

CA B 103/784

Part 2 of 2

HEREWITH are left (see Appendix) :-

1. Extracts from War Cabinet 217 of 17th August, 1917.
2. Extract from Hansard dated 15th December, 1932.

The question here presented for the Opinion of the Law Officers is whether the Crown has the legal right to reclaim Cabinet Papers from ex-Cabinet Ministers.

The expression "Cabinet Papers" here means :-

1. Cabinet Minutes.
2. Cabinet Memoranda.
3. Minutes and documents circulated to Cabinet Committees and sub-committees, including the Committee of Imperial Defence and its sub-committees.

All the above documents are circulated from the Cabinet Office, and may come into existence in the following ways :-

1. In the case of Cabinet Minutes and certain Cabinet and Cabinet Committee Papers, the documents are themselves composed by the Cabinet Office. The copies of the documents, if typed, are reproduced in the Cabinet Office; if printed, the work is entrusted by the Cabinet Office to the Foreign Office Printer who sends the required number of copies to the Cabinet Office. The Cabinet Office then circulate the typed or printed copies, as the case may be.
2. A Minister wishing to circulate a document to the Cabinet or to a Cabinet Committee as a rule gives instructions for the document to be drafted in his Department. When the draft has been prepared it is submitted to the Minister for approval and he may either initial the actual document, in which case

be headed "Memorandum by the Minister of (Health)" or B (as is not unusual) he may decide to circulate the document as a Departmental Memorandum under cover of a Note initialled by himself, a simple form of which would be -

"I circulate for the information of [the Cabinet] a Memorandum prepared by my Department on . . . "

C In certain cases, comparatively few in number, the Minister will himself compose the original document.

Whichever course is adopted the Minister may either :

- (a) send the original document (or a copy of it) to the Cabinet Office for reproduction (type or print) and circulation; or
- (b) cause the necessary number of copies to be reproduced by his own Department and send the copies to the Cabinet Office for circulation. If the Minister wishes the document printed, the work is invariably entrusted to the Foreign Office Printer, the only exception being that the draft Bills are confidentially printed by Eyre and Spottiswood.

On the 17th August, 1917, the War Cabinet of that day decided that in future all War Cabinet documents should contain a statement that "This document is the property of His Britannic Majesty's Government" and since that day all Cabinet documents issued for circulation from the Cabinet Office have been so headed, with the addition of the word "Secret".

The documents, therefore, to which consideration has here to be directed will fall into one or other of

five groups :-

Group 1. The original MSS of documents of which the Minister has retained possession. These MSS. may be :

- (1) The original initialled text of the draft prepared by the Department;
- (2) the original text composed and initialled by the Minister. (See C above).

Group 2. Copies of (1) which may have been made by, or on the direction of, the Minister and retained by him as spare copies or fair copies. These copies may, or may not, bear the heading "This document is the property of His Britannic Majesty's Government. Secret".

Group 3. Copies of (1) which have been made on the instructions of the Minister and sent by his direction to the Cabinet Office for circulation, and circulated with the heading "This document is the property of His Britannic Majesty's Government. Secret".

Group 4. Copies of (1) made in the Cabinet Office for circulation, and circulated with the same heading.

Group 5. Copies made and circulated (with the same heading) by the Cabinet Office, of Cabinet Minutes, or of certain other Cabinet documents composed in the Cabinet Office.

The practice in relation to the recovery of Cabinet Papers has varied in the past. Under an early ruling in 1908 of the Committee of Imperial Defence, the Secretary was instructed to recover all records of that Committee from Ministers on their vacating office. This ruling has never

been changed, and the documents of that Committee are recovered by the Cabinet Office from outgoing Ministers as a matter of routine. There is a further rule that ex-members of that Committee can have access to documents issued during the time when they were members of it.

As regards Cabinet documents, in pre-war days, when such documents were comparatively few, and when there was no Cabinet Secretariat, it was the custom for Ministers to retain their documents.

In August, 1917, the War Cabinet, in view of the grave danger of Cabinet Papers getting into wrong hands after the retirement or death of Cabinet Ministers, decided that on leaving office Ministers should either hand over their Cabinet Papers to their successors in the War Cabinet, or return them to the Cabinet Office. [See extract from War Cabinet 217 of 17th August, 1917, herewith.]

Ex-Ministers were however to be given access at the War Cabinet Offices to Cabinet documents to which they had had access during the time when they were in office.

At the first meeting, on 4th November, 1919, of the first post-war Cabinet, the Cabinet had before them certain draft instructions to the Secretary on the subject of procedure, based on the procedure of the War Cabinet, and they included the following paragraph :-

"Cabinet Minutes and Papers are not the personal  
"property of Members, and on a Minister leaving office  
"it is the duty of the Secretary to recover from him,  
"or in the event of his death from his Executors,  
"all Cabinet Papers issued to him from the Cabinet  
"Offices".

The Cabinet, considering that secrecy was "safeguarded by the rule that no one is entitled to make use of Cabinet documents without the permission of the King" <sup>x</sup>, decided to delete this paragraph from the draft instructions to the Secretary. The effect of this decision was that Ministers on leaving office were allowed to take away with them their Cabinet Papers and (except in the single case of the Conservative Government of 1924-1929, which resigned after the General Election and without a final meeting of the Cabinet) this procedure has been followed in the case of each successive Administration, the practice being for the Cabinet of each Administration to adopt at its last meeting a Conclusion in the following terms :-

"To adhere to the procedure of their predecessors in regard to Cabinet documents, that is to say, Ministers should retain such Cabinet documents as they desire, on the understanding that as ex-Ministers they could have access to Cabinet Minutes and other documents issued during their term of office".

Such a conclusion was adopted at the last meeting of the Labour Cabinet on the 24th August, 1931. But the recent case of Mr. Edgar Lansbury's biography of his father (Mr. George Lansbury) has raised the question whether some change should not be made in regard to this practice, and at a meeting on March 21st, 1934, the Cabinet approved the following proposals :-

- (a) That it shall be the duty of all Cabinet Ministers on vacating office to return forthwith all Cabinet Minutes and Papers issued to them while in office to the Secretary to the Cabinet, and it shall be the duty of the Secretary to the Cabinet to recover all such papers accordingly.

<sup>x</sup> See in this connection the extract from Hansard dated 15th December, 1932, containing a reply by Mr. Baldwin to Mr. Lloyd George.

- (b) That the same procedure shall be followed in the case of Ministers outside the Cabinet on vacating office
- (c) That members of previous Cabinets shall continue to have the right of access to all Cabinet Minutes and Papers issued to them during the time that they were members of the Cabinet.
- (d) That the Secretary to the Cabinet be instructed to invite the representatives of deceased ex-Cabinet Ministers to return forthwith to the Cabinet Offices all post-war Cabinet Minutes and Papers in their possession.
- (e) That the Secretary to the Cabinet be instructed to write to living ex-Cabinet Ministers inviting them to co-operate by returning their Cabinet Minutes and Papers to the Cabinet Offices to be kept in safe custody for them.

The Cabinet has authorised its Secretary to put these proposals into operation. Before any step is taken to recover Cabinet Papers under this authority, it is desirable that the strict legal rights of the Crown over them should be defined.

Of the five groups of documents into which, as has been already pointed out, (p.3), the Cabinet Papers fall, the fifth group raises the legal question in its easiest form. Documents which have been composed in the Cabinet Office are clearly Crown documents; and any copy of them which is issued to a Minister under the heading "This document is the property of His Britannic Majesty's Government. Secret." is issued, it is submitted, subject to the two express conditions

- (1) that the property in the document has not passed to the Minister to whom it is issued; and
- (2) that it is secret.

It follows that as regards all Cabinet papers falling within this group which have been circulated by the present Cabinet or by any future Cabinet which adopts the conclusions of March 21st, 1934, the ownership remains in the Crown and the documents can be recovered at law by Latin Information in rem (Robertson p.175). The question however arises whether the Cabinet Conclusions made in the past "that Ministers should retain such Cabinet documents as they desire" have affected the property in such documents. On the one hand, it may be said that those Conclusions have merely authorised the Ministers to retain possession of the documents upon the same condition as before - namely, that the property has not passed. In that case, the Ministers remain bailees of the documents and re-delivery of them may be demanded at any time. On the other hand, it may be said that they raise the question of fact referred to in *Oliver v. Oliver* (11 C.B. (N.S) p.139) "Whether the letters in question had been given to the Defendant so that he might retain them as his own property . . . or whether they were merely deposited with him to take care of them for the Plaintiff". In this connection the language employed in the Cabinet Conclusions (d) and (e) of March 21st, 1934, will be noted.

The fourth group is, it is submitted, in the same position as the last mentioned group. In the fourth group, although the original document was composed by or on the instructions of the Minister, the copies have been made by the Cabinet Office and circulated under the same conditions as the fifth group. and the paper on which the copies are made are supplied in the Cabinet Office from the Crown stores.

The third group consists of copies which have been made at the direction of a Minister from an original document.



composed by him or on his instructions. Here again, it is submitted, there is no real distinction between these copies when circulated by the Cabinet Office and those of the fourth and fifth groups. In fact the copies will have been made in the Minister's own department (or by the Foreign Office printers, as the case may be) on paper belonging to the Crown. It is merely a question of administrative convenience whether their actual reproduction is undertaken in the Minister's Department or the Cabinet Office, and the Cabinet Offices will circulate these copies in the same way as if they had been made on the instructions of the Cabinet Secretary.

It is in the first two groups - and more particularly in the first group - that the legal position is most obscure. Suppose that a Minister has supplied copies to the Cabinet Office from an original which he has himself composed and which he retains together with perhaps one or two duplicate copies. Has the Crown a legal right to the return of the original and the duplicates? No doubt in the majority of such cases the documents will have been created in the Minister's own Department, upon paper belonging to the Crown, and if this fact could be established it is submitted that these documents also could be recovered at law. There would still however remain to be considered documents of this group, which had been created on paper belonging to the Minister. This brings us to the fundamental question whether the relation of the Minister to the Crown enables the Crown to claim, as its own property, the written productions of its servants.

So far as the copyright in such productions is concerned, it is submitted that the ownership is in the Crown under S.5 (1) (b) of the Copyright Act, 1911, the author being in the service of the Crown and the work made in the course of his employment.

The ownership of the copyright does not however determine the right to sue in detinue for the document and although in *Shepherd v. Conquest* (17 Common Bench 427), it was contended that "the produce of the labour of the servant became the property of his masters at the moment of production" (see p.442) that case was determined on the question of authorship and copyright prior to the Copyright Act, 1911, and it has not been possible to discover any other case in which the question has been determined, although in *R. v. Crisp and Homewood* (83 J.P. p.121) Sir Archibald Bodkin appears to have submitted that pencilled memoranda by a Clerk in the War Office were the property of the War Office.

Although it is not contemplated that legal proceedings will be resorted to for the purpose of recovering Cabinet Papers, the Law Officers are asked to advise as to the nature of the proceedings which would be available.

For many reasons it is regarded as important that all proceedings for the recovery of Cabinet Papers of whatever description should be taken in the name of the Crown at the instance of the Cabinet. It is submitted that to whichever of the five groups the papers in question may belong, the appropriate proceedings will be the issue of a Latin Information by the Crown. If so, the fact that the remedy is given at law would appear to exclude the Crown from proceeding in equity by way of English Information even if it were desired to take advantage of the discovery afforded by that procedure.

One further question is submitted. Is the retention of Cabinet Papers, after a demand for their return has been made, an offence under the Official Secrets Act, 1911 and 19

S.1(2) (a) of the Act of 1920 makes it a misdemeanour to fail to comply with directions to return an official

document, but the expression "official document" is defined in S.1(c) in terms which appear to exclude Cabinet Papers. S.2(1) of the Act of 1911 makes it a misdemeanour for any person to retain in his possession any document "which he has obtained owing to his position as a person who holds or has held office under His Majesty when he has no right to retain it or when it is contrary to his duty to retain it". There appears to be nothing in the section to limit the nature of the document. (See R. v. Simington 1921 1 K.B.451).

So far as the ex-Minister himself is concerned, therefore, and to the extent to which he is merely a bailee of the documents, retention of them after the proper demand for their return would, it is submitted, fall within the offence created by the Statute. The further questions remain, however, whether the same observation applies -

- (a) to ex-Ministers who retain the documents (belonging to Group I and Group II) which were created by the Minister and never passed into the possession of the Cabinet Secretariat;
- (b) to Executors and Administrators of deceased ex-Ministers who have come into possession of the documents in right of their deceased;
- (c) to persons who, like Mr. Edgar Lansbury, received them from the ex-Minister himself. Here, it may be observed, the act of "receiving" is itself an offence under S.2(2) of the Act of 1911, so far as the receiver was not a person to whom the Minister was authorised to communicate the documents. [See R. v. Crisp & Homewood 83 J.P. at p.123.]
- (d) to the legatees or next-of-kin of a deceased ex-Minister who have taken possession of them as personality to which they are entitled.

THE LAW OFFICERS are asked to advise in relation to all five groups of documents referred to on page 3 of this Case (distinguishing them where necessary) :-

1. Have the documents ever become the property of the Minister? If so, at what stage did they become his property?
2. Is the Minister entitled to retain the documents after vacating office? If so, is he entitled to retain them after he has been requested by the Cabinet Secretary to return them?
3. Does it make any difference to the answers to Question (2) that he has retained them under the express authority of the Cabinet of which he was a Member?
4. In the case of documents circulated by the Cabinet Secretariat, it sometimes arises that persons other than Cabinet Ministers (e.g. any Ministers concerned with the matter in question who are not Members of the Cabinet) are included within the circulation. It is assumed that the Law Officers, in answering these questions, make no distinction between Members of the Cabinet and other authorised persons to whom the documents are circulated.
5. If any person has become possessed of these documents as executor, administrator or assign of the Minister, is he entitled to retain them or to retain them after he has been requested by the Cabinet Secretary to return them?

