actuality, the Library of Virginia was not alone in deciding to recover the journal; officials in the Office of the Attorney General became involved during the identification stage of the process and determined that the Commonwealth retained title to the journal. So committed to recovering the journal for the state, the Attorney General Abram P. Staples would not allow the State Librarian to return the journal to Farish, who had secured it on loan from Hook. Staples wrote, “Since we are of the opinion that the book belongs to the State, I doubt very much that it is within your power to return the same to Commonwealth Williamsburg, Incorporated.”⁶⁰⁹

Even with the involvement of the Attorney General, the negotiations remained outside of court, but it appears that the participation of this agency effectively added pressure to the dealer to comply. Prior to the Attorney General’s association with the case, there were reports that Hook threatened to destroy the journal rather than allow the Library of Virginia to law claim to it.⁶¹⁰ While the Library of Virginia had offered to compensate Hook with a nominal award, Hook was unwilling to consider this proposal until a meeting with the Attorney General more than a year later. The State Librarian’s case notes report the following: “Mr. James Lewis Hook called on me April 28, 1942. He stated that he had been to see the Attorney General and had a satisfactory conversation with him ... He said he is now willing to accept the \$500 for the Journal and settle the matter amicably.”⁶¹¹ From Hook’s perspective, circumstances had changed

⁶⁰⁸ See John Henry Merryman, “Two Ways of Thinking About Cultural Property,” *The American Journal of International Law* 80, no. 4. (1986): 831-853. Perhaps the most famous cultural patrimony dispute focuses on the Parthenon Marbles that are in the British Museum’s collection. The Greeks, who call for the repatriation of the marbles to their native land, represent the “cultural nationalist” perspective.

⁶⁰⁹ Abram P. Staples, Attorney General, to Wilmer L. Hall, March 16, 1942; Box 3; Replevin files, 1914-1992.

⁶¹⁰ Lee Carter Boone, Bibliophile, to J. W. R. Smith, Secretary to VA Senator Cater Glass, October 28, 1941; Box 3; Replevin files, 1912-1992; “Extract from the Minutes of the Meeting of the Library Board,” February 13, 1942; Box 3; Replevin files, 1914-1992.

⁶¹¹ Wilmer L. Hall, Journal case notes, undated; Box 3; Replevin files, 1914-1992.

little since the initial offer -- with the exception of Attorney General's involvement. He was unaware, for example, that Colonial Williamsburg had transported the journal to Richmond for examination. State archives that have the strong support of their Attorney General's office, like the State Archives of North Carolina, may find that this is to the advantage of their replevin efforts. Even if the legal counsel to the state makes no explicit threat of lawsuit initially, the private party may recognize that litigation is a possibility and choose to make conciliations during this negotiation stage.

Negotiations ended with the State Librarian's agreement to pay the earlier offer of \$500 to Hook; this was done with the Library Board's approval.⁶¹² A signed agreement solidified the custody determination. Describing Hook as a "wily" individual, the Chairman of the Library Board advised the State Librarian to obtain the dealer's signature on a document that acknowledged his receipt of \$500 and the relinquishment of his claims to the journal. On July 9, 1942, with the receipt signed, the Library of Virginia concluded the replevin case.⁶¹³ The Journal of the Convention was accessioned into the record group titled "Convention of 1776." The catalog entry (figure 7) reveals nothing of the custodial history of the journal that climaxed with its recovery in 1942. This omission is in contrast to the entry for the Henrico County records (figure 6), which even includes "Replevin – Virginia" as a subject term heading. While a user is unable to access information about replevin and the convention journal through the catalog entry, the Library of Virginia highlights the recovery story on its Virginia Memory website.

⁶¹² Robert B. Tunstall, Chairman of the Library Board of Virginia, to Wilmer L. Hall, May 14, 1942; Box 3; Replevin files, 1914-1992.

⁶¹³ Receipt signed by James Lewis Hook, July 9, 1942; Box 3; Replevin files, 1914-1992.

Blog./Hist. Note	The five revolutionary conventions that provided Virginians with an alternative government between August 1, 1774, and July 5, 1776, grew out of an extralegal meeting of twenty-five members of the House of Burgesses at the Raleigh Tavern in Williamsburg on May 30, 1774. The burgesses considered methods of protesting the closing of the port of Boston by British authorities as a punishment for the Tea Party held there in 1773. A boycott of British goods was agreed upon, and a call was issued for the full House to convene at Williamsburg on August 1, 1774, in open defiance of Lord Dunmore, the royal governor, who had prorogued the assembly. The dates of the conventions were: first, August 1-6, 1774; second, March 20-27, 1775; third, July 17-August 26, 1775; fourth, December 1, 1775-January 20, 1776; fifth, May 6-July 5, 1776. This fifth convention adjourned and was replaced the next day by the new state government organized under the Virginia Constitution of 1776.
Finding Aid	Accession analysis with list of content available on reel 617 and in repository.
Related Work	Agency history record describes the history and functions of the Virginia Convention of 1776. (Search Virginia Convention as author).
Subject - Corporate	Virginia. Convention (1776 : May 6-July 5)
Subject - Topical	Constitutional conventions -- Virginia.
Subject -Geographic	Virginia -- History -- Revolution, 1775-1783 Virginia -- Politics and government -- 1775-1783.
Genre/Form	Journals (accounts) Letters (correspondence) Orders. Resolutions -- Virginia. State government records.
Series	State government records collection; 30003

Figure 7: Screenshot of partial Library of Virginia catalog entry for the recovered Journal of the Convention. (Courtesy of the Library of Virginia)

The Virginia Memory webpage that describes the recovered journal suggests that “the transaction was one of several made during the same period that established the precedents by which the Commonwealth of Virginia has been able to recover a large number of lost public documents.”⁶¹⁴ The question that emerges from a consideration of this case is whether the Library of Virginia can and does draw upon a seventy-year old success to bolster a contemporary claim of ownership. The Director of Description Services, who has been at the Library of Virginia for 33 years, made no reference to instances in which the success in this case was used in contemporary ownership claims. This dissertation found that public officials will draw upon their own experiences in settling a case with a party when they encounter a similar circumstance. It did not find, however, that a state’s successful recovery in one settled case will have much influence in ensuring another success. Moreover, institutional memory, as the Lossing case illustrates, is short and settlements sporadically documented.

