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Recommended Citation

Redmond A. Burke & Robert Q. Kelly, *The Lewis-Clark Expedition Papers: The Genesis of a Case*, 7 DePaul L. Rev. 162 (1958)

Available at: <https://via.library.depaul.edu/law-review/vol7/iss2/2>

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THE LEWIS-CLARK EXPEDITION PAPERS: THE GENESIS OF A CASE

REDMOND A. BURKE, C.S.V., AND ROBERT Q. KELLY

ON JANUARY 23, 1958, the United States Court of Appeals for the Eighth Circuit decided a case of first impression, which has aroused the interest of lawyers, historians, archivists, private collectors of manuscripts and librarians. *United States v. First Trust Company of Saint Paul*¹ consisted of a controversy over the ownership of rough notes written by William Clark, about events in the famed Lewis-Clark Expedition, 1804-1806. Never before has the federal government been a party to the judicial test of ownership of an intellectual production of an archival nature.²

The purpose of this article is to trace the history of the disputed papers and thereby to lend perspective and clarity to the legal elements of the case. Surely, the principles of law are enriched and elucidated by inquiry into their historical context, for law and history are both social sciences. The full understanding of one is never achieved without some appreciation of the other. This interdependence is particularly evident in *United States v. First Trust Company of Saint Paul*.

THE UNKNOWN WEST

Although the Mississippi River was the western boundary of the United States in 1783, the nation was naturally curious about the vast region that lay beyond it. Owned by Spain and inhabited by Indians, it could be a menace in time of war or a source of profitable trade in time of peace. For a number of years the only source of information about the area was derived from the conversations of traders and occasional travellers.³ Tales were continually drifting back to the East of stirring adventure and of great wealth to be found in these vast

¹ U.S. v. First Trust Co. of St. Paul, C.A. 8th, No. 15, 744 (Jan. 23, 1958).

² Griffin, Lewis and Clark: A Legal Analysis, 10 Manuscripts, 64 (1958).

³ 1 History of the Expedition of Captains Lewis and Clark, xxvii (Hosmer ed. 1924).

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open spaces. And soon after Thomas Jefferson became President, he formulated plans for an expedition to secure reliable information on Indian tribes, geography, plant and animal life, and to establish friendly relations with the Indians of the plains.

EARLY ATTEMPTS AT EXPLORATION

Months before the completion of the famous Louisiana Purchase from Napoleon Bonaparte for \$15,000,000 Jefferson had secured from Congress an appropriation for a scientific exploration of the land west of the Mississippi.⁴ This was the fourth attempt made by Jefferson to institute an exploratory expedition. Though he had never travelled more than fifty miles west of his own home, at Monticello, the vast unexplored lands beyond the Mississippi had fascinated his imagination for years before he reached the White House. While Governor of Virginia he had advocated the activities of George Rogers Clark which gave the Northwest to America. While Secretary of State, he had endeavored to take advantage of the strained relations between Great Britain and Spain to increase American privileges or rights to navigation on the Mississippi. Unlike most easterners who were interested in the commercial possibilities inherent in western development and simultaneously fearful of its political implications, Jefferson, as an American and a statesman, looked beyond the difficulties and visualized an America stretching from ocean to ocean. In 1783 he had suggested a western expedition to General George Rogers Clark, but it came to nothing; he had proposed a plan for crossing Russia and Siberia to Kamchatka, thence to the west coast and by land eastward across the American continent and this failed; in 1793 he had arranged a tour up the Missouri and down the Columbia for Andre Michaux and again was disappointed.

In 1803, Jefferson appointed Meriwether Lewis, his personal secretary, to lead an expedition to the west. This appointment proved successful. William Clark, the youngest brother of George Rogers Clark, of the Revolutionary War fame, was chosen to join Lewis in leading the expedition. The legislative authorization was given on February 23, 1803,⁵ in response to a confidential message from President Jefferson (January 18, 1803).⁶

⁴ 2 Stat. 206 (1803).

⁵ *Ibid.*

⁶ Richardson, 1 A Compilation of the Messages and Papers of the Presidents, 1789-1897, 352 (1899).