6. What is the nature of the proceedings (if any) which may be taken in the last resort to compel surrender of the documents, and by whom should such proceedings be taken? Is the English Information available for this purpose?
7. Is retention of the documents as described in Questions 2, 3, 4 or 5, an offence within the Official Secrets Acts? If so, by whom is the offence committed.
8. Generally.

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APPENDIX

Extract from War Cabinet 217 of 17th August, 1917.

- (a) Cabinet documents should be the property of His Majesty's Government, and that the Cabinet should have the right to insist on the return of any confidential Government document.
- (b) This arrangement should date from the formation of the present Government in December 1916, when for the first time records of Cabinet meetings were kept.
- (c) An ex-Minister should at any time be allowed to have access at the War Cabinet offices to Cabinet documents to which he had had access during the time when he was in Office.
- (d) Upon leaving Office, the normal course should be to hand over his papers to his successor, and that these documents should be regarded as the property of the office, and not of the individual.
- (e) The Secretary, in conjunction with Lord Curzon, should prepare a list of certain specified documents (including War Cabinet Minutes and Imperial War Cabinet Minutes of great secrecy) which, if not handed over to his successor should be returned by a Minister on vacating office.
- (f) It should be the duty of the Secretary to collect such documents from ex-Ministers as are not handed over to their successors.
- (g) In future, all War Cabinet documents, whether printed or otherwise, should contain a statement that "This document is the property of His Britannic Majesty's Government".

"CABINET MINUTES (PUBLICATION).

MR. LLOYD GEORGE (by Private Notice) asked the Lord President of the Council whether the Government are prepared either to publish or consent to publication of the Minutes of the discussion, referred to in yesterday's Debate on the question of the American Debt, which took place in 1922 before the issue of the Balfour Note, when it was expressly stated that the instructions given to the Chancellor of the Exchequer to negotiate a debt settlement with America would be the line which he was to follow?

THE LORD PRESIDENT OF THE COUNCIL (Mr. Baldwin): I am replying to this question on behalf of the Prime Minister, who, I regret to say, is still confined to his room. I learn from the proper constitutional authorities that the publication of Cabinet Minutes would require the approval of the King. The approach to the King should be made through the Prime Minister of the day, as the custodian of Cabinet archives, and it would be the duty of the Prime Minister of the day to advise His Majesty whether permission should be given for publication or not. The Prime Minister is not prepared to advise His Majesty that it would be in the public interest to publish the Minutes to which the right hon. Gentleman refers."

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CABINET PAPERS.

O P I N I O N  
OF THE LAW OFFICERS OF THE CROWN.

1, 2 & 3. Such difficulty as there is in answering these questions arises entirely from the minutes of successive Cabinets dealing with the retention of documents. Apart from these decisions, we have no doubt that all papers included in the five groups were recoverable from any Minister or ex-Minister at any time as being the property of His Majesty's Government. So far as group 1 is concerned there might be some original informal draft prepared by a Minister in his home, or some scheme or proposal which never became an official document, but we think once the draft has been initialled for an official purpose it becomes an official document. The other groups are a fortiori cases. The question as to whether any of the documents have become the property of Ministers turns in our view primarily on the construction of the minute which has been adopted at the last meeting of previous Cabinets, with the exception of the 1924-1929 Government. This minute appears to proceed on the principle that ex-Ministers should be able to refer to Cabinet documents either by retaining them or by access to the documents as filed. In our opinion this entitled Ministers to retain possession of the documents if they exercised the right of retention. A distinction might be drawn in the 1924-1929 Government, but as the same practice appears to have been followed we think that those Ministers would be entitled to be treated as if the usual resolution had been passed.

It is no doubt a possible view that this licence

to retain was revocable, but the Cabinet resolution of the 21st March 1934 does not purport to revoke it and the words there used, in so far as they are relevant to the question, support the view that the right to retain was a final right and that the Ministers affected could if they choose decline to return the documents.

4. Strictly construed the minute we have referred to applies, in our opinion, only to Cabinet Ministers. It cannot have been intended that Ministers other than Cabinet Ministers should have access to Cabinet minutes. The position therefore of other Ministers would be that they have retained documents without any express authority. It might be contended with some force, having regard to the express authority given in the case of Cabinet Ministers, that the same authority should be implied from the similar practice adopted towards Ministers who were not in the Cabinet. We think this is a point of considerable difficulty. On the whole we are of opinion that a right of retention could not be claimed, but we think the arguments are so evenly balanced that we would not advise the distinction being taken.

5. We think that persons are not entitled to retain documents of the character in question of which they have obtained possession as executors, administrators or assigns of a Minister. Such persons are clearly outside the purpose of the authority conferred, which would be construed as conferring the right of retention on the Minister only for the period of his life. He would, we think, be entitled to destroy the documents if he so desired, but if he had not done so, the right to possession of the documents would on

his/



his death revert to the Crown.

6. In our view the appropriate proceedings would be the issue of a Latin Information. An English Information could not properly be used, in our opinion, for this purpose. The difficulty we foresee is in identifying any particular documents as being in the possession of any ex-Minister.

7. In our view an offence would be committed under section 2 of the Official Secrets Act, 1911, if a Minister in future, or an executor or administrator or assign retained any of the documents in question. No doubt in all cases requests would be made for the return of the documents before any proceedings were taken, but the recent conclusion of the Cabinet will make it clear to Ministers that it will be their duty in future to return the documents without any necessity for a request. In the case of executors no doubt requests would always be made as they might well not be familiar with the resolutions of the Cabinet affecting the position and the offence which would be committed by the Minister or executor in question.

*JON. JACKIE*  
*J.B. Somerville*

LAW OFFICERS' DEPARTMENT.

18th June, 1934.



LAW OFFICERS' DEPT

Reg'd 19 APR 1934

No 48634

CABINET PAPERS

SECRET

PROPERTY IN DOCUMENTS

Confidential.

CASE

86

PUBLIC RECORD OFFICE.

REGISTER OF EDWARD THE BLACK PRINCE .

The following Case received from the Master of the Rolls has been forwarded to the Solicitor to the Treasury by the Permanent Secretary to the Lord Chancellor with an intimation that the Lord Chancellor considers it desirable that the opinion of the Law Officers of the Crown should be taken immediately upon the question stated at the end of the Case.

The Public Record Office Act 1838 - Section 1, reciting that "whereas the public records are in the keeping of several persons . . . and it is expedient to establish one Record Office and a better custody . . ." enacts "That the records belonging to Her Majesty which now are or ought to be deposited in the several Record, Offices, courts, places and custody hereinafter mentioned: that is to say, in the . . . Chapter House of Westminster . . . Augmentation Office . . . shall from the passing of this Act be under the charge and superintendence of the Master of the Rolls for the time being in the name and on the behalf of Her Majesty"

Section 2 enacts - "That it shall be lawful for Her Majesty, with the advice of Her Privy Council to order that Records belonging to Her Majesty deposited in any Office, Court, Place or Custody other than as herein-before mentioned shall be thenceforth under the Charge and Superintendence of the Master of the Rolls; and thereupon the Provisions of this Act shall extend to all such Records, and to the Persons then having the Charge or Custody of the same, as fully as if such Office, Court, Place or Custody

had been named and included in this Act".

In pursuance of this Section an Order in Council was made on the 5th of March 1852 as follows:-

"Whereas by an Act passed in the Session of Parliament held in the first and second years of the reign of Her present Majesty, intituled 'An Act for keeping safely the Public Records', it is, amongst other things, enacted, 'That it shall be lawful for Her Majesty, with the advice of Her Privy Council, to order that Records belonging to Her Majesty deposited in any Office, Court, Place, or Custody, other than as hereinbefore mentioned, shall be thenceforth under the charge and superintendence of the Master of the Rolls, and thereupon the provisions of this Act shall extend to all such Records, and to the persons then having the charge or custody of the same, as fully as if such Office, Court, Place, or Custody had been named and included in this Act".

"And whereas it is expedient that all Records belonging to Her Majesty in divers Offices, Courts, Places, and Custodies other than those mentioned and specified in the said recited Act should be henceforth under the charge and superintendence of the Master of the Rolls, so that the provisions of the said Act may extend to such Records.

"Now, therefore, Her Majesty, having taken the same into consideration, doth thereupon, with the advice of Her Privy Council, order that all Records belonging to Her Majesty deposited in any Office, Court, Place, or custody, other than those before mentioned in the said recited Act, shall from henceforth be under the charge and superintendence of the Master of the

Rolls, subject and according to the provisions of the said Act.

(Signed) Wm. L. Bathurst."

Section 3 of the Public Record Office Act of 1838, enacts:- "After the passing of this Act . . . the Master of the Rolls shall by warrant under his hand from time to time appoint a fit person or persons to attend the several courts, offices and places aforesaid and in his name to receive and take charge of all other records of which the charge and superintendence are hereby vested in him; and the chief Judge of the Court or Principal Officer of the Office to which the same shall belong, upon sight of the warrant . . . shall give the necessary orders to the proper Officer or Officers of his Court or Office for the delivery thereof."

In pursuance of the above mentioned Act the present Public Record Office was established - and to it were removed the contents of the pre-existing Offices mentioned in the Act - including the Chapter House at Westminster and the Augmentation Office.

Among the records so removed are various documents of Edward, Prince of Wales, commonly called the Black Prince. These presumably passed at his death to his son, afterwards Richard II.

These include accounts and vouchers of Bailiffs and other receivers of the Prince's rents, letters addressed to him, etc., and, in particular, three volumes of Registers relating to the Administration of his property.

These Registers are:-

1. A paper Book dealing with the whole area of administration for the period 1348 to 1348 - and (after an interval of \_\_\_\_\_ for which there is no extant Register)

(2) Two large Registers on parchment, similar in the nature of their contents to the paper Book - but dealing with separate branches of administration, viz. the Palatinate of Chester and the Duchy of Cornwall respectively. These parchment volumes both cover the period 1351-1365 and are in every respect uniform in style.

It appears that in the course of removal of the effects of a firm of Solicitors, Messrs. Philpot & Co., from Bedford Row to New Square last year, a Register of Writs and other instruments of the Black Prince was discovered. This was brought to the Public Record Office and having been compared with the two parchment volumes above referred to: the three were found to correspond exactly in size, style and general appearance and to cover the same period - the volume now in question dealing, however, with another branch of the Prince's administrative business, and relating to affairs in such parts of England as were not in the Palatinate of Chester or the Duchy of Cornwall. It became abundantly clear that the three parchment Registers represent three branches of the Prince's business; that they are complementary to each other, and that together they give a complete account of the administration of the Prince's Chancery for the whole of England during the period 1351-1365.

There can be little doubt that originally all three volumes were the property and in the possession of the Crown and there is every reason to believe that the two volumes now in the Public Record Office have been in proper official custody throughout the whole period of their existence.

It is not at present known how the third volume was originally separated from its fellows and got into private hands - but as regards its later history the following evidence has been obtained.

In 1793, Mr Richard Gray, Deputy Auditor of the Duchy of Cornwall, gives in a note attached to "the Book of the Accounts of the Black Prince in Gascony, 1355-1356", an extract from a book of Miscellaneous Entries then in the possession of Mr Philpot of Red Lion Square, and adds that this Mr Philpot

"has the possession of this and divers other valuable Books and Records, as an Exor to a gentleman to whose charge they were delivered from private hands of which he is better enabled than myself to give the private history. He has also a large volume of Acts and proceedings of Edward the Black Prince in very fine preservation, - and a Book containing Charters and Abstracts of the Revenues granted to P. Henry, Ao. 1610, which ought to be delivered into this Office."

He attests his statement thus:

"R. Gray. 24 Feb. 1793,

being the day on which I viewed these Records at Mr Philpot's."

The second volume mentioned in this statement is that discovered among Philpot & Co's papers last year.

It will be noticed that Mr Gray in his Memorandum does not definitely state the name of the "Office" to which the books which he had inspected ought to be restored but presumably intends to claim the volume for the Duchy of Cornwall. It is submitted, however, that the proper place of deposit for the volume is the Public Record Office, as representing the Crown and containing all the records of the Chapter House of Westminster and the Augmentation Office and specifically the other volumes of the Series.

In 1841 some extracts from this Register, stated to be then in the possession of J. Philpot Esq., were printed in



Beltz's Memorials of the Order of the Garter".

At this date "John Philpot and John Philpot, Junr" were the members of the firm of London Attorneys named Philpot in the Law List.

Mr Herbert A. Hughes of 11 New Square, Lincoln's Inn, is now the only member of the firm of Philpot & Co., and is in actual possession of the Register.

A grave doubt arises as to the position of the firm of Philpot & Co towards it. Two alternative views seem to present themselves, viz:

1. If the volume came into the custody of Mr J. Philpot in or before 1793, in his capacity of executor or an attorney to a client, the firm would apparently hold it on behalf of the representatives of testator or client - but would have no power to alienate it.
2. If, on the other hand, Mr Philpot acquired it as a purchaser in his individual capacity, unless he by deed or will conveyed it to the firm, such right as John Philpot had would have passed to his legatees or legal representatives.

An opinion is desired upon the question whether the Master of the Rolls, as representing the Crown can recover possession, by process of law, of the Register now in the possession of Mr Hughes, either by force of the indefeasible right of the Crown to its official records and of the maxim Nullum tempus occurrit regi, or by force of the Public Record Office Act of 1838 cited above; and if so; what steps should be taken.