⁶¹⁴ “Fifth Virginia Revolutionary Convention Called for Independence, May 15, 1776,” Virginia Memory, Library of Virginia, accessed February 5, 2014, http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/convention_independence.

There is little documentation that captures Hook's perspective in the records in the Library of Virginia's collection. His position appears to be that he had the right to income of the thing and the right to alienate it. His sales agent at the New York dealership said of Hook, "I'm quite sure that the owner, although he would be perfectly willing to sell it, is not willing to give it away."⁶¹⁵ In *Protecting Your Collection: A Handbook, Survey, & Guide for the Security of Rare Books, Manuscripts, Archives, & Works of Art*, Gandert suggests that a possible implication of replevin is that collectors will choose to destroy records rather than incur the litigation costs of replevin.⁶¹⁶ In the case of the Journal of the Convention, there was concern that Hook would destroy the record rather than allow the state to secure custody of it. This threat is consistent with someone who views himself as having private property rights to a thing and, namely, the right to alienate it. The generality of the perception that collectors are willing to destroy records did not emerge from this study. This is the one instance of such a threat located in this dissertation research.

Isle of Wight Records

The case of the Isle of Wight records involves a character now familiar to the readers of this dissertation. In 1993, Hamilton approached a curator at the Isle of Wight Museum and inquired whether he would be interested in purchasing for the museum 57 documents for \$10,000. Hamilton himself, by calling attention to his cache of records, sparked the set of events that followed. When the Clerk of the Circuit Court in the Isle of Wight County, the legal custodian of public records of Isle of Wight County, learned of Hamilton's sales pitch, he wrote to Manarin, who was simultaneously involved with the case against Hamilton in Middlesex County, to

⁶¹⁵ David Randall to William J. Van Schreevan, March 17, 1941; Box 3, Replevin Files, 1914-1992.

⁶¹⁶ Gandert, *Protecting Your Collection*, 55.

request direction, pointing to the Library of Virginia's role as a resource for local records custodians in their replevin activities."⁶¹⁷

This case is particularly notable in illustrating how the court opinion influenced both the identification stage of the replevin process and the nature of the negotiations. When the Isle of Wight County challenged Hamilton's ownership the records, Hamilton's attorney described the applicability of what he called "Judge Person's three prong test." He wrote to the attorney for the Isle of Wight County that "the County may prove that a document is a county public record by convincingly showing that:

1. A particular document is of a type a statute required the Clerk to keep....
2. A particular document was retained by a Clerk and the specific circumstance surrounding its removal demonstrate the removal was wrongful...
3. A particular document satisfied the Coleman definition of public record."⁶¹⁸

In North Carolina, the burden for proving ownership rests on the holder of the property. With the judge's decision in *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, private parties and their legal counsel are able to argue it falls to Virginia's public officials to demonstrate ownership.

The county attorney for the Isle of Wight County, working in consultation with the Assistant Attorney General, wanted to avoid having the court decide custody. Among public officials, there was a strong expectation that such a route would once again split the records and result in "no total victory for either side."⁶¹⁹ Because Hamilton wanted to make money in this – dealing in manuscripts was his business – the state and county officials had to make a concession if they wanted to avoid litigation. They needed to compensate Hamilton.

⁶¹⁷ William E. Laine, Jr., Clerk of Circuit Court of Isle of Wight County to Louis H. Manarin, February 14, 1993; Box 4, Replevin Files, 1914-1992.

⁶¹⁸ Rick Reiss, Attorney at Law, to H. Woodrow Crook, Jr., County Attorney, January 22, 1993, Box 4, Replevin Files, 1914-1992.

⁶¹⁹ Joan W. Murphy, Assistant Attorney General, to John Tyson, State Librarian, May 17, 1993, Box 4, Replevin Files, 1914-1992.

For this compensation to happen, the county officials had to assemble the funds. For this, they turned to the Library of Virginia, revealing another occasional role for the agency. In addition to providing advisory services to local governments, the state officials may also be involved in monetarily backing the terms of the custody determination.⁶²⁰ The matter of compensation, as seen in the Pennsylvania chapter, was accompanied by careful language from the public officials. Manarin wrote to the Assistant Attorney General of Virginia, “It should be pointed out to Mr. Hamilton that he cannot “sell” the documents, since they are public records. What we have offered is to compensate him for taking care of and for keeping the documents in good condition”⁶²¹ Because the county officials were asserting public ownership, they did not view this as a governmental taking and the payment constitutionally required. Their position was that the county was recovering property that belonged to the public and that the compensation was a necessary courtesy to bring the matter to a conclusion.

This case, settled between the county and Hamilton through the assistance of the Library of Virginia, illustrates how a court opinion can shape the nature of negotiations and custody determinations. The public officials approached the case differently than they had as a consequence⁶²²

⁶²⁰ Joan W. Murphy, Assistant Attorney General, to John Tyson, State Librarian, May 17, 1993, Box 4, Replevin Files, 1914-1992.

⁶²¹ Louis Manarin, State Archivist, to Joan Murphy, Assistant Attorney General of Virginia, April 28, 1993; Box 4, Replevin Files, 1914-1992.