INSTRUCTIONS ON A JOURNAL

In his detailed instructions to Lewis of June 20, 1803, President Jefferson displayed particular concern for the journals of the proposed expedition which were to be prepared "with great pains and accuracy, to be entered distinctly and intelligibly for others as well as yourself."⁷ These notes were to be guarded against loss by making several copies, "one of these copies [to] be written on the paper of the birch, as less liable to injury from damp than common paper." This recommendation, however, was not carried out in practice. Their party of some thirty men left St. Louis in May of 1804 and made their way up the Missouri River. They went into winter quarters near the present town of Bismarck, North Dakota. After travelling some two thousand miles up the Missouri, then over the continental divide they followed western streams until finally they floated down the Columbia to the Pacific which they reached on November 7, 1805, having covered four thousand miles from the point of departure. Here the explorers built a fort for the winter, and claimed the country in behalf of the United States government. On their return journey the following spring, the party broke into three detachments, uniting again at the confluence of the Yellowstone and the Missouri, reaching their starting point two years and four months after their departure.

PREPARATION OF JOURNALS

Upon reaching St. Louis on the return (September 23, 1806), individual journals were for the most part transcribed by members of the expedition into neat blank books with the intention of preparing them for publication. The field books from which the transcriptions were made were apparently cast aside and eventually perhaps destroyed, since only one is now known to exist. There are, however, still extant several notebooks apparently written in the various camps.

EARLY HISTORY OF MANUSCRIPT JOURNALS

The early publication history of the manuscript journals makes reading nearly as fascinating as the published journals themselves. While the expedition was still on the Pacific coast, President Jefferson sent a message to Congress including a letter from Lewis dated at Fort Mandan the previous April. The letter described the expedition as far as Fort Mandan and included brief reports on explorations of the

⁷ 1 History of the Expedition of Captains Lewis and Clark xlviii (Hosmer ed. 1924).

Red and Washita Rivers by Doctor Sibley, Doctor Hunter, and William C. Dunbar, together with other miscellaneous data, this melange then being published as a government document. Popular stories of the first year of the expedition then began to be published based upon this document and including filler material on the western Indians, much of it extremely inaccurate.

SERGEANT PATRICK GASS

In 1807, shortly after the return of the expedition, the first detailed report of the entire tour was published in Philadelphia. This was the journal of Sergeant Patrick Gass, actually written by David McKeehan, a schoolmaster, based upon the rough but accurate notes of the Sergeant. This publication reached several editions in America as well as a London and a Paris edition.

Although both Lewis and Clark intended to publish their own journals their appointments to important government posts soon after their return caused them to delay in the preparation of the manuscripts for publication. The President, although he had not required an official report, was keenly concerned about the publication of the journals, and in 1809 arrangements were made with C. and A. Conrad and Co. of Philadelphia for the publication with General Lewis as editor. It was while on his way to Philadelphia to begin this task that Lewis met his mysterious death.⁸

NICHOLAS BIDDLE AS EDITOR

Despite continued effort on the part of Clark to secure a publisher, it was not until 1814 that publication was achieved with Nicholas Biddle as editor.⁹ In his task Biddle was aided by George Shannon, a private on the expedition, who contributed his personal reminiscences, while assisting in the interpretation of the notebooks. In addition, Clark purchased the journal of Sergeant Ordway to add to the material available. It is estimated that nearly 1,200,000 words of original manuscript were condensed by Biddle into 270,000. His literary skill resulted in a most interesting book of American travel, but it is Biddle's book, not actually the journals of Lewis and Clark.

In 1816, Jefferson began a search for the manuscript journals in

⁸ Thomas Jefferson suggested that Lewis committed suicide in his "Life of Captain Lewis," in *1 History of the Expedition of Captains Lewis and Clark*, lvi (Hosmer ed. 1924).

⁹ Purcell, *The American Nation*, p. 307 (1937).

order to place them for permanent safe-keeping with the American Philosophical Society since, to his keen disappointment, publication of the complete journals had not been achieved. Mr. Biddle did eventually surrender the documents in his possession but there is no assurance that Clark did the same. The mass of materials relating to the expedition can be indicated by the custom of both Lewis and Clark of making rough notes as well as maps and various sketches in field books. These notes were developed into better form when the expedition would be encamped. In addition there were the diaries and journals of the other members of the group.