Public Record Office.  
Register of Edward the Black Prince.

Opinion  
of  
The Law Officers of the Crown.

The documents mentioned are obviously "records" within the meaning of the definition contained in section 26 of the Records Act 1838, the Master of the Rolls is therefore by virtue of the Statute and the Order in Council prima facie entitled to their custody and should at once take steps to secure their protection. He ought however to point out that if these documents could be effectively alienated by the Crown, the long adverse possession

possession of them that has taken place  
would support the assumption that they  
had been duly dealt with and that their  
present custody was lawful. Our opinion  
proceeds on the hypothesis which on the  
whole we think accurate that the Crown  
never owned these documents as private &  
personal property and could not effectively  
transfer their ownership to third parties.

We think the Master of the Rolls should  
issue a Warrant approved and countersigned  
by the Lord Chancellor under Section 3  
of the Statute directing delivery of the  
documents into his custody. In default  
of compliance proceedings should at once  
be instituted by the Attorney General at the  
instance

instance of the Master of the Rolls of  
their recovery.

John Simon

Attorney General

Law Officers Department

16<sup>th</sup> July 1911.



LAW OFFICERS DEPT

11 JUL 1914

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Entered Opinion Book A.O.  
page 510.

11  
1914

PUBLIC RECORD OFFICE.

REGISTER OF EDWARD THE BLACK PRINCE.

C A S E

FOR THE OPINION OF THE ATTORNEY and  
SOLICITOR GENERAL.

THE ATTORNEY GENERAL

11 JUL 1914

8

See ~~the~~ Opinion within.  
16/7/1914

Treasury Solicitor

The Public Records Act, 1838, and the  
Limitation Act, 1939.

9c

CASE FOR THE OPINION OF THE LAW OFFICERS AND COUNSEL.

Herewith are sent:-

1. Copies of letters from the Master of the Rolls to Sir George Coldstream dated 27th April 1956 and 3rd May 1956.
2. Copy of a memorandum prepared by Mr. Evans, Deputy Keeper of the Records, enclosed with the second letter of the Master of the Rolls.
3. Copy of the Case for the Opinion of the Law Officers dated July 1914.

The facts in this matter appear from the letters of the Master of the Rolls and the memorandum of Mr. Evans. The Law Officers and Counsel are requested to advise the Lord Chancellor and the Master of the Rolls on the following questions:-

(a) Whether the records of Edw. II. now in the hands of Messrs. Robinson of Pall Mall fall, apart from any question arising under the Limitation Act, 1939, within the Order in Council relating to H.M. public documents made on the 5th March 1852, under section 2 of the Public Record Office Act, 1838, and so are under the charge and superintendence of the Master of the Rolls, subject and according to the provisions of the said Act;

(b) whether, apart from any such question as aforesaid, the procedure for recovering possession of records by warrant under section 3 of the Public Record Office Act, 1838, is available for the recovery of the records concerned;

(c) whether, apart from any such question as aforesaid, an action for detinue would lie at the instance of the Master of the Rolls or the Attorney General suing on behalf of the Crown for the recovery of the said records;

(d) whether section 3 of the Limitation Act, 1939, read with sections 20 and 30 of that Act, bar the bringing of an action for detinue, having regard in particular to section 3(2) of the Act which may have the effect of extinguishing the title to a chattel when the period of limitation has run for an action for conversion even though it has not run for an action for detinue;

(e) whether, if the title of the Crown to the records in question has been extinguished by section 3(2) of the Limitation Act, 1939, the application of sections 2 and 3 of the Public Record Office Act, 1838, is thereby excluded, assuming that they would otherwise apply.



THOMAS HINSWELL  
TREASURY SOLICITOR

*Handwritten:*  
1000 of  
1000 of  
1000 of

17.5.46

Mr. Roger Winn

CASE FOR THE OPINION OF THE  
LAW OFFICERS AND COUNSEL.

The Public Records Act, 1838,  
and the Limitation Act, 1939.

27th April, 1956.

My dear George,

P.R.O.

A little time ago it came to our knowledge that a document of considerable interest, being a book of the accounts for work done at the Palace of Westminster, the Tower of London, and elsewhere in the early days of King Edward II, was being offered for sale by a firm of dealers in old books etc., Robinson of Pall Mall. The document is in good condition and contains about 120 pages.

Having regard to the character of the document it seems to me tolerably clear that it is in fact a "public record" within the scope of the Public Record Office Act, 1838, and the Order in Council of 1852, and is accordingly under my charge and superintendence as Master of the Rolls. Unless the document was in the personal possession of the Sovereign at some time and alienated by him (and the present document would not be, I think, of that character) then it would not and could not have lost its character as a public document. In actual fact, Robinson found it among the residue of the collection of ancient documents known as the Phillips Collection; and the very strong probability is that Phillips got it (as he got other documents) from one Calvert Ord, who was an Officer in the Department of the King's Remembrancer at the end of the 18th century and at the beginning of the 19th - before, in fact, the Record Office Act. In other words, the strong probability is that Ord, quite wrongly of course, pocketed the document and then disposed of it.

Evans had been in communication with Robinson who has asked the extravagant sum of £5,000 for the document. He has now informed us of an offer which he says he has obtained from a customer or associate in New York at that figure, and he has formally applied for an Export Licence. I should say that in Evans' view it is by no means certain that the offer is, in fact, genuine rather than designed to make good his claim for £5,000 as a proper value.

Although the matter is not one of desperate urgency, Robinson's move now makes it necessary for me to decide, with your assistance, what, if any, steps we should take - particularly whether I should execute a warrant under my powers in Section 3 of the Public Record Office Act, countersigned by the Lord Chancellor, for the purpose of asserting my right to the possession of the document as Master of the Rolls.

The power under Section 3 of the Act has in like circumstances been exercised on a few occasions recently in regard to documents of relatively slight significance; and on these occasions it has been the practice to obtain Treasury sanction for making to the person from whom the document is recovered a small ex gratia payment generally corresponding to the price stated in the dealer's catalogue and amounting to a few pounds only. In the year 1914 certain public documents of more substantial value and character were found in the possession of a Solicitor named Hughes, and on this occasion my predecessor obtained the Opinion of the Law Officers (John Simon and Stanley Buckmaster) on the question whether the powers under Section 3 covered cases of this kind. The real point, I imagine, is whether a document in the possession of a dealer or Solicitor etc. can be said to be in a "place" within the meaning of the first three Sections of the Act. The Law Officers (a copy of whose Opinion I have seen) advised my predecessor in an affirmative sense on this point and a warrant was, in fact, then executed by Cosens Hardy countersigned by Haldane for the

purpose of recovering Hughes' documents. In the event it became unnecessary to take any further step because Hughes then delivered over the documents.

The question, then, is: ought we to do the same thing in the present case? My present view is that we should. I have, after all, not only a power but, as I assume, a duty: and although the "thin end of the wedge" argument can be tiresome, nevertheless I think that if we do nothing in this case it may be difficult to proceed hereafter in other cases. This, then, is the first question, and upon it, obviously, I shall want your view and that of the Lord Chancellor.

There will then arise a further question - what, if any, ex gratia payment (assuming that we are right in our claim to the document) ought to be made to Robinson? The market value of a document of this kind must always be very difficult to assess, but in Evans' opinion £5,000 is an altogether preposterous figure. The right sum would, I imagine, be based on consideration of what Robinson paid for the residue of the collection and some estimate of what other things of value it contained. The sort of figure that Evans had in mind would not be more than £100.

I have kept this letter short. You will probably want to ask many questions and what I suggest, in order to save a lot of correspondence, is that at some convenient time you and Evans and I might meet and then one or other of us would try to answer your questions. We would also, of course, produce to you such documents as we have, including the Law Officers' Opinion which I have mentioned.

I should add that I have or may have a vague interest in this matter in another capacity, namely as a Pilgrim Trustee. I am told that when the existence of the document in Robinson's hands was first discovered, a suggestion was made that there should be an application to the Pilgrim Trust in order to find the whole or part of Robinson's price. Though I believe Oakeshott, one of my colleagues on the Trust, was informed about it, no formal application so far as I know has yet come to the Pilgrim Trust. If it did, I should obviously want to be able to inform my colleagues whether, as Master of the Rolls, I proposed to take steps which would make the application unnecessary.

For reasons which will be obvious I am sending a copy of this letter for his information to Bridges.

Yours sincerely,

RAYMOND E.

Sir George Coldstream, K.C.B.,  
House of Lords, S.W.1.

ROYAL COURTS OF JUSTICE,

W.O.2.

3.V.56

My dear George,

P.R.O. & Robinson

Evans has prepared a full account of the whole matter with various appendices. I now send you a copy, as I think you will like to see it and pass it on to ~~Boss~~ Rolf. It may provide, by way of anticipation answers to some of the questions that will arise in your minds.

I hope we may have a talk about it next week, as we don't want to lose too much time.

As regards the first part of Evans' last para. (8), I doubt if we can properly ask for any Discovery. But (I should have thought) if we issue a Warrant, R. can then be told that if he wants an ex gratia payment, he had better come clean.

You will notice that I (wrongly) referred to Mr. Graves Ord as Calvert Ord for which I apologise.

Yours sincerely,

RAYMOND.

COPY/

CORRESPONDENCE BETWEEN THE  
MASTER OF THE ROLLS AND  
SIR GEORGE COLDESTON

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PHILLIPPS MS.4099: Particulars of the Account of  
the Clerk of the Works of the King's Palace and  
News at Westminster and at the Tower of London.  
1-4 Edward II (1307-1311).

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(1) The Ministry of Works is preparing, with Treasury approval, an official 'History of the King's Works'; the Permanent Secretary of the Ministry is Chairman of its 'Steering Committee', of which J.H. Collingridge is a member. The Editor of the volume dealing with the Middle Ages is Mr. H.M. Colvin of St. John's College, Oxford. Mr. Colvin found in Brayley and Britton's 'History of the Ancient Palace and late Houses of Parliament at Westminster' (1836), at pp.109-112, references to and translated abstracts from 'a manuscript in the possession of Sir Thomas Phillipps, Bart.,' relating to the works that were carried out at Westminster, etc. in the first year of Edward II. The abstract is confined to payments made for one week in August 1307. A footnote at p.109 adds that

"This manuscript (or 'Compotus') was purchased by Sir Thomas Phillipps at the second sale of the effects of the late Craven Ord, Esq. (who was the first Secondary in the King's Remembrancer's Office,) in January 1830, for the sum of seventy guineas. There can scarcely be a doubt that it had belonged to the Exchequer."

(2) The circumstances of this sale are referred to in a letter, dated 17 December 1832, of Robert Thompson, a Sworn Clerk in the King's Remembrancer's Office of the Exchequer, to the Secretary of the Royal Commission on Public Records (see Appendix A).

Craven Ord (1756-1832), a well-known antiquary, formed a fine collection of impressions of brasses and historical manuscripts. His biographer in the D.N.B. omits to mention that Ord was from 1781 a Curator of the Chancery and entered the King's Remembrancer's Office as a Sworn Clerk in 1782; and at his death or retirement in 1832 was First Secondary in the K.R.'s Office. As such he had in his keeping the important

books of the Office, including the Red Book of the Exchequer and the Abbreviation of Domesday, and throughout his career had access to the records of the office which included the accounts of the King's Works from the time of Henry III.

(3) There are several accounts, some of them fragmentary, of the King's Works for the reign of Edward II surviving among the King's Remembrancer's Records in the Public Record Office (see Appendix B). There is, e.g., one of nineteen ms. for the years 5-12 Edward II. The corresponding Account for 1-4 Edward II is 'Phillipps 4099'. These four years are of special interest and activity covering a time of new building, following a fire at Westminster in 1298: the size of the record (a large quarto parchment document of some 123 leaves, in very good condition), is some measure of the exceptional activity at Westminster during these years.

(4) Mr. Colvin has naturally been very anxious to have access to this Account. There have been many sales of documents and books from the vast Phillipps Collection between the death of Phillipps in 1872 and the last war, and as 4099 was not traceable in the catalogues of these sales, Colvin approached Messrs. William H. Robinson Ltd. of Pall Mall, who were known to have bought, by private treaty, the remainder of the Phillipps Collection some ten years ago.

Through the mediation of Collingridge, Colvin was allowed to see the manuscript to enable him to identify it; but Robinsons have declined to allow any notes, much less a copy, to be made of its contents. Their attitude is that the market value of a document is seriously depreciated if it is known to have been copied.

(5) This difficulty was brought to my attention in March; and I arranged to call on Messrs. Robinsons with my colleague H.C. Johnson, on the 26th, to see the document. I made it plain to Mr. Philip Robinson that I considered it to be a Public Record

and that its proper place is among the King's Remembrancer's Records in the custody of the Master of the Rolls. He said that he proposed to sell it to someone who would present it to a national institution; and would let me know what he considered the document was worth. Copies of his letters of 26th March and 25th April are appended (see Appendix C). Taken together they mean that he proposes to use the Export License machinery to extract a large sum from the Treasury or from some benevolent fund to prevent the document going to the States. By naming such a high figure, he is also, I think, betraying nervousness about the provenance and status of the document, and hopes to use the American offer (from another dealer, not from an established Library) as a bargaining figure. He must also be aware that the residue of the Phillipps Collection contains other important documents formerly among the Public Records.