⁶²² Memo titled “Isle of Wight Documents,” John Tyson to Joan W. Murphy, May 17, 1993; Box 4, Replevin Files, 1914-1992. William E. Laine, Jr., Clerk of Circuit Court of Isle of Wight County v. Jack Hamilton, d/b/a Hamilton’s Bookstore, Dismissal Order, June 9, 1993; Box 4, Replevin Files, 1914-1992.

The Papers of James S. Gilmore

This final and most recent case involves the papers of former Virginia Governor James S. Gilmore, who held office from January 17, 1998 to January 12, 2002.⁶²³ Although the general public may not readily recognize replevin as a familiar term, the Gilmore papers case is an example of replevin permeating popular media sources. This section is formed through a study of statute and newspaper reports contemporary to the Library of Virginia's efforts to secure the transfer of the complete collection of Governor Gilmore's records.

Another section of the Code of Virginia is at the crux of this recovery effort. Section 2.2-126 states the following, "Before the end of his term of office, the Governor shall have delivered to The Library of Virginia for safekeeping all correspondence and other records of his office during his term. This section shall not apply to correspondence or other records of a strictly personal or private nature, or active files necessary for the transaction of business by the Office of the Governor, the decision thereon to be made by the Governor after consultation with the Librarian of Virginia."⁶²⁴ Staff from the Library of Virginia did indeed meet with Gilmore to discuss the transfer of the records, but what arrived at the doorstep of the Library was an incomplete collection. Particularly glaring was the absence of records documenting gifts to Gilmore, clemency records, and the gubernatorial records in response to the attack on the Pentagon on September 11, 2001.⁶²⁵

This, the Library of Virginia argued was in violation of the Code of Virginia. While the Code allows the Governor to purge his or her corpus of documents of any papers that are strictly

⁶²³ "Virginia Governor James S. Gilmore III," National Governors Association, accessed February 12, 2014, http://www.nga.org/cms/home/governors/past-governors-bios/page_virginia/col2-content/main-content-list/title_gilmore_james.html.

⁶²⁴ Code of Virginia § 2.2-126

⁶²⁵ Jeff E. Schapiro, "Gilmore Asks Librarian for List; He Cites 'Confusion' in Documents Dispute," *The Richmond Times Dispatch*, June 29, 2002, B-1.

personal in nature, the Library officials and the Governor evidently interpreted this allowance very differently, leading to an eleven-month back and forth between the state and the now-private citizen. When the Library of Virginia confronted him about the gaps in his documentation, Gilmore argued that none of the materials he withheld “fell under any definition of archivable public records.”⁶²⁶ Moreover, as he asserted in an editorial in *The Richmond Times Dispatch*, Gilmore believed that his executive privilege allowed him to use his discretion. He wrote, “Virginia law allows an outgoing Governor to keep ‘records of a personal or private nature’ and states clearly that the Governor, and no one else, decides which documents are private. There’s a reason for this rule: A Governor’s staff wants to know that their frank, unvarnished advice will remain private. Virtually all of the remaining documents in my possession were created for my private consideration.”⁶²⁷ Officials in the Library of Virginia and the Attorney General’s Office disagreed strongly with this interpretation. The Chairman of the Library Board argued that records are not personal just because a public official wants them to be. “Even if a Governor reads these documents in private,” he said, “they still are public records because he reads them in his capacity as Governor.”⁶²⁸

On November 18, 2002, months after the initial transfer and through the assistance of a mediator, the Library of Virginia acquired the remainder of the records.⁶²⁹ Per directives in the Code of Virginia, records like the clemency files, which Gilmore originally withheld, have access restriction in place.⁶³⁰ Others were restricted as a result of an agreement between the

⁶²⁶ Jim Gilmore, “Records Retention Law in Need of Reform,” *The Richmond Times Dispatch*, December 12, 2002, A-27.

⁶²⁷ Gilmore, “Records Retention Law in Need of Reform,” A-27.

⁶²⁸ Gilbert Butler, Jr. “Virginia’s Records Laws are Clear, and Governors Must Respect Them,” *The Richmond Times Dispatch*, December 12, 2002, A-27.

⁶²⁹ Jeff E. Schapiro, “Gilmore Surrenders Bulk of His Paperwork; State Archive Fought with Former Governor,” *The Richmond Times Dispatch*, November 19, 2002, A-1; Gilmore, “Records Retention Law in Need of Reform,” A-27.

⁶³⁰ Under Code of Virginia 42.1-78, clemency files are restricted for 75 years after the date of creation. “A Guide to

Library of Virginia and the former governor, restrictions that are set to expire on January 1, 2015.⁶³¹ This agreement marked the formal conclusion of this replevin custody.

Attorney General Anthony F. Troy, who represented the Library of Virginia in this case, told reporters that “had the Gilmore matter gone to court, the focus would have shifted from Gilmore's conduct as governor to that as private citizen. ‘No private citizen should be holding public documents,’ Troy said.”⁶³² Although his office has been less inclined to pursue replevin cases that target more historical materials and cases where the mode of loss is unclear, Troy holds to the principle of inalienability with this succinct statement to the press. Chapter Seven of this dissertation argues that public officials are motivated to recover public records because of a responsibility to the public they serve, rather than because of any sort of malevolence or greed. It is the responsibility of the Library of Virginia to hold Gilmore’s administration accountable to the public by preserving and making available the administration’s records.