Not until 1893 was there a new edition edited by Dr. Elliott Coues, and that was so inadequate that its only value lay in the impetus it gave to a more thorough and accurate edition. This was arranged by the American Philosophical Society with Reuben Gold Thwaites as editor and resulted in the discovery of a considerable store of manuscripts in the New York home of Clark's heirs. It is interesting to speculate on why this wealth of material was in the possession of the Clark heirs when Clark himself was supposed to have surrendered all in his possession to Jefferson and, indeed, to have helped Jefferson in his effort to locate the entire collection. It is possible that Biddle or Clark or both felt that these materials were included in those turned over to the President or were of too little importance to be valuable. In speculating on this entire matter, Thwaites made an interesting observation:

The probable answer is, that Biddle found the four Clark morocco notebooks of no service to him; for practically all of the facts contained in them are noted either in Lewis's journals of similar dates, or in later drafts by Clark—as a rule, fuller, and in better form. He therefore probably returned the books to Clark, in the early stages of the work, keeping only those which later were placed in the Society's archives. It is probable, also, that the engraver having completed the few maps which he deemed necessary for the publication, all of the charts made upon the expedition were returned to Clark. As for the skin-bound field-book, this having already been transcribed into a red morocco notebook, very likely the original did not go to Biddle at all; the orderly book, the various draftments, the Lewis-Clark correspondence, and the letter of credit, were doubtless also kept at St. Louis as being deemed for Biddle's purpose of a popular narrative, unusable material.

On his part, it is possible that Clark had either forgotten the existence of these documents, or, like Biddle, considered them as of relatively slight historical value. His seemingly careless treatment of them would appear to bear out the last conclusion.¹⁰

¹⁰ Thwaites, "Newly Discovered Personal Records of Lewis and Clark," *Scribner's Magazine*, Vol. XXXV, p. 692 (1905).

STORY OF THE HAMMOND FIND

In January, 1953, the Minnesota Historical Society was approached by Mrs. Elizabeth F. Vytlačil of Sparkhill, New York, with the announcement that she had discovered some papers of possible interest in the attic of her mother, Mrs. Burnside (Sophia V. N.) Foster, in St. Paul. Miss Lucille Kane of the Society, working by flashlight, collected a packing box full of papers, among them one bundle wrapped in a NATIONAL INTELLIGENCER of Thomas Jefferson's day.¹¹ Within the wrappings were sixty-seven items in which she recognized the names of William Clark and Meriwether Lewis.

How the papers found their way into the St. Paul attic is not clear. All that is known is that Mrs. Foster was the daughter of General John Henry Hammond, of whose papers these were a part. General Hammond was a Union officer, a railroad builder and an Indian agent, who married Sophia Wolfe of Louisville, Kentucky, during the Civil War. The Wolfe and Clark families are known to have been neighbors at one time near Louisville.

For two months the manuscripts were carefully scrutinized by experts whose final decision was that they were indeed authentic original records of the expedition dating from December 13, 1803, to May 14, 1804, and they have since been described as the greatest discovery of the kind in decades. It was reported that the papers represented the long-sought missing portion of the Lewis and Clark journals. The difficult assignment of transcribing the manuscripts, of deciphering the almost illegible notes, was given to Dr. Ernest S. Osgood, Professor of History in the University of Minnesota. His expert knowledge of western history qualified him for the task and provided the background and understanding essential to a proper transcription.

The papers were identified as rough daily notes of Captain Clark made at the winter camp opposite the mouth of the Missouri in the winter of 1803-4 and those made on the first leg of the Lewis and Clark expedition up the Missouri to Fort Mandan and during the winter of 1804-5 before leaving for the mountains and the Pacific.

Certain correspondence still available sheds some light on the early history of the travel notes. On April 1, 1805, William Clark, from Fort Mandan, wrote President Jefferson:

¹¹ First Trust Company of Saint Paul v. Minnesota Historical Society, 146 F. Supp. 652, 654 (D.C. Minn., 1956).