(6) Before discussing the recovery of Public Records known to have strayed from official custody, I should mention that the Phillipps MS.4099 bears the signature of T. Martin. Martin - 'Honest Tom Martin of Palgrave' (1697-1771) was a famous Suffolk antiquary. It would appear that some of his papers, bearing his signature, passed into Craven's Ord's hands. The signatures of T. Martin in 4099 are on paper pasted on to the parchment. Ord may have hoped, if his ownership of this document had been questioned at the sale of 1830, to be able to assert that he had acquired it from T. Martin's collection. Unfortunately, neither the King's Remembrancer nor anyone else at the sale challenged his right to the record.

#### The recovery of strayed Public Records.

(7) The Record Office Bill of 1838 had originally a Fourth Section giving the Master of the Rolls 'power to compel delivery of records in the possession of private persons'. For reasons given in Appendix D it was later omitted.

The Deputy Keeper, Sir Henry Maxwell Lyte, in his



evidence before the Royal Commission on Public Records (1910)<sup>1</sup> referred to such records as Wardrobe Books of which the main series is in the Public Record Office, though many had been borrowed, stolen or bought, some being in the Phillipps Collection. In reply to questions he said he once tried to stop the sale of them without success, and that he had tried to recover them on the grounds of the prerogative of the Crown, but not to purchase them. Some Chancery Rolls had been recovered and an honorarium 'for services in restoring them' paid.

The Revels Account of the early years of James I, a record of the Audit Office containing information of Shakespearian interest, got into private hands and was offered to the British Museum in 1868. The Keeper of the Manuscripts recognised it as a public record and impounded it; it was handed over to the Public Record Office. It appears from the Third Report (1919) of the Royal Commission on the Public Records (p.27) that the Commissioners were satisfied that the statutory powers of the Master of the Rolls under Section 3 of the Public Record Office Act of 1838 were sufficient for the recovery of lost, stolen or strayed public records and that they had been 'frequently exercised'.

In a letter of 5 November 1907 to the Dean of Westminster, referring to records which had possibly strayed from the Chapter House to the Capitular Muniment Room, the Deputy Keeper makes the following statement of policy -

"By the Statute 1 & 2 Vict. cap. 94, all documents of  
"a public nature belonging to Her Majesty which, in 1838,  
"were 'or ought to be' in the Chapter House at Westminster,  
"in any Office of the Exchequer, and in various other  
"repositories, were placed under the charge and super-  
"intendence of the Master of the Rolls, and by virtue of  
"this Act we have from time to time recovered Public  
"Records that had gone astray.

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1. Royal Commission Public Records (1910). I pt. 3, p.23.

"It has, however, always been felt that it would be  
"(to say the least) inexpedient for the Crown to lay claim  
"to Public Records in private custody in cases where their  
"existence has been revealed through the operations of  
"the Historical Manuscripts Commission, who are dependent  
"upon the courtesy of corporations and individuals. Hence  
"no application has been made for the restitution of any  
"documents now in the Capitular Muniment Room at Westminster.

"Without prejudice to legal rights, we, in point of fact,  
"intervene only in cases of alienation. Thus, in 1894, the  
"Dean and Chapter of Westminster, finding an enormous mass  
"of ancient writs of the Courts of Common Law, presented  
"them to the British Museum, but we claimed them under the  
"Statute, and the Trustees, after consulting the Law Officers  
"of the Crown, had to hand them over."

In 1914 there were two occasions on which the authority  
of the Public Record Office Act of 1838 was invoked for the  
recovery of public records in private hands. The first of them  
concerned a Register of letters, writs and other proceedings  
relating to the affairs of the Black Prince in the Duchy of  
Cornwall, which had come to light in a solicitor's office in  
London, where it had apparently been since 1793 at latest. The  
solicitor, in whose possession it was, contested the interpreta-  
tion of the Act, but eventually gave the volume to the Public  
Record Office 'in the interests of the nation'. Meanwhile,  
the opinion of the Law Officers of the Crown had been sought  
(see Appendix E).

Later in 1914 the Act of 1838 was invoked when certain  
records of the South Eastern Circuit were offered for sale by  
a secondhand bookseller and advertised in his catalogue. As  
the Law Officers' opinion mentioned in the last paragraph  
applied, a countersigned warrant was issued and the records  
willingly surrendered by the bookseller, who subsequently  
offered to surrender other records of like character not  
mentioned in the warrant. In writing to the Treasury for  
sanction to pay an honorarium to the bookseller substantially  
less than the price advertised for the documents, the Secretary  
of the Public Record Office said -

"This is the first occasion within recent times when the  
"powers of the Master of the Rolls of issuing a warrant under  
"the Act applicable to records in private possession have

"been exercised, and Mr. Marcham (the bookseller) had  
"no notice that such a claim could be made. The offer for  
"sale was, moreover, openly made in his printed catalogue  
"and the documents in question had been innocently  
"acquired. He has acted with propriety and has given  
"information which he might have easily withheld and he  
"engaged to make it known in the 'trade' that commercial  
"dealings in public records will not in future be permitted.  
"It seems equitable therefore that he should not altogether  
"suffer financial loss on this occasion although he will  
"not make such substantial profit as he had hoped - and  
"it is recommended that he should be paid the sum of £15  
"above mentioned as an honorarium for his action and  
"services."

(8) In view of the precedents and Law Officers' Opinion of 1914, the issue of a Countersigned Warrant for the recovery of Phillips MS.4099 would seem to be the only effective reply to the application for an Export Licence for a public record; and it should be accompanied by a request for the discovery of other public records remaining in this Collection.

The document Phillips 4099 is a public record. It is being offered for sale overseas at an exorbitant figure. It is of course a unique document, and its value derives from the fact that it was compiled by a royal official in the course of his duties. In the meantime the information it contains is withheld from the official historian of the Department which is the administrative successor of the Clerk of the King's works of 1307 who compiled this record.

May 1 1956

D. L. EVANS

## PROCEEDINGS OF THE RECORD COMMISSIONERS

This is interesting, but the only passage which really refers to the year 1833. Volume 52. The passage which we are concerned with I have marked on p. 53. H 2-17  
IV. 7 Apr 58,

Records in the King's Remembrancer's Office.—These are the Records which were in the wooden shed that for so many years disfigured Westminster Hall. The attention of the Board to their lamentable condition at that period was awakened by Mr. Illingworth's observations.

"The present situation and condition," says that gentleman, "of the numerous Records in this Repository which are kept in the long wooden shed on the side of Westminster Hall, to which place they were removed on the erection of the New Courts, are too shameful to pass unnoticed. The loss, spoliation, and disarrangement of them, in consequence of their sudden removal in wheelbarrows and baskets by soldiers and common labourers, is a most serious and lamentable evil. On their being hereafter removed to a place of permanent deposit more damage will unavoidably ensue; and their ultimate arrangement will be a labour not easily overcome."

That many cartloads of these Records were destroyed by the damp during their unfortunate sojourn in Westminster Hall the Commissioners are well aware, but they are not perhaps aware of another cause that has been even more prejudicial to these precious documents—the want of a responsible *Keeper*. This will sufficiently appear from the following documents. Mr. Thompson is one of the Sworn Clerks in the King's Remembrancer's Office, and if it could be supposed beneficial to those gentlemen that the ancient system should be adhered to, he has an interest in its preservation neither greater nor less than that which they may imagine themselves to possess.

Exchequer Office, Temple,  
Dec. 17, 1832.

SIR,

I was not aware that any investigation into the Records in the Office of his Majesty's Remembrancer of the Exchequer was being made until I was called upon by him on the 12th November last as one of the clerks in his office to make a return, nor was I informed of the full nature of the Inquiry until I was favoured with your letter of the 30th November inclosing the Questions proposed by his Majesty's Commissioners of Public Records. I understand on inquiring that the King's Remembrancer is preparing a Report of the State of the Records, but I conceive that little more information can be conveyed than was done in the Return of 1800, except their transfer from one building to another and the partial arrangement of the Records of the Court as a Court of Equity, leaving an immense mass of most valuable Manuscripts totally useless. Having much interested myself respecting the Records of our office, and devoted considerable time and attention to Antiquarian research, I beg to submit such facts as suggest themselves to me respecting them, in the hopes of assisting to rescue a most valuable collection of Historical and Topographical Antiquities from destruction, for the easy and cheap access and reference of Authors and Antiquaries.

The Custody of the Records by the King's Remembrancer is merely nominal, he having no interest or emolument from them and knowing nothing about them. In fact, the eight Table and twenty-four Side Clerks are the Keepers, each of them individually having the power of searching for, removing, and copying such as they may require,

and receiving all fees therefrom, they only being attended by the Bagbearer, whilst the Bagbearer, a non-responsible officer, keeps the keys and has at all times access alone to every part of the Records, except those few Books in the private Custody of the first and second Secondary. Without the least impeachment of the present Bagbearer, who I believe to be a most respectable and trustworthy man, I humbly submit that it is by no means proper that one person uncontrolled, and he in an humble station, should be the guardian of some of the most valuable National Documents; and moreover the free access of between twenty and thirty individuals and their clerks seems equally improper, as it takes away all responsibility from each.

During the twenty-one years that I have been in that office many things have occurred that have convinced me of the necessity of some change in the system: about sixteen or seventeen years since I was engaged for near six weeks in the damp and dark rooms at Westminster for the Earl of Somers, searching for the Survey of Malvern Chase in the Counties of Worcester, Hereford, and Gloucester, in the reign of Charles I., but could never find it. About two or three years afterwards Lambert, the then Bagbearer, produced it to me, being a large bundle, stating that he had found it at a Clerk in Court's house, but it was then useless to Lord Somers. I have recently had occasion for the same survey again, but only two or three skins are forthcoming. Many instances might be adduced of the impossibility of finding Records, which have been previously seen, and are known to exist: there is no doubt that the removal of the Records from the old rooms at Westminster to the wooden building in the Hall, and subsequent removal to the Mews, though it has disclosed many curious Documents, has still tended to increase the confusion,—but this I fear is not all.

At a sale that took place at Evans's, in Pall Mall, on the 27th June, 1829, of the library of the late Craven Ord, the first Secondary in the King's Remembrancer's Office, there were sold at large prices Wardrobe Accounts of our early Kings, which had originally been in the Exchequer, and at two subsequent sales of further parts of the Library of the same Gentleman there were more of the same description of Manuscripts sold: these were all purchased by the British Museum and Sir Thomas Phillips, and by that means are preserved to the country; at that time an application was made to the King's Remembrancer to stop the sale: finding a disinclination on his part to interfere, I wrote to the then Home Secretary of State, who took no notice; and lastly I applied to Mr. Ellis and Mr. Madden, at the Museum, but as they were not their Records they could not interfere. Mr. Madden, I have no doubt, would infer the Commissioners of these facts, and of the value and prices given by them, and Sir Thomas Phillips, for the Manuscripts in question. There can be no doubt that for very many years past, even from the time of the Commonwealth, many Manuscripts which are at present in various collections, have been from time to time taken from amongst the Records of the Exchequer, where they were originally deposited.

In any arrangement that might be made respecting the Records, they must be divided into two distinct classes, their uses being so wholly different.

The one Class comprising the Memoranda of the Exchequer, together with all the Records of the Court, both as a Court of Equity and of Revenue, and also the Special Commissions, must necessarily ever remain attached to the Court. They are mostly in a good state of preservation, with the exception of some of the earlier ones. The Special Commissions are considerably damaged, but are very valuable, and require arranging and indexing.

It is, however, to the other Class that I would particularly call the attention of the Commissioners—in this may be comprehended all the unarranged Records set forth in the Report of the Commissioners made in 1800.—page 143. Little can be added to the Return then made; they are in the same confusion, and a search amongst them for any document is quite a matter of uncertainty.

These Unarranged Records may be again subdivided into such as are merely Historical, and can by no possibility be used as evidence, such as Wardrobe and Household Accounts, Parliament Rolls, Repairs of Castles and Palaces, Gascon Rolls, Jewel Account, Army and Navy, and indeed Manuscripts under so many heads that it would be difficult to enumerate them all without a complete assortment and List made. The immediate transfer of all these Records to the British Museum I should most strongly recommend, and I should conceive that no objection could be raised by any one, as no emolument is derived by any body; and they are daily becoming more damaged, are almost useless to the Public from a total want of arrangement, and are scarce ever looked at by the Officers of the Court. I have had repeated applications for references to different Manuscripts: could they have been readily referred to, they would have been of considerable value to many parties.

The other portion of the unarranged Records would be more difficult to deal with, namely, the Ministers and Bailiffs' Accounts, Inquisitions post Mortem, Escheat Rolls, Extents of Manors, and such other documents as are occasionally used as evidence in Courts of Law, and it is objected that, were they removed, they would cease to be evidence: at present, however, they are in such confusion as to render it almost impossible to find what is wanted without great time and labour, and consequently, expense to parties; and as to the value of these Records as legal evidence, the Judges have, I believe, lately declared that they did not place so much reliance upon them—at the same time, to the Antiquary and Topographer they are most valuable, but the fees for searches and copies are almost a total obstacle to their being available to literary characters, and under some arrangement they also, I should humbly submit, might be transferred to the Museum as a National Library.

The expense to parties and the danger to these Manuscripts is moreover increased by the practice of certain Clerks in Court permitting various parties to search amongst these Records attended only by the Bagbearer, the Clerks in Court will receive their fees.

The Records at present are partly contained in the Stone Tower at Westminster, but the greater mass are in the King's Meas at Charing Cross, and as these latter Records must now be very shortly removed from that building, it seems a most favourable time at once to place the valuable Documents to which I have alluded in a permanent depository before any further loss and damage takes place. The arrangement of them under Reigns, Subjects, Places and Matters, though laborious, might be done, I should conceive, without very great difficulty; but to make any Calendars or Indices Locorum, Nomina and Rerum, or even simple Lists of them, would be a very long and arduous undertaking, from their numbers, confusion, and bad state, they being many of them loose, dirty, untied up, crushed up together, and crammed into chests, bags, and presses; and in each removal they must necessarily be more torn and damaged. At present they might be, without doubt, arranged, tied up, and indorsed, and classed so as to form a very valuable collection of Manuscripts—to do it effectually it would require constant and uninterrupted attention for a long time—but when done they must be placed in such custody that persons should not needlessly open and scatter them about again, as has been the case with some that have been tied up and indorsed.