VI.D. SUMMARY

It was not possible to tell the story of replevin in Virginia by studying the Library of Virginia alone. This is a state where replevin more frequently occurs on the local level with the involvement of circuit court clerk but, even then, such cases do not occur very often. The researcher’s assumption beginning the study of replevin in Virginia was that the state would fall

the Policy Office Clemency Files of Governor James S. Gilmore, 1998-2001,” The Library of Virginia, 2006, accessed February 25, 2014,

<http://ead.lib.virginia.edu/vivaxtf/view?docId=lva/vi00965.xml;query=governor%20gilmore;brand=default>

⁶³¹ “A Guide to the Records of the Policy Office of Governor James S. Gilmore, 1998-2001,” The Library of Virginia, 2006, accessed February 2014,

<http://ead.lib.virginia.edu/vivaxtf/view?docId=lva/vi00969.xml;query=governor%20gilmore;brand=default>.

⁶³² Jeff E. Schapiro, “Gilmore Surrenders Bulk of His Paperwork; State Archive Fought with Former Governor,” *The Richmond Times Dispatch*, November 19, 2002, A-1.

somewhere between North Carolina and Pennsylvania in terms of how actively and successfully records are recovered. In studying the history of replevin and the contemporary approaches to recovery in the state, Virginia as a case looks more like Pennsylvania and less like North Carolina in the years following the court decision in *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*.

In Dow's text, she maintains that "most" dealers and collectors "reject claims against those materials for which governments can show no evidence that the archives ever held them."⁶³³ In Virginia, like in Pennsylvania, public officials have the most success in eliciting the support of legal counsel when it is apparent that the archives once had physical custody of an alienated record. As part of the identification stage of the replevin process, the Director of Description Services said that the Library staff does research "just to see if we could pinpoint and find evidence that it was ever here. If we could find it on microfilm from the 1950s, then I'm sure the Attorney General would pursue it, because we could say, 'we've had it here and it's gone.' I can't ever remember that being the case."⁶³⁴ This stands in direct contrast to replevin in North Carolina today. The Department of Cultural Resources, supported by legal counsel in the Department of Justice, has a history of success in recovering records that were never in the archives. Again, it was not always this way in Virginia. In the cases involving the Lossing papers and the Journal of the Convention, the mode of loss was not known. The public officials involved in these cases pursued them and pursued them successfully. A weakened inclination among public officials, both the record custodians and legal counsel in the Attorney General's Office, to attempt to recover records that never reached the archives was a consequence of the state's mixed success in *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*.

⁶³³ Dow, *Archivists, Collectors, Dealers, and Replevin*, 70.

⁶³⁴ Lyndon H. Hart, III, interview with author, December 17, 2013.

There are perceptible contrasts in how different eras of leadership in Virginia have responded to the discovery of records in private hands. What this reveals about replevin is that when players change, replevin activities change. In the earlier part of the century, replevin had the backing of officials in high places in Virginia. The Governor's Office, for example, took interest in both the Lossing papers cases, which were resolved at the turn of the 20th century, and the Journal of the Convention case, settled in 1942. The interest of leadership like the Governor was likely connected to the fact that the state's records program was in its nascent form at this period in time. The state suffered serious wartime losses of its records and public officials were trying to bring order and avoid, to paraphrase the *Report of the Committee on the Records of Government*, losing the state's memory completely.⁶³⁵

Manarin, State Archivist from 1970 to 1995, earned a reputation as an aggressor among the private collecting community. Following *Middlesex County et al. v. Jack Hamilton, d/b/a Hamilton's Book Store*, the Manuscript Society published a caustic description of Manarin's replevin efforts and posited that the court opinion would hinder him in the future. S.L. Carson wrote, "The Archivist of the State of Virginia, Dr. Louis Manarin, can no longer march into a home or shopkeeper's place of business as sole judge and jury and in effect, use Louis XIV's famous quote, 'I am the State,' to seize private property peremptorily."⁶³⁶ The outcome in the case against Hamilton, coupled with Manarin's departure from the Library, ushered in a changed period for replevin. Public officials still demonstrate a commitment to recovery and, thus, to governmental openness. Today, there is a less of an inclination to *demand* custody of records and more of an inclination to *negotiate* custody. The exception to this tendency was the hard-line

⁶³⁵ Committee on the Records of the Government, *Report of the Committee on the Records of the Government* (Washington D.C.: The Committee on the Records of the Government, March 1985), 7, (accessed March 25, 2014, <http://files.eric.ed.gov/fulltext/ED269018.pdf>)

⁶³⁶ S.L. Carson, "Manarin Mauled in Replevin Decision; To the State of Virginia: 'Sic Semper Tyrannis!'" *The Manuscript Society News* 8, no. 4 (Fall, 1992): 113.

position that the Library of Virginia and the Attorney General held in the Gilmore papers case and, even in this case, the public officials did work with Gilmore to develop an agreement related to access, but not to ownership.

VII. DISCUSSION AND FUTURE DIRECTIONS

VII.A. A REFLECTION ON REPLEVIN AND THE PUBLIC GOOD

This study drew upon interviews and records to trace the contours of the replevin process in three jurisdictions. The historical and contemporary case studies analyzed within these pages illustrate varied processes even within the same state and reveal that replevin activities are largely dependent on the priorities and interests of public officials within the state archives and the state attorney general offices. This was a clear finding in this study. The people in power – both in the state archives and in the Attorney General’s Offices – have tremendous influence on the activity and inactivity of the replevin program in the state. Replevin is handled differently across time and administrations.

This dissertation began with an understanding of replevin as attempts by government archives to regain custody of public records in the possession of private parties. The term “replevin” refers to three types of recovery cases involving public records:

- Recovery that enters litigation but where ownership is settled between parties;
- Recovery that enters litigation and where ownership is determined by the court;
- Recovery that does not involve the court system and where ownership is settled between parties.