It being the wish of Captain Lewis I take the liberty to send you for your own perusal the notes which I have taken in the form of a Journal in their original state. You will readily perceive in reading over those notes that many parts are incorrect, owing to the variety of information received at different times. I most sincerely wish that leisure had permitted me to offer them in more correct form.¹²

On April 7, 1805, Meriwether Lewis, from Fort Mandan, wrote Jefferson:

. . . You will also receive herewith a part of Captain Clark's private journal, the other part you will find inclosed in a separate tin box. This journal is in its original state, and of course incorrect, but it will serve to give you the daily details of our progress, and transactions. Captain Clark does not wish this journal exposed in its present condition but has no objection, that one or more copies of it be made by some confidential person under your direction, correcting its grammatical errors, etc., indeed it is the wish of both of us, that two of those copies should be made, if convenient, and retained until our return; in this state there is no objection to your submitting them to the perusal of the heads of the departments, or such others as you may think. A copy of this journal will assist me in compiling my own for publication after my return. . . .¹³

Undoubtedly, the journal "in its original state" which would "serve" to give Jefferson "the daily details of our progress and transaction" is the Hammond Journal, which covers the period from December 13, 1803 to May 14, 1804. Thwaites published line entries from January 1, 1804 to April 7, 1805¹⁴ from a record entitled by Clark "Remarks and References." No other detailed entries or copies of the period December 13, 1803 to May 14, 1804 had been found. It might be reasonable to assume that Jefferson did not have copies made of Clark's "journal in their original state" as suggested by Clark. It is likewise reasonable to assume that when Clark talked with Jefferson while in Washington, from about January 20 to March 9, 1807, he asked Jefferson for the return of the "journal in its original state" and that Jefferson handed it to him, whatever conversation there may have been not being reduced to writing as it was unnecessary. Perhaps Clark planned to work over the journal in its original state and incorporate it with the journal beginning May 13, 1804, now in the American Philosophical Society, but never did so. Presumably he took it with

¹² Lewis, *Original Journals of the Lewis and Clark Expedition, 1804-1806*, 313 (Thwaites ed. 1904-1905).

¹³ Manuscript in Bureau of Rolls, Jefferson Papers, ser. 2, vol. 51, Doc. 107. Quoted in Lewis, *op. cit.*, Vol. 7, pp. 318-20. The above letter is also quoted in part, in the *American State Papers: Indian Affairs* (I, 706-7), with many changes and omissions. It is endorsed by Jefferson as having been received by him, July 13, 1805.

¹⁴ Lewis, *op. cit.*, Vol. I, pp. 217-31.

him on his return trip to St. Louis in March 1807. The period covered exclusively by the Hammond Journal is December 13, 1803 to May 14, 1804.

In October 1953, executors of the estate of Mrs. Foster entered suit in the County District Court to determine title to the manuscripts. An heir of General Hammond, Louis Starr, claimed the papers were given to his mother and were therefore his property. The heirs of Mrs. Foster claimed the papers were delivered to the Minnesota State Historical Society only for examination and report and not as a gift which is the Society's claim. The original parties to the legal action were the First Trust Company of St. Paul, as executor of Mrs. Foster's will, Louis Starr and the Historical Society. After the action was brought Mrs. Foster's heirs agreed that if the papers should be adjudged a part of Mrs. Foster's estate, her heirs would sell them to Louis Starr upon payment of any additional inheritance taxes that might be payable by reason of the papers being a part of the estate.

Sometime after the action had been started, the federal government intervened in the action, claiming title to the papers, and removed the case to the Federal District Court in St. Paul.¹⁵ The federal government intervened in order to quiet title to the disputed drafts, and foreclose the historical society's claim of title by gift, and the claims of the executor of General Hammond's estate and that of his granddaughter. A suit to quiet title is unusual when the res is personalty but this form of action is more efficacious than replevin when more than two parties lay claim to title.¹⁶ The federal government asserted paramount title to the res, on the theory that it constituted the work product arising out of Clark's commission by Jefferson. The government was not precluded from asserting its claim by either operation of laches or a statute of limitations because of the maxim: "*Nullum tempus occurit regi.*"¹⁷ In consideration of public policy the statute of limitations does not run against the sovereign or the state, nor can laches be asserted against either.