On the first removal of the Records from the old Rooms at Westminster to the wooden building in the Hall, it was discovered that some of the labourers had taken parchment books and sold them to the glue manufacturers, and on that occasion two or three Gentlemen in the Office laid it before the Treasury; but, as it was said the Documents were of no value, and the persons could not be discovered, no further notice was taken—this I submit to show the danger of removals.

*Two hours  
with 3 or 4 men  
St. Andrew's*

I have merely hastily sketched out such ideas as offered themselves to me, not having had time to investigate and make any return to the Questions proposed to me by the Commissioners, and as the King's Remembrancer will, I believe, make a minute Return, I presume any individual return would be useless. I shall ever feel most happy to give every information in my power, and the Commissioners may command my services, and rely upon my exerting my utmost abilities in forwarding what I have for many years considered a great national object—in preserving our most Ancient Archives in one grand Repository.

And remain, Sir,  
Your obedient Servant,  
ROBERT THOMPSON.

To C. P. COOPER, Esq.

The Secretary has been furnished with an account of the Records belonging to the King's Remembrancer's Office that were sold on the occasions mentioned in the foregoing Letter.

The first of Mr. Craven Ord's Sales took place on the 25th June, 1829, when the Museum purchased—

No. 638. A Transcript by Mr. Ord of the Household Book of Henry VII.

The Original of this was once in the Exchequer, as proved by a note in it, yet it was sold at Mr. Ord's Second Sale, and is now in the Library of Sir Thomas Phillips.

Thorpe purchased for Sir T. Phillips—

- No. 545. Liber Garderobæ ab anno 18 Edw. II. ad an. 15 Edw. III. £110 0 0
- 546. Liber Receptorum in Scaccario et Garderobæ, 6 Edw. III. . . . . 42 0 0
- 547. Liber Garderobæ Alienoræ Sororis Edw. III. . . . . 42 0 0
- 548. Liber Garderobæ Johannæ Regine Henr. IV. . . . . 44 2 0
- 549. Liber Garderobæ 3 Henr. VIII. . . . . 31 10 0
- 550. Household Book of Henry VIII. anno 1544-5 . . . . . 53 11 0

The Cartularies are not mentioned because it is unlikely (though possible) they should have been in the Exchequer.

The Second Sale took place 25th January, 1830, when the Museum purchased—

- No. 1004. Liber Garderobæ 25 Edw. I. . . . . £54 12 0
- 1005. Ditto 29 Edw. I. . . . . 54 12 0
- 1006. Ditto Edw. II. . . . . 54 2 0

Sir Thomas Phillips bought—

- No. 1008. Computus Meh. de Tickhull 5 Edw. II. of Works at the Palace of Westminster and at the Tower . . . . . 73 10 0

All undoubtedly once in the Exchequer.

At the last Sale Sir T. Phillips bought—

- No. 1007. Liber Receptorum et Garderobæ, 17 Edw. II. . . . . £27 6 0
- 1012. Account of the Navy, temp. Henry VI. . . . . 43 1 0
- 1014. Original Wardrobe Warrants, temp. Henry VI. . . . . 6 2 6
- 1017. Privy Purse Expenses of Henry VII. . . . . 20 9 6
- 1018. Ditto . . . . . 17 6 6
- 1019. Ditto Henry VIII. . . . . 22 1 0

The Secretary has endeavoured, both by threats and promises, to induce the gentlemen in the King's Remembrancer's Office to concur in some plan for hav-

and receiving all  
Bagbearer, a not  
to every part of  
first and second S  
which I believe to  
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Commissioners of  
Sir Thomas Phillips, for  
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Commissioners, as  
in a good state of  
and indexing.  
is, however, to th  
Commissioners—in t  
the Report of the  
the Return st...

## WORKS.

281

Bundle	No.	Period.	Description.
468	16	1 to 7 Edward II.	Account of wages of clerks and surveyors of works at Westminster. 1 m.
"	17	1 to 13 "	Account of Nicholas de Tikshulle and John de Norton of expenses of works at Westminster, the Tower of London, and the mews near Westminster. 3 ms.
"	18	2 "	Part of an account of payments for works at Westminster and the Tower of London. 1 m.
"	19	2 "	Expenses of repairs of breaches in the Thames wall near Temple mills. 1 m.
"	20	5 to 12} "	Imperfect book of accounts of works at Westminster and the Tower of London. 38 pp.
469	1	13 "	Account of John de Norton of expenses of works at Westminster. 1 m.
"	2	13 "	Counter-roll of John de Vyens of the same. 2 ms.
"	3	13 to 16 "	Payments made to John de Ditton, clerk of the works at Westminster and the Tower of London. 1 m.
"	4	17 & 18 "	Charge of William de Chaillon, clerk of the works at Westminster. 2 ms.
"	5	17 & 18 "	Account of payments to William Chillon, clerk of the works at Westminster and the Tower of London. 1 m.
"	6	17 & 18 "	Imperfect account of works at Westminster. 7 ms.
"	7	17 to 19 "	Account of William Chillon, clerk of the works at Westminster and the Tower of London. 11 ms.
"	8	17 to 19 "	Roll of "Robert de Pypeshull, controller of the same." 19 ms.
"	9	17 to 19 "	Account of works at Westminster. 5 ms.
"	10	19 "	Roll of the controller of works at Westminster. 5 ms.
468	3	19 "	Roll of the controller of works at Westminster. 5 ms.
468	15	1 to 4 Edward II.	Memorandum of Works ordered to be done at Westminster, the tower of London, and the mews near Westminster. 1 m.



COPY

Letters from William H. Robinson Ltd., 16 Pall Mall, London, S.W.1. to the Deputy Keeper.

26th March, 1956.

Dear Mr. Evans,

Phillips MS. 4099

Further to your call upon us this morning in reference to the above, I write to say that in our opinion 25,000 would be an entirely fair and reasonable sum to attach to the MS, and that is the price we place upon it.

I assure you that in arriving at this figure we have taken particular care not to attach undue weight to the special circumstances of the present moment, but have considered it purely as an economic document. The price is the sort of figure we think an economic MS. of this early date, unpublished and with valuable details of work and wages (including payments to artists), would fetch in our international market for such material. We are, of course, in touch with the department of economics in many American universities and this is exactly the sort of thing we are often asked for but are never able to supply.

I have duly written to the person I mentioned to you and will let you know what transpires. It was a great pleasure to make your acquaintance this morning.

Yours sincerely

(Sgd.) PHILIP ROBINSON

25th April, 1956

Dear Mr. Evans,

Phillips MS. 4099

Further to our conversation and further to my letter of March 26, I promised to let you know what transpired in regard to the above. Unfortunately, although a month has elapsed, I have had no reply from Lord Devereux other than an acknowledgment from his secretary and it would appear, therefore, that he is not interested. I confess to being much disappointed in this connection.

A complication has only just arisen in that the manuscript has attracted the attention of Mr. John Fleming of New York (the successor of the famous Dr. Rosenbach) who is at present on a visit to this country. Mr. Fleming is very anxious to purchase the manuscript and has placed with us a firm order for it. Needless to say, I have explained to him that an export licence will be necessary and that this is a case where it is not at all certain that such will be granted. Nevertheless, we have no option but to make application for such a licence and the documents have gone forward to the appropriate authorities today.

Yours sincerely,

(Sgd.) PHILIP ROBINSON

APPENDIX D

ROYAL COMMISSION ON PUBLIC RECORDS 1st Report

Vol. I Part II. Appendix I.

1. THE ORIGIN OF THE PUBLIC RECORD OFFICE ACT OF 1838.

.....

p.3.

The original fourth section gave power to compel delivery of records in the possession of private persons, and was omitted altogether.

It ran as follows :-

4. Power to compel delivery of records in the possession of private persons.

"And be it enacted, That it shall be lawful for the Master of the Rolls, sitting in his Court of the Rolls, to make a summary order according to the usage of the said Court, requiring any person having possession of any record which, under the provisions of this Act, ought to be in the custody of the Master of the Rolls, to deliver the same to the Deputy Keeper of the Records, who shall cause the same to be placed in the proper custody; and every person against whom any such order is made, and who shall neglect or refuse to deliver up such record upon being served with such order, shall be considered to act in contempt to the said Court; and it shall be lawful for the Master of the Rolls to deal with such person as in other cases of a contempt of court."

## ROYAL COMMISSION ON PUBLIC RECORDS 1st Report

## Vol. II Part III.

p.181

19. PRECIS OF CORRESPONDENCE BETWEEN LORD LANGDALE AND THE LAW OFFICERS AS TO THE DRAFTING OF THE PUBLIC RECORD OFFICE ACT 1838.+

.....

16 July 1838. Lord Langdale to Sir R.M. Rolfe (Solicitor General.)

Bethune sent him no copy of the Record Bill as last altered, and this was not seen by him until he purchased a copy. The words "legal custody" in 1. 24 of p.1 should be "charge and superintendence", or some equivalent words, the plan of the Bill being "to place all the Records under the care of the Master of the Rolls at once, but not to place them in his legal custody otherwise than by enactment or formal act; by enactment in this Bill as to the Chancery Records and formal act as to all others by the provisions of the 3rd clause."

The 4th clause is most awkwardly expressed, and is hardly right in substance. Records have got out of custody, "some by accident, some by theft." These "are public records and ought to be recovered for the public," but the Master of the Rolls should not be the proper judge of the desirability of taking action in such cases. The power should be vested in the Lord Chancellor, with discretion to award compensation to holders for value. Criticisms of several other clauses follows.

19 July 1838. Sir R.M. Rolfe to Lord Langdale. Has gone through the Bill again with Bethune, and has corrected it in several particulars. He has altered "legal custody" to "charge and superintendence", and has omitted the 4th clause.

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+ See above Part II, p.4, and note, for an explanation of the circumstances under which this correspondence was communicated by the courtesy of Mr. F.H. Martin.

He has substituted for this another clause based on Lord Langdale's suggestions, but, on consideration, the clause seems open to objection. Any such records can be recovered by information in an action of Trover or Detinue, and therefore there is no need of a summary remedy in this case. He agrees with Lord Langdale's objections to other clauses. The Duchies of Lancaster and Cornwall and Office of Woods applied to have their records specially excepted from the scope of the Bill, but he has thought best to leave this to be procured by Order in Council if actually required, since the need for exemption can only be temporary.

(Stamped)  
LORD CHANCELLOR'S OFFICE  
20 July, 1914

OPINION

The documents mentioned are obviously "records" within the meaning of the definition contained in sec. 20 of the Records Act 1838. The Master of the Rolls is therefore by virtue of the Statute & the Order in Council *prima facie* entitled to their custody and should at once take steps to secure their protection. We ought however to point out that if these documents could be effectively alienated by the Crown, the long adverse possession of them that has taken place would support the assumption that they had been duly dealt with & that their present custody was lawful. Our opinion proceeds on the hypothesis which on the whole we think accurate that the Crown never owned these documents as private personal property & could not effectively transfer their ownership to third parties. We think the Master of the Rolls should issue a Warrant approved & countersigned by the Lord Chancellor under sec. 3 of the Statute directing delivery of the documents into his custody. In default of compliance proceedings should at once be instituted by the Attorney General at the instance of the Master of the Rolls for their recovery.

(Sd) John Simon  
" Stanley G. Eastmaster

July 16, 1914

**MEMORANDUM**

**PREPARED BY MR. EVANS, DEPUTY  
KEEPER OF THE RECORDS.**

---

Case for the Opinion of the Law Officers (July 1914)  
concerning the recovery of a volume of the Black Prince's  
Register of his Estates in England outside the Duchy of Cornwall

(Certain passages relating to the history of the Register have been omitted)

The Public Record Office Act 1838 - section one, reciting that  
 "Whereas the public records are in the keeping of several persons ... and it  
 is expedient to establish one Record Office and a better custody ...."  
 enacts "That the records belonging to Her Majesty which now are or ought to  
be deposited in the several Record Offices, courts, places and custody  
 hereinafter mentioned; that is to say, in the ... Chapter House of  
 Westminster ... Augmentation Office ... shall from the passing of this Act  
 be under the charge and superintendance of the Master of the Rolls for the  
 time being in the name and on the behalf of Her Majesty".

Section two enacts - "That it shall be lawful for Her Majesty, with the  
 advice of Her Privy Council, to order that Records belonging to Her Majesty  
 deposited in any Office, Court, Place or Custody other than as herein-before  
 mentioned shall be thenceforth under the Charge and Superintendance of the  
 Master of the Rolls; and thereupon the Provisions of this Act shall extend  
 to all such Records, and to the Persons then having the Charge or Custody  
 of the same, as fully as if such Office, Court, Place or Custody had been  
 named and included in this Act."

In pursuance of this section an Order in Council  
 was made on the 5th March, 1852, as follows -

(Order in Council of 5th March 1852  
 was set out here.)





compared with the two parchment volumes above referred to, the three were found to correspond exactly in size, style and general appearance and to cover the same period - the volume now in question dealing, however, with another branch of the Prince's administrative business, and relating to affairs in such parts of England as were not in the Palatinate of Chester or the Duchy of Cornwall. It became abundantly clear that the three parchment Registers represent three branches of the Prince's business; that they are complementary to each other, and that together they give a complete account of the administration of the Prince's Chancery for the whole of England during the period 1351-1365.