The dissertation concludes with an understanding of replevin that can be most succinctly stated as follows: *Replevin* describes government efforts to recover *selected* public records or publically owned records that are in private hands. Such efforts may involve the courts but are most commonly settled by the parties involved. Public archives do not, as this dissertation demonstrated, pursue all records that are in private hands. Just as there is a pattern to the replevin process, conceived as a six-stage process in this dissertation, there is a pattern to the types of public records that, when alienated, are most likely to be the subject of a replevin effort. States in this study pursued records that are “archival,” meaning they are permanent according to retention schedules, and that fill a gap in the existing collection. The cases presented, with few exceptions, focused on records that predated 1900 and that were in the custody of a private individual or auction house. Today, state archives in Pennsylvania and Virginia are less inclined to pursue records that are out of state and cases where it is unclear whether a government office actually received or created the record in question. Moreover, state archives employees in these states may find it more difficult to convince their legal counsel to support a recovery effort where the record has low financial value or where it was never in the archival repository.

C.B. Macpherson identifies two usages of the word “property.” In its colloquial use, property is synonymous with “things,” with public records serving as the “things” of interest in this dissertation. The legal field, however, understands property as “not things but *rights*, rights in or to things” and the notion of a “bundle of rights” remains the dominant paradigm.⁶³⁷ The people are the owners of public records. The Deputy Secretary of Cultural Resources certainly captured this point when he defined replevin as “the action taken to retrieve property belonging to the people that are out of the hands of the people.”⁶³⁸ The general populace, however, does not

⁶³⁷ MacPherson, “The Meaning of Property,” 2.

⁶³⁸ Cherry, interview with author, June 6, 2013.

exercise all of the incidents or the entire bundle of rights that property theorists describe. We have the right to use the thing -- the collection of public records in a public archives. We as users, however, do not have the ability to exclude others of the right to use the thing. We certainly do not have the right to discard the thing at our own discretion. Public property is an unusual category of property and involves trust. The public expects that the state will be stewards of the public property and that the state is committed to providing indiscriminate access to the general public.⁶³⁹

Margaret Davies says, “property serves as a lens into a social order.”⁶⁴⁰ The property issues at the heart of this dissertation do just that. In her chapter in Cox and Wallace’s edited volume *Archives and the Public Good*, Anne Van Camp, asserts that a “hallmark of a society’s openness is the degree of public access to the archives and records of its government.”⁶⁴¹ While news stories consistently challenge the notion of governmental transparency in the United States, our public archives are built on a premise of providing access to public records, records that provide evidence of government decision-making and that hold public officials accountable for actions. Replevin is directly in line with this mission.

During the *State of North Carolina v. B.C. West Jr.* case, there were archivists and private collectors and dealers alike who leveled criticism against the state’s efforts to recover the bills of indictment, characterizing it as overzealous, unethical, and even unconstitutional. West’s attorney, in questioning State Archivist Mitchell in the case heard in the Superior Court, suggested that the Department of Cultural Resources was acting with “proprietary” interests in

⁶³⁹ Marchak, “What Happens When Common Property Becomes Uncommon,” 4.

⁶⁴⁰ Davies, *Property*, 2.

⁶⁴¹ Anne Van Camp, “Trying to Write ‘Comprehensive and Accurate’ History of the Foreign Relations of the United States: An Archival Perspective,” in *Archives and the Public Good: Accountability and Records in Modern Society*, ed. Richard J. Cox and David A. Wallace (Westport, CT: Quorum Books, 2002), 229.

mind and was moved by greed rather than concern for public access to evidence.⁶⁴² This was not the impression that emerged from the study of the historical and contemporary replevin activities in three state archives.

The public officials interviewed and studied in this dissertation view recovery of public records as a responsibility that they must bear. A statement by the Deputy Secretary of the Department of Cultural Resources conveys this best. Cherry said,

There is a difference in preserving the record to provide information about the activities of government than there is preserving the record of history that is separate from government actions. It's especially important for a democracy. If we can't have a record showing what our elected officials have done -- if they can easily be taken ...out of the hands of the people, then we are losing our ability for individuals to control our government. And writing history is a form of controlling government. If you are not given the fuel to have the ability to interpret the past... and you don't have that evidence because someone else is holding it in their private collection somewhere, you are being denied your rights as a citizen.⁶⁴³

Each state archives exhibited an adherence to these words through the actions of their staffs. The disinclination to pursue records in existing archival collections suggests that proprietary interests certainly do not drive replevin activities. As Mitchell suggested, records that are in other archival collections are removed from their context, diminishing, he argued, their archival integrity. This situation may not be the ideal from the perspective of either the public archivist or of the user. They are, however, still available to the members of the public who desire to understand an action or decision by the government. Records that are in a private individual's custody are not accessible, or if they are, the availability is at the discretion of that individual. The very existence of the records may not even be known, as illustrated by this dissertation's discussion of the discovery stage in the replevin process. Public archivists, very simply, want to facilitate public

⁶⁴² Tr. of Evidence, p. 47, November 6, 1975, submitted in *State of North Carolina v. B.C. West Jr.*, 293 N.C. 18, 235 S.E.2d 150 (1977).

⁶⁴³ Cherry, interview with author, June 6, 2013.

access to public information. The motivation behind replevin is an effort to benefit the public good.