The federal government originally contended that General Hammond obtained the Clark notes when he closed the Central Superin-

¹⁵ First Trust Company of Saint Paul v. Minnesota Historical Society, 146 F. Supp. 652 (D.C. Minn. 1956).

¹⁶ Historical Writings; The Independent Value of Possession, 67 Yale L.J. 151, 154 n. 18 (1957).

¹⁷ Broom, Legal Maxims, 45 (1864).

tendency of Indian Affairs at Lawrence, Kansas, in 1878. The government further alleged that Clark had left the notes in the office of the St. Louis Superintendency, when he was either Indian agent or Governor of the Missouri Territory.¹⁸ But the Federal District Court reasoned that, since the notes had no relation to the affairs of the agency, they could have been abandoned, forgotten, or turned over by Clark to others at the agency; such circumstances would not tend to prove the government's case. Accordingly, the court ruled that the government had not sustained its burden of proof in its attempt to establish paramount title to the drafts.

FEDERAL GOVERNMENT APPEALS

The federal government appealed from the decision of the United States District Court for the District of Minnesota to the United States Court of Appeals for the Eighth Circuit.¹⁹ The appellate tribunal reduced the dispute to a single issue, to wit, whether the District Court was erroneous in concluding that the government had failed to carry its burden to establish paramount title. The upper court noted that Jefferson's instructions to Lewis in respect to keeping a journal contained no reference to others in the party. The court remarked further that the disputed sixty-seven documents contained a "great many personal and private notations."²⁰

Citing Rule 52 (a) of the Federal Rules of Civil Procedure, the court declined to substitute its judgment for that of the finder of the facts. "Findings of fact shall not be set aside unless clearly erroneous. . . ."²¹ Further, the court opined that Lewis thought that the disputed notes of Clark were of a private nature. Finally, the Court of Appeals decided "that the conclusions of the trial court are based on substantial evidence, are not against the clear weight of the evidence, and were not induced by an erroneous view of the law."²²

CONCLUSION

Precedents have been established in cases wherein the basic issue resembles the question of ownership of the Lewis-Clark notes, but

¹⁸ 146 F. Supp. 652, 668 (D.C. Minn., 1956).

¹⁹ *United States v. First Trust Company of Saint Paul*, C.A. 8th, No. 15744 (Jan. 23, 1958).

²⁰ *Ibid.* 7.

²¹ 28 U.S.C.A., R. 52(a) (1950).

²² *United States v. First Trust Company of Saint Paul*, C.A. 8th, No. 15744, p. 10 (Jan. 23, 1958).

never in an identical case. Common law awards ownership of property in intellectual productions to their originators.²³ The extent of one's property right in the intellectual labor of an employee has been determined generally by contract. A college, for example, in the absence of a special agreement, has no right to a manuscript created by a professor even though he has made use of college facilities in the preparation of his work.²⁴ An artist, employed by the United States Government to accompany an expedition to Japan in order to make sketches, as illustrations of a public report was denied a property right in his creations because of the nature of his contract.²⁵ This ruling must be distinguished from the ruling in the matter of the Lewis-Clark papers, because in the latter controversy, there was no evidence of a specific contractual provision relating to the disputed *res*.

A careful review of the evidence from an historical and legal viewpoint leads us to believe that the decisions of the United States District Court of Minnesota and the United States Court of Appeals, in the matter of the Lewis-Clark papers, were eminently just. The federal government made the most of a tenuous and conjectural claim. Even though title to the Lewis-Clark manuscripts has not been completely clarified, our nation is indebted to the jurists, attorneys, and disputants in this controversy, for illuminating a very important chapter in the history of our country.

²³ *Wheaton v. Peters*, 8 Pet. (U.S.) 591, 651 (1834).

²⁴ *Peters v. Borst*, 9 N.Y.S. 789 (N.Y.S. Ct., 1889).

²⁵ *Heine v. Oppleton*, 11 Fed. Cas. 1031, No. 6, 324 (S.D. N.Y., 1857).