There can be little doubt that originally all three volumes were the property and in the possession of the Crown and there is every reason to believe that the two volumes now in the Public Record Office have been in proper official custody throughout the whole period of their existence.

.....

An opinion is desired upon the question whether the Master of the Rolls, as representing the Crown can recover possession, by process of law, of the Register now in the possession of Mr. Hughes, either by force of the indefeasible right of the Crown to its official records and of the maxim Nullum tempus occurrit regi, or by force of the Public Record Office Act of 1838 cited above; and if so, what steps should be taken.

COPY/

CASE FOR THE OPINION OF THE  
LAW OFFICERS (JULY 1914)

---

OPINION of the Law Officers  
and Mr. Rodger Winn.

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1. We have been asked as a matter of urgency to advise what, if any, proceedings could be taken to prevent export of certain records of Edward II which are in the possession of a dealer in rare books and documents.

2. We understand that these documents have been the subject-matter of at least two sales, the first of which took place probably more than 100 years ago: there is no evidence that they have ever been stolen but plainly each of the sales constituted conversion.

3. In our opinion the combined effect of Sections 1 and 2 of the Public Record Office Act 1838, assuming that an Order in Council was made pursuant thereto, the documents in question should have been brought into the charge and superintendence of the Master of the Rolls. We have considered whether it would be possible to require delivery up of the documents by a Warrant issued pursuant to Section 3 of the same Act, but we are satisfied that such a Warrant can only issue for the limited purposes and in the special circumstances set out in Section 3 of the Act, and that the only function of such a Warrant is to appoint an authorised person to attend at the Court's Offices and places referred to in Section 1 of the Act. Such a Warrant could not be used to legalise the taking of documents from the possession of a tradesman.

4. Section 4 of the same Act makes provision for the preservation of records by the Order of the Master of the Rolls but in the context this relates only to the taking

1838, Section

of measures designed to prevent decay or deterioration of the records.

5. We have considered the provisions of Section 3 of the Limitation Act 1939 and the decisions in Beaman v. A.R.T.S. Ltd. (1948) 2 A.E.R. 89 and the R.B. Policies at Lloyds v. Butler (1950) 1 K.B. 76, and advise that where a chattel has been converted more than 6 years ago no right of action survives or can be brought anew into existence for either conversion or detinue of that chattel. Furthermore by force of Section 3(2) of the 1939 Act (which Act binds the Crown - see section 30(1) in such circumstances the title of the true owner of the chattel is to be deemed to have been extinguished.

6. It follows, in our opinion, that no remedy exists either under the 1838 Act or by way of proceedings for delivery up on the ground of detinue.

7. A Declaratory Judgment could not, in our opinion, be obtained pursuant to Order 25, rule 5 of the Rules of the Supreme Court, because, although legal ownership of the records is still in a sense vested in Her Majesty, nevertheless by force of the Limitation Act 1939, Section 3(2), Her title to them has been extinguished and there is therefore no right to relief which could be derived from a ~~declaratory~~ declaration that no voluntary transfer of ownership has ever taken place. The Court would not grant a Declaration except as an effective step towards the assertion of a legal or equitable right - c.f. Guarantee Trust Company v. Hannay (1915) 2 K.B. 536.

8. Statutory powers exist to prohibit the export of goods from this country. The Customs and Excise Act 1952, Section

56 provides that if any goods are sought to be exported, the exportation of which would be contrary to any prohibition or restriction for the time being in force, the goods shall be liable to forfeiture.

S. I. 1955 No. 518

"The Export of Goods (Control Consolidation) Order 1955 made by the Board of Trade pursuant to powers conferred by Section 1 of the Import, Export and Customs Powers (Defence) Act 1939, provides by Article 2 as follows :-

' The goods specified in the First Schedule hereto are, subject to the provisions of this Order, prohibited to be exported from the United Kingdom ..... The First Schedule to the Order, Group 18, includes -

Articles, not elsewhere specified, manufactured or produced more than 100 years before the date of exportation other than postage stamps of philatelic interest and similar articles' "

Against that group is printed the letter "A", the significance of which is that it is provided in Article 4 of the Order that -

"Nothing in Article 2 of this Order shall be taken to prohibit the exportation of

(a) any goods specified in the First Schedule hereto other

than any goods in relation  
to which the letter "A" appears  
in that Schedule to.....  
United States of America. "

9. The question is thus raised whether the documents in question are "Articles produced more than 100 years ago"; we think that it is at least arguable that they are since the word "article" is of very comprehensive meaning. It was said that "no more comprehensive word could by any possibility have been used" per Lord Justice-General in M'Intyre v. M'Intee 1955 Sc.(J) 27. However, it is held that a gold-fish is not an article in Daly v. Cannon 1954 1 W.L.R. 261. Coal gas has been held to be an article within Section 151 of the Factories Act 1937 by the Court of Appeal in Cox v. B. Gutter and Sons Limited and Hampton Court Gas Company 1948 2 A.L.J. 665.

10. It has also been provided by Section 23(1) of the Exchange Control Act 1947, manifestly with a view to securing control of the exportation of capital assets rather than the preservation of works of antiquity or other treasures of an artistic or literary character, that

"The exportation of goods of any class or description from the United Kingdom to a destination in any such territory as may be prescribed is hereby prohibited except with the permission of the Treasury unless the Commissioners of Customs and Excise are satisfied.....  
(b) that the amount of the payment,....

is such as to represent a return for the goods which is in all the circumstances satisfactory in the National interest".

By the Exchange Control (Payments) Order 1948 this Section was applied to all territories outside the Scheduled Territories, i.e. including United States of America,

11. It appears to us that it would be possible to take administrative action through the Commissioners of Customs and Excise to suspend the exportation of the documents and to make a further Order amending or expanding the provisions of S.I. 1955 No.518 so as to remove any possibility of doubt whether the documents do fall within Group 18 of the First Schedule to that Order.

16 /5/56

Re: Certain Public Records

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OPINION of the Law Officers  
and Mr. Hodger Winn

---

TREASURY SOLICITOR

---



THE PUBLIC RECORDS ACT, 1838, AND THE  
AMENDMENT ACT, 1939

OPINION OF THE LAW OFFICERS OF THE CROWN  
AND MR. RODGER WINN

1. The Memorandum of Works covering the period 1-4 Edward II was in our opinion a public record within the meaning of Section 20 of the Public Record Office Act 1838, as a document which belonged to the Crown.

It is clear that the memorandum was part of Sir Thomas Phillips' collection. It is probable that he acquired it either in 1829 or 1830 at a sale from Craven Ord. If in 1838, the document was one which was or ought to have been deposited in the offices of the Queen's Remembrancer, Section 1 of the 1838 Act applied and so the document was by that section placed 'under the charge and superintendence of the Master of the Rolls for the time being in the name and on behalf of Her Majesty'.

2. Section 2 of the Act gave Her Majesty power by Order in Council to extend the operation of the Act to records belonging to Her Majesty deposited in offices, courts, places or custody other than those mentioned in Section 1. It gave Her Majesty no power to extend the operation of the Act to records which ought to be in the offices, courts, places or custody to which the operation of the Act was extended. The effect of such an Order in Council is declared to be to extend the operation of the Act 'as if such office, court, place or custody had been named and included in the Act'.

3. Section 3 of the Act contains mere machinery for the collection by the Master of the Rolls of the records placed under his charge and superintendence by Section 1 or by Order in Council under Section 2. He may by warrant appoint a person to collect them and require delivery to that person

/who is

record found in the possession of Robinson Ltd. can be recovered.

Not does not in our view provide a method whereby a public deposited, in the offices of the Queen's Remembrancer. The

the Master of the Rolls as a document which, ought to be virtue of Section 1 under the charge and superintendence of

for obtaining possession of the memorandum even if it was by private hands. The procedure under Section 3 is not available

intended to operate in relation to public records held in Section, the Act does not operate and was not in our opinion

which, ought to be deposited, in the places mentioned in that 5. Notwithstanding the application of Section 1 to records

Section 3 to a receipt being given to the judge or officer, custody, This construction is supported by the reference in

'place of official custody' and 'custody', as meaning 'official character. 'place' must consequently be construed as meaning

custody' listed in Section 1, all of which are of an official regard to the several record offices, courts, places and

'custody' in Section 2 have, we think, to be construed with Applying the principle "noscitur a sociis", 'place' and

the custody of that company. company cannot be regarded as 'deposited' in Pall Mall or in

of Robinson Ltd., in our opinion the memorandum held by that per se wide enough to cover a shop in Pall Mall and the custody

4. Although the words "place or custody" in Section 2 are same shall be delivered.

documents he obtains, to the judge or officer to whom the who is required to deliver a Schedule and a receipt for the

/to the charter

recovered, the title of the person who had the cause of action  
cause of action has expired and possession has not been  
8. Section 3 (2) of the 1939 Act provides that where such a

Robinson Ltd. for conversion or detention.  
(Section 3 (1)). It follows that the Crown cannot now sue  
of action in respect of the original conversion or detention  
after the expiry of six years from the accrual of the cause  
brought in respect of the further conversion or detention  
Further conversion or detention takes place, no action can be  
detention has accrued and before possession is recovered a  
where a cause of action whether for conversion or

the cause of action in respect of that conversion would now be  
barred.  
Sir Thomas Phillips. Even if the sale took place later,  
or 1850 if the memorandum was then sold by Craven Ord to  
case the original conversion may have taken place in 1829  
from the date on which the cause of action accrued. In this  
could only sue in tort before the expiration of six years  
by virtue of Section 2 (1) (a) from that date onwards the Crown

subjects. The Act came into force on the 1st July, 1940 and  
Crown in like manner as it applies to proceedings between  
7. The Limitation Act 1939 applies to proceedings by the  
the possession of private person.

the warrant procedure to be used in relation to documents in  
Courts to hold that the Act must now be construed as enabling  
doubtful if such use can be established or would lead the  
has been used against private persons but we think it very

6. We do not know on how many occasions the warrant procedure

to the chattel is extinguished. Section 30 (1) says that the Act shall apply to proceedings by the Crown. Section 3 (2) relates to title, not to proceedings by the Crown. It could therefore be argued that the Crown's title to the memorandum is not extinguished by Section 3 (2). While it cannot be said that the matter is free from doubt, we are inclined to the view that Section 3 (2) is so related to Section 3 (1) and to proceedings that notwithstanding the limitation of Section 30 (1), Section 3 (2) would be held to apply to the Crown in which case the Crown's title to the memorandum is extinguished.

9. The extinction of the Crown's title would appear fatal to any attempt to secure a declaratory judgment. If it has not been extinguished, then as no power to secure recovery of the memorandum exists, the Court would be unlikely to grant a declaration (see *Guarantee Trust Company v. Hannay* [1917] 2 K B. 536.)

10. The Export of Goods (Control) (Consolidation) Order 1955 (S.I. 1955 No. 518) appears to apply to the memorandum. A licence to export it is required, and if an attempt to export without a licence is made the memorandum can be seized and confiscated.

11. Our answers to the questions put to us are as follows:-

(a) No.	(c) Yes.	(e) Yes.
(b) No.	(d) Yes.	

R. E. M-B.

H. H. F.

R. W.

THE PUBLIC RECORDS ACT, 1938  
AND THE LIMITATION ACT, 1939

O P I N I O N  
OF  
THE LAW OFFICERS OF THE CROWN  
AND  
MR. RODGER GINN

TREASURY SOLICITOR

---

 RE: SIR WINSTON CHURCHILL'S PAPERS
 

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 INSTRUCTIONS TO COUNSEL TO ADVISE  
 IN WRITING
 

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Counsel has herewith copies of the following:-

To be  
provided -  
referred  
to in (7)  
below

- (1) Correspondence with Sir Winston Churchill in 1934-1936 about the return of official papers;
- (2) Settlement made between the Rt Hon. Winston Churchill and others on 31st July 1946;
- (3) Settlement made between Lady Churchill and others on 5th December 1963;
- (4) Undertaking given by Lady Churchill and others on 9th April 1964;
- (5) Applications for exemption from estate duty and undertakings given under section 48 of the Finance Act 1950 by Lady Churchill on 1970 and by Sir Leslie Rowan and Mr J R Colville on 1970, and related undertakings given by the Treasury on 27th November and 4th December 1970;
- (6) Contents page of catalogue prepared by the Public Records Office; sample page of catalogue; and sample page of Cabinet Office inventory;
- (7) Summary of papers on Cabinet Office files;
- (8) Law Officers' opinions relating to:
  - (a) return of Cabinet papers (1934);
  - (b) Register of Edward the Black Prince (1914);
  - (c) Memorandum of Works of Edward II (1956).

Inland  
Revenue  
to supply  
direct.

### Background

Instructing Solicitor acts for the Cabinet Office. Counsel is asked to advise on the ownership of Sir Winston Churchill's papers.

The Churchill Archives Centre at Churchill College, Cambridge was built with funds provided by American admirers of Sir Winston and houses archive material relating to Churchill and the period during which he lived. Papers he acquired during his lifetime form a substantial part of the archive; these relate to his private and political life, and also include early family papers and heirlooms. They cover his ministerial career as Under-Secretary of State for the Colonies (1906-8), President of the Board of Trade (1910-11), 1st Lord of the Admiralty (1911-15 and 1939-40), Chancellor of the Duchy of

Lancaster (1915), Minister of Munitions (1917), Secretary of State for War (1918-21), Air (1918-21), and the Colonies (1921-22), Chancellor of the Exchequer (1924-29) and Prime Minister (1940-45). They include numerous official papers which he retained after leaving office.