Davies' understanding of property as a means for viewing social order is applicable when considering the objections that critics have historically leveled against replevin. Americans live in a society that values government openness and accountability, but they also a part of a society that values private ownership rights. Still, this dissertation pointed to a softening in the criticism against public officials' efforts to reconnect the public with their property. While the Manuscript Society's Replevin Committee retains a fund to support individuals who find themselves involved in what the committee views as an unjust replevin, the chair of the Replevin Committee said that the membership understands there are just replevin cases and they weigh the merits of both claims before supporting the private holder.⁶⁴⁴

The public can find good reasons to distrust the government. Replevin is not one of those things. As the North Carolina court system reviewed the case against West, Charles Hamilton said the following: “[North Carolina’s success] will set a precedent for other states. Every public and university library, every historical society, every collector and dealer will be fair game for state historians. Your own collection may be looted by North Carolina or other states or even by the Federal government. Scholarship will be set back a century. Every card catalogue in every library will have to be overhauled.”⁶⁴⁵ Of course, this did not happen. The Department of Cultural Resources may indeed be a bulldog in this area, but they – and indeed the other two states studied here -- are not motivated by greed and they are not simply trying to protect their turf. Instead, this “dogged” commitment to recovery is for the good of the people.

⁶⁴⁴ Interview with Michael Dabrishus, Chair of the Manuscript Society Replevin Committee, December 11, 2013, University of Pittsburgh Hillman Library, Pittsburgh, PA.

⁶⁴⁵ Charles Hamilton, Autograph Dealer, to unnamed colleagues, December, 22, 1976; “Reaction after Supreme Court Decision,” folder titled “Reaction after Supreme Court Decision,” Box 78, General Correspondence 1974-1978, North Carolina vs. West; Archives and Records Section, North Carolina State Archives, Raleigh, NC.

This dissertation challenges the conceptualization of replevin as a process that involves two camps of players, one that includes public archivists and the other dealers and collectors. Collectors can be partners to public archivists, bringing alienated items to their attention, and, in each of these states, public archivists show discretion in what they pursue and a willingness to cooperate, whether it be with acknowledgements of donations or “care and keeping” fees. There is movement and collaboration between these camps.

There is another, very important, camp that is influenced by replevin activities: its composition is the general populace. Among the records that public archivists preserve and recover are papers that carry the signatures of our founding fathers or that document governmental decisions during the Civil War. Others are less removed in time but are no less important. These records may have a lower market value, but high evidential value, documenting the actions of contemporary public employees and elected officials in matters of great public importance. It is troubling to imagine an alternate version of the conclusion to the Gilmore papers case, one in which the Library of Virginia officials and the state’s Attorney General happily accepted the papers the Governor’s office originally transferred. Had this been the case, there would be large – and deliberate -- gaps in the evidence. The hypothetical becomes all the more troubling when one realizes that Gilmore had considered a run for the Republican presidential nomination in 2008. Without proper enforcement of public records laws, public employees and elected leaders could erase evidence at a whim. The public should want archivists to pursue alienated records and archivists should have the aid of legal counsel in Attorney General’s offices. They should be and must “bulldogs” in this matter.

Staff at the three state archives were open about replevin activities, further evidencing that they are motivated by a commitment to the public and not, as select members of the

Manuscript Society have sometimes suggested, any nefarious reasons. The individuals that participated in this study were candid and willing to speak with a member of the public who wanted to learn about the decision-making and processes within their institution. The State of North Carolina was particularly notable in fulfilling records requests and facilitating my ability to study this topic in doing so. While I was in Raleigh, for example, I expressed interest in studying the Department of Justice's file on the George Washington letter case. As the record request, included in Appendix B, illustrates, this was approved within minutes, thanks to the assistance of the Special Deputy Attorney General in expediting it. This much was clear in conducting the research: none of these institutions are trying to withhold information about their efforts to recover public records.

VII.B. FUTURE DIRECTIONS IN RESEARCH

During the preparation of the dissertation proposal, George Bain's article on state archival law, published by the *American Archivist* in 1983, was a useful, but dated, resource. In the area of replevin, there have been changes to the legislative landscape in which state archives recover public records in private hands. Moreover, in contrast to today, email communication was not the prevalent form of communication among state employees at the time of Bain's writing. An application of Bain's methodology to the current public records statutes would be of value to both public employees and the larger archival community. This study will be among my future projects.

This dissertation focuses on ownership of government records in the analog and the traditional understanding of replevin as the recovery of original records. My next project will

probe what replevin may look like in a digital context. The latter question is relevant in an age when public sector employees conduct much of their business correspondence through their email. The management of these records is complicated by the use of private email addresses and alias accounts, a practice that, on the federal level, was the subject of a House Committee on Oversight and Government Reform hearing in September 2013. At this time, the Archivist of the United States testified federal employees may, when necessary, use private email accounts for government business, but must adhere to federal records laws and records retention schedules.⁶⁴⁶ There are frequent stories, however, of public officials in all levels of government failing to comply with public records management requirements, prompting the questions of how these emails can be retrieved and made discoverable and how this type of behavior may be discouraged.

At the Committee on Oversight and Government Reform hearing in September, three individuals testified on their use of private email accounts and alias email accounts for matters of public business. Their testimonies provided some insight into what would prompt a public official to use personal email accounts, though the motivations that the individuals offered may have been fabricated to hide more clandestine reasons. One individual, a former executive director of the Loan Programs Office at the Department of Energy, cited a lack of understanding of retention schedules and private email accounts and, at the same time, described the “old and cumbersome” nature of the his Department’s information systems.⁶⁴⁷ Another individual, the

⁶⁴⁶ David Ferriero, Testimony before the House Committee on Oversight and Government Reform Session, “Preventing Violations of Federal Transparency Laws,” September 10, 2013, accessed October 15, 2013, <http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/>.

⁶⁴⁷ Testimony of Jonathan Silver, Testimony before the House Committee on Oversight and Government Reform, “Preventing Violations of Federal Transparency Laws, September 10, 2013, accessed October 15, 2013, <http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/>

former chairman of the Commodity Futures Trading Commission testified that there was an absence of sufficient training on public records management.⁶⁴⁸

I will draw upon the contacts I have developed through this dissertation research to focus on this information challenge from the context of state government. My initial research in this area will draw upon a framework that the Inspector General of the Department of Commerce (DOC) employed in examining the use of private and alias email accounts for public business.

The following points of inquiry guided his investigation:

- a) Whether it is possible to determine the extent personal email accounts are used by DOC employees to conduct official business.
- b) Whether DOC has procedures in place to collect, maintain, and access records created by personal or alias email accounts.
- c) Whether DOC has provided appropriate training for staff related to the use of personal or alias email accounts.
- d) Whether DOC has reprimanded, counseled, or taken administrative action against any employees for using personal or alias email accounts.
- e) Whether DOC officials have promoted or encouraged the use of personal or alias emails for conducting official government business.⁶⁴⁹

An application of such a framework to state agencies can inform an understanding of the information behavior, systems, policy, and training in the public sector.

I am interested in approaching this records management challenge in several ways, exploring strategies in the form of policies and curriculum development for public sector employees. For those emails that have escaped, I would like to conceive of and develop a digital

⁶⁴⁸ Testimony of Gary Gensler, Testimony before the House Committee on Oversight and Government Reform, "Preventing Violations of Federal Transparency Laws, September 10, 2013, <http://oversight.house.gov/hearing/preventing-violations-of-federal-transparency-laws/>

⁶⁴⁹ Todd Zinser, Inspector General, Department of Commerce, to Lamar Smith Chairman of the Committee on Science, Space and Technology, May 20, 2013; accessed February 4, 2014, <http://www.oig.doc.gov/OIGPublications/2012.11.15-Hall-Johnson-to-IG-Request-Letter.pdf>

replevin process. Additionally, I hope to engage in collaborative research with faculty colleagues who have expertise in information systems design in order to probe whether there are limitations in government communications systems that contribute to the use of personal email accounts. We may consider developing a more robust information system or design modifications to current systems in use.

The larger significance of the use of personal email accounts is this: if public employees either choose to circumvent public records laws or do not fully understand the distinctions between public and private records, the records may escape public custody and may not be discoverable. The consequences may impede the public's ability to hold their officials accountable for their decisions and actions.

APPENDIX A: INSTITUTIONAL REVIEW BOARD DOCUMENTATION

Gmail - Human Subjects' Research

19/03/2014 12:54



Eleanor Mattern <nora.mattern@gmail.com>

Human Subjects' Research

12 messages

Ivanusic, Carolyn <ivanusicc@upmc.edu>
To: "nora.mattern@gmail.com" <nora.mattern@gmail.com>

Mon, Mar 4, 2013 at 3:47 PM

Nora,

This e-mail is a summary of the conclusion of our meeting, and some information that you can use as reference regarding what constitutes "human subjects' research".

Under the OHRP (federal) regulations governing human subjects' research, the definition of a human subject is a living individual about whom you are obtaining identifiable information. The definition of research is a systematic investigation designed to contribute to generalizable knowledge. The IRB is responsible for oversight of projects that meet this definition.

Based on your description of the study, we concluded that the interviewees are not the topic of study, nor do you intend to collect data for a planned statistical analysis. Instead, your intention is to study the process and procedures by which documents are obtained / distributed, etc., will ask professional individuals questions based on the actions and policies of their institutions, and are not collecting data for the purpose of analysis to prove or disprove a hypothesis. Therefore, your project would not fall under the oversight of the IRB.

Regarding the FOIA records, please consult with the individual who provided the information to you regarding what this information can be used for in the future and regarding confidentiality issues.

I hope that this has been helpful. Please let me know if any of your study plans change in a way that may appear to be human subjects research.

Good luck with your project!

Carolyn



Eleanor Mattern <nora.mattern@gmail.com>

Human Subjects' Research

Ivanusic, Carolyn <ivanusicc@upmc.edu>
To: Eleanor Mattern <nora.mattern@gmail.com>

Wed, Mar 6, 2013 at 12:44 PM

Nora,

Because you would still be studying the process, and not the people, it would not be human subjects' research. Remember that not only must the people be the topic of study, data about them would need to be collected in a planned / systematic way in order for you to need IRB review.

Carolyn



University of Pittsburgh
Institutional Review Board

3500 Fifth Avenue
Pittsburgh, PA 15213
(412) 383-1480
(412) 383-1508 (fax)
<http://www.irb.pitt.edu>

Memorandum

To: Eleanor Mattern
From: Christopher Ryan, Vice Chair
Date: 4/3/2013
IRB#: [PRO13030576](#)
Subject: The Replevin Process in Government Archives: Recovery and the Contentious Question of Ownership

The above-referenced protocol has been reviewed by the University of Pittsburgh Institutional Review Board. Based on the information provided to the IRB, this project includes no involvement of human subjects, according to the federal regulations [§45 CFR 46.102(f)]. That is, the investigator conducting research will not obtain information about research subjects via an interaction with them, nor will the investigator obtain identifiable private information. Should that situation change, the investigator must notify the IRB immediately.

Given this determination, you may now begin your project.

Please note the following information:

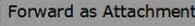
- If any modifications are made to this project, use the "**Send Comments to IRB Staff**" process from the project workspace to request a review to ensure it continues to meet the determination.
- Upon completion of your project, be sure to finalize the project by submitting a "**Study Completed**" report from the project workspace.

Please be advised that your research study may be audited periodically by the University of Pittsburgh Research Conduct and Compliance Office.