In 1946 Sir Winston made a settlement (the 1946 settlement) in which he settled those papers (the pre-1945 papers) acquired by him prior to his resignation in 1945, together with certain other property, on various trusts for the benefit of his family. The pre-1945 papers were resettled in 1963 by a further settlement (the 1963 settlement). Instructing Solicitor understands that further changes have recently been made to the trusts on which the pre-1945 papers are held.

Papers created after 1945 (the post-1945 papers) were left by Sir Winston in his will to his wife. He intended that Lady Churchill should bequeath them to the trustees of the 1946 settlement (the archives trustees), but instead she left them to Churchill College, who now own them outright. This in outline is the background to the case.

The archives trustees have approached the Government to see whether they would be willing to buy the pre-1945 papers. In considering how to respond the Government needs to know whether it can maintain that it owns some of the documents already ~~or~~ *has enforceable undertakings, ~~granted to the~~ Trustees, which prevent them from offering some of the papers for sale without the agreement of the Prime Minister of the day.*

The 1946 and 1963 settlements

Counsel has before him copies of the 1946 and 1963 settlements (2) and (3). It is not necessary to consider in detail the precise terms of the trusts for the benefit of Sir Winston's descendants. Clause 1 of the 1946 settlement recites that the settlor has "in his possession the records and memoranda shortly mentioned in parts 1 and 2 of the Schedule hereto (some of which may be of such a nature that they ought not to be divulged to the public without due precautions being taken in the public interest)...". Clause 2 recites that the settlor has delivered to the trustees "the documents, boxes and casket shortly mentioned in the Schedule hereto". The Schedule lists four categories of papers: records and memoranda relating to Sir Winston's early and middle life up to 1934; records and memoranda relating to the period 1934-1945, including material relating to the first Duke of Marlborough; papers formerly belonging to Lord Randolph Churchill; and a tortoiseshell casket containing letters from the first Duke of Marlborough to the Grand Pensionary Heinsius of the Netherlands.

Clause 2 of the 1946 settlement also assigns to the trustees the copyright in the documents (so far as it belonged to Sir Winston).

Clause 11(ii) of the 1946 settlement is particularly important. It reads:-

"The Trustees shall not at any time make public or sell or dispose of any document or information relating to any office, ministry or department of the British Government since the year One thousand nine hundred or any official papers of a general character without the permission of the Prime Minister of England for the time being and the other Ministers (if any) for the time being representing the office, ministry or department concerned".

The 1963 settlement altered the trusts on which the papers were held. In particular the trustees were given power to vest the collection in a single beneficiary absolutely. Clause 2(j) of the 1963 settlement provides that clauses 9 to 13 inclusive of the 1946 settlement are to continue to apply; these of course include clause 11(ii).

## Copyright

In 1963 Sir Winston Churchill assigned the copyright in the post-1945 papers to a company called C&T Publications Limited, a subsidiary of the Daily Telegraph. The archives trustees assigned the copyright in the pre-1945 papers to that company also. This was done in connection with a biography of Sir Winston Churchill which was being prepared, initially by his son Randolph and subsequently by Martin Gilbert. Lord Birkenhead was also commissioned to write a short biography of Churchill. The assignment to C&T Publications provided that none of the papers should be made public until 10 years after publication of the last volume of the official biography. This did not take place until 1988. Instructing Solicitor understands that it has recently been agreed with C&T Publications that the period of 10 years be reduced to 2 years.

## Location of the papers

The pre-1945 papers were originally housed in the Muniment Room at Chartwell Manor. Subsequently they were kept at Lloyds Bank before being moved to the Bodleian Library at Oxford while Martin Gilbert worked on them. Finally they were transferred by the archives trustees to Churchill College in 1980. Instructing Solicitor is not aware of the terms on which the documents were transferred, but the transfer clearly did not involve any change of ownership.

## The 1964 undertaking

The provision in the 1963 settlement enabling the archives trustees to vest the collection in a single beneficiary absolutely was apparently intended to enable the collection to be given by the beneficiary to an institution such as Churchill College. The 1963 settlement does not however contain any limitation on the power of disposal of any beneficiary becoming absolutely entitled. In order to ensure that the protection given by clause 11(ii) of the 1946 settlement continued without a break an undertaking was obtained from the archives trustees in 1964 in the following terms, a copy of which Counsel has before him (4):

"To:

The Secretary of the Cabinet,  
Cabinet Office,  
Great George Street,  
London, S.W.1.

## The Rt Hon. Winston Churchill's Archive Settlement

In consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive Settlement, to retain under our control the State Papers formerly belonging to Sir Winston and which came into existence prior to his resignation as Prime Minister in 1945 and any further State Papers formally belonging to him which may come into our hands together with any Catalogues relating to them, we write to give you our formal assurance that we will not without your consent, vest such Papers in any Beneficiary without imposing upon him an obligation similar in terms to that contained clause 11(ii) in the Settlement known as "The Chartwell Trust" and receiving from such Beneficiary an undertaking to impose a similar obligation on any further disposal of the State Papers and Catalogues



Dated 9th April 1964

(signed) C S Churchill  
T L Rowan  
John Colville  
Anthony Moir"

### Estate duty exemptions

In 1969 and 1970 there were extensive discussions about the form of undertaking to be given in connection with the Estate Duty exemptions claimed following the death of Sir Winston and his son Randolph. Exemption was granted in respect of both the pre- and post- 1945 papers under section 40 of the Finance Act 1930, as amended. Exemption under the section was subject to the following conditions set out in section 48 of the Finance Act 1950:

- (a) the objects would be kept permanently in the United Kingdom, and should not leave it temporarily except for a purpose and a period approved by the Treasury; and
- (b) reasonable steps would be taken for the preservation of the objects; and
- (c) reasonable facilities for examining the objects for the purpose of seeing the steps taken for their preservation or for purposes of research would be allowed to any person authorised by the Treasury so to examine them.

The archives trustees (in respect of the pre-1945 papers) and Lady Churchill (in respect of the post-1945 papers) were unwilling to give an undertaking in terms of paragraph (c) above partly because they felt that some of the documents of a more intimate personal nature should not be open to public scrutiny, but mainly because the agreement under which copyright had been assigned to C&T Publications provided that access should not be permitted until 10 years after the last volume of Churchill's biography had been published. Eventually, undertakings were given in the form required by the tax legislation, in return for which the Treasury undertook that pending agreement on the terms of access they would not exercise their right to authorise access to the papers. Once agreement on the terms of access had been reached the Treasury would authorise access in accordance with the terms of the agreement. Counsel has before him copies of the undertakings and the counter-undertakings (5). Discussions have continued sporadically on the question of access, but no agreement has ever been reached.

### The ownership of the papers

In principle, each document would need to be considered separately in order to determine its ownership. This is clearly not practical. Counsel has before him a copy of the contents page of the catalogue prepared by the Public Records Office in the early 1960s together with a sample page from the catalogue and a sample from the inventory which is currently being drawn up by a reviewer from the Cabinet Office. These give an idea of the sort of papers which the "official part" of the pre-1945 archive contains.

### The position before 1934

Prior to the First World War there were no restrictions on Ministers retaining papers. During the First World War, Cabinet Minutes became more formal and after August 1917 War Cabinet documents were headed "This document is the property of His Britannic Majesty's Government" with the addition of the word "secret". Cabinet documents have continued to bear this heading since then. In August 1917 the War Cabinet also decided that on leaving office Ministers should either hand over their Cabinet papers to their successors or return them to the Cabinet Office. The first meeting of the post-War Cabinet in November 1919 considered a proposal imposing on

the Secretary a duty to recover Cabinet papers from ex-Ministers or their executors, but the proposal was not adopted. Instead, each Cabinet at its final meeting (with the exception of the Conservative Government of 1924-29 which resigned after the General Election without a final meeting of the Cabinet) adopted a resolution enabling Ministers to retain such documents as they wished. This continued until the last meeting of the Labour Cabinet on 24 August 1931.

#### Developments in 1934

In 1934, in the wake of Edgar Lansbury's biography of his father George Lansbury, the Cabinet decided that it was the duty of all Cabinet Ministers on vacating office to return all Cabinet minutes and papers to the Secretary. At the same time an opinion was sought from the Law Officers on the extent to which Cabinet papers were recoverable from Ministers. Counsel has before him a copy of the Instructions and the Opinion, which sets out the history more extensively, including the full text of the 1934 Cabinet resolution. The Law Officers were asked to advise on a number of different categories of document (8). Their advice was that an informal draft prepared by a Minister at home might never become an official document, but that once a draft had been initialled by the Minister for an official purpose it would have become an official document. The other types of document under consideration were all held to be official documents. The Law Officers decided that on the basis of the concluding resolutions of each successive Cabinet (with the exception of the 1924-29 Government) Cabinet Ministers were entitled to refuse to return Cabinet papers. On balance they felt that there was no right of retention in the case of papers held by Ministers not in the Cabinet, but they felt that the arguments were so finely balanced that no distinction should be drawn. In either case, they felt that the right was personal to the Minister concerned and did not apply after his death. They advised that a right of action would lie against the personal representatives of a deceased Minister for the return of official documents. They also considered that an offence would be committed under section 2 of the Official Secrets Act 1911 if a Minister or personal representative refused to return an official document.

#### The law in 1934

The Law Officers advised that the appropriate method of proceeding would be the issue of a Latin Information. This was a particular form of action - correctly described as an information of devenerunt - used by the Crown to recover property which had come into the hands of a third party. It was abolished by section 13 of the Crown Proceedings Act 1947 and is no longer available. The law of limitation as it affects the Crown has also changed since 1934. The old doctrine "nullum tempus occurrit regi" still applied so that an action by the Crown to recover its property could not be time barred. Similarly it was established that the Crown was not affected by the equitable doctrine of laches. However, these doctrines were modified by section 30 of the Limitation Act 1939, now section 37 of the Limitation Act 1980.

#### The present law

The changes in the law made by the Limitation Act 1939 and the Crown Proceedings Act 1947 mean that the question of ownership is to be determined in accordance with the ordinary law. The law relating to public records and to official secrets is also relevant however, and will be examined below. Consideration will also be given to whether clause 11(ii) of the 1946 settlement or the undertakings given by the archives trustees and by Lady Churchill in 1964 are capable of founding a cause of action. Finally the question of copyright and confidence will be considered.

### Conversion and detinue

Prior to 1 January 1978, the correct form of action for the recovery of property wrongfully retained by another was an action in detinue. Detinue was abolished by section 2(1) of the Torts (Interference with Goods) Act 1977 on the basis that the tort of conversion would be available in all situations where detinue was available (except in the case of loss or destruction of the goods by a bailee which is dealt with by section 2(2) of the 1977 Act but is unlikely to be material in the present case). It has been argued that the abolition of detinue has left a gap in the law as conversion would not necessarily have been committed in every case where detinue was available: see N E Palmer (1981) 44 MLR 87. However, any deficiency in this area is unlikely to be material if ownership is determined by events prior to 1 January 1978.

Section 3(2) of the Limitation Act 1939 provided that where a cause of action in respect of the conversion or wrongful detention of a chattel accrues to a person, and he does not recover possession of the chattel for six years, his title to the chattel is extinguished. Section 3(2) of the 1980 Act is in similar terms.

It has been argued that because section 37 of the 1980 Act (and section 30 of the 1939 Act) states that the Act applies "to proceedings by or against the Crown", section 3(2) does not bind the Crown since it relates to title, not proceedings. The Law Officers considered this question in 1956 in the context of an opinion they gave on the possible recovery of a Memorandum of Works of Edward II (referred to below (8)). They felt that although the question was not free from doubt, they were inclined to the view that section 3(2) was so related to section 3(1) and to proceedings that notwithstanding the limitations of section 30(1) section 3(2) would be held to apply to the Crown. Even if the Law Officers were wrong, and section 3(2) does not bind the Crown, it would not seem to assist the Crown since it would still be barred from bringing proceedings to recover its property. It is necessary to consider whether any event has started time running under the Limitation Acts.

### Events after 1934

In 1934 Lord Hankey, then Secretary of the Cabinet, requested Churchill to return official documents in his possession. Churchill refused. Counsel has before him copies of this correspondence (1). Churchill refers to a settlement by Lord Randolph Churchill of State papers, with a prohibition on publication without Government consent, and states that he has himself executed a similar deed with a similar provision. In June 1935 the Cabinet Office wrote to Churchill setting out their view of the law (following the 1934 Law Officers' Opinion) and stating their reasons for wishing the papers to be kept under their control. Churchill replies by asserting his intention to retain documents during his lifetime. He questions what was meant by Cabinet papers and states that many important notes about Cabinet business which he had dictated were his own property. The Cabinet Office replied, conceding that original informal drafts prepared by a Minister at home which never became official documents, fell outside the scope of their definition. In 1935 it was decided (with the approval of the Cabinet) not to take any further action against Churchill during his lifetime. In April 1936 the Cabinet Secretary noted that Churchill had returned all Cabinet Minutes and that he was hopeful that he would recover a great part of the Cabinet papers. Apart from a note on the Cabinet Office file in 1945 to the effect that Churchill was said to be taking away the printed copies of his minutes but that copies would remain in HMG possession, nothing further appears to have happened until the settlement of 1946. These events are also referred to in slightly more detail in the summary of the Cabinet Office files on the subject which Counsel has before him (7).