APPENDIX B: DOCUMENTATION RELATED TO RECORDS REQUESTS

Current Folder: **INBOX**

Welcome: EMM100

Search Results  Delete  Forward  Forward as Attachment  Reply  Reply All

Subject: RE: Records Request from Eleanor Mattern
From: "Haury, David" <dhaury@pa.gov>
Date: Mon, April 22, 2013 10:45 am
To: "EMM100@pitt.edu" <EMM100@pitt.edu>
Priority: Normal
Options: [View Full Header](#) | [View Printable Version](#) | [Download this as a file](#) | [Add to Address Book](#) | [View Message details](#)

April 22, 2013

Eleanor Mattern
616 Summerlea St. Apt. 2
Pittsburgh, PA 15232
570-852-9627
emm100@pitt.edu

RE: PHMC RTKL 2013-09

Dear Ms. Mattern:

On April 10, 2013, the open-records officer of the Pennsylvania Historical and Museum Commission (PHMC) received your written request for information. PHMC is responding to your request under the Pennsylvania Right-To-Know Law, 65 P.S. §§ 67.101, et seq. (RTKL). You asked for:

"This is a request for PHMC records related to replevin cases involving Pennsylvania public records (for example, agency records related to the replevin claim against E.G. Marshall & Associates in 2009). This request includes correspondence between the PHMC and the Attorney General's Office that relate to these replevin cases, along with documentation between the PHMC and the private parties in possession of records that the PHMC believes to be public in nature."

On April 12, 2013, we notified you that PHMC required an additional 30 days, until May 17, 2013, to respond to your request.

Your request is granted in part and denied in part as follows. The records for which access is granted are attached. The attachment is the copy of the Commonwealth Court decision and related documents in the Commonwealth v. E. G. Marshall & Associates case which you requested.

However, PHMC has withheld information that is exempt from disclosure by law, as follows:

We did not provide the requested correspondence between PHMC and the Attorney General's Office related to the Marshall case. The RTKL provides that this information is exempt from disclosure based on attorney-client privilege: "Section 305. Presumption. (a) General rule. - A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record. The presumption shall not apply if: (1) the record is exempt under section 708;(2) the record is protected by a privilege. . . ." The Marshall case is the only "replevin" litigation in which PHMC has been involved within the past decade, and from this perspective your request is granted and we have provided the records related to this case not closed by attorney-client privilege.

PHMC has also denied your request because it is not sufficiently specific. The RTKL requires that a request for records be made with "sufficient specificity to enable the agency to ascertain which records" are being requested. 65 P.S. § 67.703. We deem your request to be insufficiently specific because you provide no time limitations for the records being sought and you also provide no limitations regarding the type of documentation being sought, i.e. correspondence; or the type of records, i.e. state or local government documents.

With regard to the records that were not produced you have a right to appeal this response in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reasons: why you think the record is public (a statement of the grounds you assert for the requested record being a public record); and why you think the agency is wrong in its reasons for saying that the record is not public (a statement that addresses any ground stated by the agency for the denial, which you are challenging). If the agency gave several reasons why the record is not public, state which ones you think were wrong. Also, the OOR has an appeal form available on the OOR website at: <https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Sincerely,

David A. Haury

David A. Haury | Agency Open Records Officer

Printer Friendly

From: "Talley, Noelle" <NTALLEY@ncdoj.gov>
Subject: RE:
Date: Thu, June 6, 2013 11:43 am
To: "EMM100@pitt.edu" <EMM100@pitt.edu>
Cc: "Blum, Karen" <KBLUM@ncdoj.gov>, "Sarah.Koonts@ncdcr.gov" <Sarah.Koonts@ncdcr.gov>

Request is approved.

Thank you,
Noelle

Noelle Talley
Public Information Officer
Attorney General Roy Cooper
N.C. Department of Justice
Desk: (919) 716-6484
After hours: (919) 218-1255
ntalley@ncdoj.gov

www.ncdoj.gov

-----Original Message-----

From: EMM100@pitt.edu
[mailto:EMM100@pitt.edu
]
Sent: Thursday, June 06, 2013 11:41 AM
To: Talley, Noelle
Subject:

Dear Noelle,

I am submitting a records request for

Records to be accessed: Item 2395, Department of Justice, Closed Department of Administration Cases File, George Washington Letter litigation, 1977 Type of access: examine only or examine and copy

Best,

Eleanor Mattern

APPENDIX C: LEGAL ABBREVIATIONS APPEARING IN DISSERTATION

Am. Jur. 2d: *American Jurisprudence*
Barb.: Barbour's New York Supreme Court Reports
Cir. Ct.: Circuit Court
C.J.S.: *Corpus Juris Secundum*
d/b/a: Doing business as
Dep.: Deposition
F.2d: Federal Reporter, Second Series
Gratt.: Grattan's Virginia Supreme Court Reports
N.C. Ct. App.: North Carolina Court of Appeals
N.C. Gen. Stat: North Carolina General Statutes
N.M.: New Mexico Reports
N.Y.S.Ct.: New York Superior Court Reports
Pa. Commw.: Pennsylvania Commonwealth Court Reports
PA C.S.A: Pennsylvania Consolidated Statutes
Pa. R.C.P.: *Pennsylvania Rules of Civil Procedure*
P.S.: Purdon's Pennsylvania Statutes Annotated
Pub. L.: Public Law
S.D.N.Y.: Southern District of New York
Summ of Pa Jur: Summary of Pennsylvania Jurisprudence
T.C.A.: Tennessee Code Annotated
Tenn. Ct. App.: Tennessee Court of Appeals
Tr.: Transcript
United States Statutes at Large: Stat
United States Code : U.S.C.
Va.: Official reporter, Virginia Supreme Court
Va. App.: Official reporter, Virginia Court of Appeals
Va. Cir.: Unofficial reporter, Virginia Circuit Court

Reference for Abbreviations:

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