The first question to be considered is whether Churchill's refusal to return papers when requested in 1934 has resulted in the Crown's title to them being extinguished. All the papers created by Churchill prior to 1934; were created by him at a time when Ministers were permitted to retain documents. As the Law Officers recognised in their opinion of 1934, this meant that Ministers could if they chose decline to return documents. On this basis the documents could not be said to be "wrongfully retained". The Limitation Act 1939 had not of course been enacted in 1934; it came into force on 1 July 1940. Although the Act is not stated to be retrospective, and section 33 provides expressly that actions already barred and pending actions are not to be affected, section 3(2) would appear to have the effect of extinguishing the title of a person to a chattel which had been wrongfully detained more than six years previously.

Counsel is asked to advise whether the Crown's title to papers which Churchill refused to return in 1934 and 1935 would have been extinguished in 1940 or 1941 following the coming into force of the Limitation Act 1939.

### Events after 1939

Churchill returned to office as First Lord of the Admiralty between 1939 and 1940 and of course held office as Prime Minister from 1940 to 1945. It does not appear that any specific demand was made to him for the return of papers, although he would have been aware of the terms of the Cabinet resolution of 1934. As has been mentioned in 1946 he made a settlement of all the papers which might now be the subject of a claim of official ownership. He would have been aware not only of the Cabinet resolution of 1934, but also of the Cabinet Office view that in relation to pre-1934 documents he was entitled to retain them only during his lifetime and they would be recoverable from his personal representatives.

The 1946 settlement could therefore be regarded as a conversion of the documents. It is not clear when the Cabinet Office became aware of the settlement, but their files would seem to indicate that it was not until nearly six years later in June 1952 when the Cabinet Secretary met Churchill's solicitor, Anthony Moir. The 1946 settlement does not purport to transfer property in all the documents to the trustees. Clause 1 recites that Churchill "having in his possession" the documents "lately decided to make proper provision for safeguarding the same and to settle therewith the other property hereinafter assigned". Clause 2 recites that Churchill had delivered the documents to the trustees and he assigns the copyright in them "so far as such copyright belongs to him". Clause 11(ii) (the restriction on disclosure) is silent on the question of ownership. It could therefore be argued that the 1946 settlement did not amount to a conversion of the official documents in Churchill's possession. It could, however, have amounted to a breach of any implied agreement to the effect that he was allowed to retain documents for his lifetime only. Counsel is asked to advise whether the settlement of 1946 could constitute a conversion such as to start time running under section 3(2) of the Limitation Act 1939, and if so whether the date when the Government became aware of the settlement would make any difference to the date when Crown ownership would be extinguished.

### Events after 1963

As explained above, Churchill made a further settlement in 1963, following which the archives trustees undertook in 1964 not without the Cabinet Secretary's consent to vest the papers in any beneficiary without imposing on him an obligation in the terms of clause 11(ii) of the 1946 settlement. The undertaking was expressed to be given "in consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive settlement, to retain under our control the State Papers formally belonging to Sir Winston". The expression "belonging to" is ambiguous but could be interpreted in this context to mean "in the possession of". The trustees by the use of the expression

"State Papers" clearly recognised a State interest in the papers and could be interpreted as having acknowledged Crown ownership, particularly when taken with the reference to retention, which seems to imply that were it not for the undertaking the Government could have demanded the State papers back. This document will presumably be of limited value if Crown ownership had already been extinguished, but it would appear to be evidence in support of the view that it had not. Section 23 of the Limitation Act 1939 (now section 29 of the 1980 Act) (which provides for a fresh accrual of action on acknowledgement or part payment) did not apply to the acknowledgement of title to chattels. The 1964 undertaking could not therefore, in the view of Instructing Solicitor, be used to revive title if it had been extinguished. Nevertheless, it could perhaps operate as some form of estoppel, preventing the trustees from denying the Crown's title. Counsel is asked to advise on this.

### Public records

The law relating to public records is now contained in the Public Records Act 1958, which replaced the Public Record Office Act 1838. There does not appear to be any procedure in the 1958 Act for the recovery of strayed public records. Records which are not in the Public Record Office or a place of deposit appointed by the Lord Chancellor under the Act (Churchill College has not been so appointed) are the subject of section 3. Section 3(1) provides that it is the "duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit... to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping". Subsection (2) provides that duties under this section are to be performed under the guidance of the Keeper of Public Records; and subsection (4) provides that public records selected for permanent preservation under the section are to be transferred not later than 30 years after their creation to the Public Record Office or an appointed place of deposit. Subsection (7) provides that "Any question as to the person whose duty it is to make arrangements under this section with respect to any class of public records shall be referred to the Lord Chancellor for his decision". Section 10(1) defines "public records" by reference to Schedule 1. Paragraph 2(1) of that Schedule provides that with certain exceptions "administrative and departmental records belonging to Her Majesty... and, in particular, records of... any department... or records of any office, commission or any body or establishment whatsoever under Her Majesty's Government... shall be public records. Section 3 is on the face of it capable of applying to public records in the custody of Churchill College but the clear intention of the section is that it should apply to government departments and other creators of potential public records and not to existing records that may have strayed from public possession.

Counsel is referred to two opinions which were obtained from the Law Officers in the present century, one relating to a Memorandum of Works of Edward II, and the other to a Register of his grandson, Edward the Black Prince (8). The Memorandum turned up in a shop in Pall Mall in 1956; the Register turned up in the course of a move by a firm of solicitors from Bedford Row to New Square in 1913. In both cases the opinion of the Law Officers was sought on whether the documents could be recovered. Both opinions were decided on the basis of the Public Record Office Act 1838. Section 20 of that Act defined "record" as "all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature belonging to Her Majesty..." Section 1 of the 1838 Act, which established the Public Record Office under the control of the Master of the Rolls, referred to "records belonging to Her Majesty which now are or ought to be deposited in the several record offices, courts, places and custody hereinafter mentioned..." Section 2 enabled Her Majesty to order that records "deposited in any office, court, place, or custody other than as hereinbefore mentioned" should be under the charge of the Master of the Rolls; and section 3 contained a procedure under which the Master of the Rolls could issue a warrant for the delivery of records. In 1956 the Law Officers held that "custody"

meant "official custody" and that notwithstanding the reference in section 1 to records which "ought to be deposited" in the places mentioned, the Act could not operate in relation to public records held in private hands. The Law Officers went on to express the view already mentioned that any title the Crown might have had to the memorandum would have been extinguished by section 3(2) of the Limitation Act 1939.

Although the instructions make it clear that the Law Officers were aware of the earlier opinion relating to the Register of Edward the Black Prince their 1956 opinion does not refer to it and they appear to have reached the opposite conclusion. (The earlier opinion was given before 1939 so the question of limitation did not arise, but this does not seem to have been the reason for their change of mind.) The 1914 instructions ask for the Law Officers' view on whether the Register could be recovered either under the 1838 Act or "by force of the indefeasible right of the Crown to its official records". The Law Officers held that the documents were "records" within the meaning of section 20 of the 1838 Act and that the Crown was prima facie entitled to their custody under the terms of the Act and an Order in Council made under section 2 (covering documents in any place other than the places mentioned in section 1). The Law Officers went on, however, to express an opinion on whether the documents could have been alienated by the Crown since their creation. They stated that their opinion preceded "on the hypothesis which on the whole we think accurate that the Crown never owned these documents as private and personal property and could not effectively transfer their ownership to third parties". This and the reference in the Instructions to the "indefeasible right of the Crown to its official records" raises an interesting question about whether public records are capable of being alienated. A thorough search of old books would be necessary to establish whether such a principle ever existed, but Instructing Solicitor in a brief search has found no mention of it. In any event if there were any such principle in ancient times, even if it survived until 1914, it is unlikely, in the view of Instructing Solicitor, that it would have survived the Public Records Act 1958, and it would also now be subject to the Limitation Act.

#### Official secrets

In their 1934 opinion the Law Officers expressed the view that an offence would be committed under section 2 of the Official Secrets Act 1911 if a Minister, or an executor or administrator or assign, retained official papers. Counsel will be aware that section 2 has been repealed (although in principle a prosecution could still be brought for an offence committed under it) and the relevant provisions are now contained in the Official Secrets Act 1989. The 1989 Act is more restricted in scope.

Section 8(4) provides that a person who fails to comply with an official direction for the return or disposal of a document or other article commits an offence. The subsection applies only to documents or articles "which it would be an offence under section 5 above for him to disclose without lawful authority". The documents were entrusted to Churchill College not by Churchill himself but by the archives trustees, and it would therefore appear that for section 5 to apply the documents must have been "disclosed" (which is defined in section 13(1) to include parting with possession) "without lawful authority". The other requirements of section 5 would also need to be satisfied, in particular disclosure has to be "damaging" for the purposes of section 1 (security and intelligence), 2 (defence) or 3 (international relations).

Section 8(5) makes it an offence to fail to comply with an official direction to return or dispose of documents or other articles which it would be an offence under section 6 to disclose without lawful authority. Section 6 relates to information entrusted in confidence to other States or international organisations; this might conceivably be relevant.

Under section 9 of the Act no prosecution may be brought without the consent of the Attorney General. The prosecution of Churchill College for refusing to "return" the papers to official custody, or indeed of the archives trustees if they were to attempt to remove the documents from Churchill College and sell them, is a purely hypothetical possibility, but nonetheless Counsel is asked to consider it.

#### Clause 11(ii) and the 1964 undertaking

Counsel is also asked to consider the enforceability of clause 11(ii) of the 1946 settlement and the 1964 undertaking given by the archives trustees. Clause 11(ii) states the trustees "shall not make public or sell or dispose of any document or information" relating to a Government department since 1900 without the permission of the Prime Minister and the Minister concerned. The first question is whether the clause, as a restraint on alienation, is valid at all. There is a line of authority holding that a restriction on alienation in an absolute gift of property is void. A relatively recent example is the case of In re Brown [1954] 1 Ch 39. In that case a testator bequeathed and devised his business and business properties to his wife for life with remainder to his four sons. He directed that if a son disposed of his interest to any person other than one of his brothers his share was forfeited and held on certain discretionary trusts. Harman J held that the prohibition on alienation was void and not binding.

Harman J held that the doctrine applied to personalty as well as to realty (page 44). It is referred to in Coke upon Littleton (11th Edition, Part 1, Book 3, Section 360) where it is said "if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void". However Coke goes on: "but if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issue of such a one, etc, or the like, which conditions do not take all power of alienation from the feoffee, etc, then such condition is good". The cases seem mostly to relate to devises and bequests, but it could be argued that the principle was equally applicable to an inter vivos settlement since "feoffment" in Coke would appear to refer to an inter vivos form of conveyance. The restriction in the 1946 settlement prevents the trustees from selling without the consent of the Prime Minister and the Minister concerned. It could therefore be argued that it is not an absolute bar and is therefore not void. Reference might be made in this context to the case of In re Rosher (1884) 26 Ch 801. In that case a testator devised an estate to his son subject to a condition that if he should wish to sell the estate during the testator's wife's lifetime, she should have an option to buy it (for a substantial undervalue). The condition was held to be void. It would be necessary to distinguish this case from the case of the 1946 settlement on the basis that clause 11(ii) does not give the Government a right to buy the documents, it is merely that no sale can take place without the relevant consent.

Assuming that clause 11(ii) is not void, is it enforceable at the instance of the Crown? The Crown is not a beneficiary under the settlement and has provided no consideration for it. In the view of Instructing Solicitor, clause 11(ii) is not enforceable at the instance of the Crown as in the absence of a claim in contract or as cestui qui trust there is no form of action known to the law which the Crown could use to enforce such a claim. The possibility of an action to restrain disclosure of confidential information is considered below.

### The 1964 undertaking

The same is not necessarily true of the undertaking given by the archives trustees in 1964. This, Counsel will recall, was given "in consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive settlement, to retain under our control the State Papers formally belonging to Sir Winston". The undertaking states that the trustees will not vest documents in any beneficiary without imposing upon him an obligation in terms of clause 11(ii). In the view of Instructing Solicitor "an obligation similar in terms to that contained in clause 11(ii)" could probably not be enforced by the Crown any more easily than the obligation contained in clause 11(ii) itself, so the undertaking may be of limited legal value. There is also some doubt about whether the parties intended the undertaking to be legally binding. A minute from the Cabinet Secretary to the Prime Minister in January 1964 referred to the desirability of concluding "some form of gentleman's agreement". The agreement does, however, appear to be phrased in legal terms: it is referred to in a covering letter from Anthony Moir to the Cabinet Secretary as "the Assurance in the agreed form". A further difficulty is that those who signed it are no longer the archives trustees. Counsel is asked to consider whether the undertaking could be enforced by the Crown against the present archives trustees.

### Copyright

It is also necessary to consider the question of copyright. Copyright was assigned by Churchill to the archives trustees in the 1946 settlement "so far as such copyright belongs to him". Neither the assignment in the 1946 settlement nor the subsequent assignment to C&T Publications could have assigned the copyright in documents the copyright in which was vested in the Crown.

The law on Crown copyright is now found in section 163 of the Copyright, Designs and Patents Act 1988. Paragraphs 40 and 41 of Schedule 1 to that Act contain transitional provisions relating to works made before the coming into force of the Act on 1 August 1989. Under paragraph 40 section 163 of the Act applies to an existing work (a work made before 1 August 1989) if section 39 of the 1956 Act applied to the work immediately before commencement of the 1988 Act. Section 39(1) provided that Her Majesty should be entitled to the copyright in every original literary work "made by or under the direction or control of Her Majesty or a Government Department". Each document would need to be considered separately, but Counsel is asked to advise whether ownership of copyright would be coextensive with "official ownership" of the document itself at the time a document was created: in other words whether the tests set out by the Law Officers in their 1934 opinion for determining which documents could be recovered from Ministers (or in the case of pre-1934 documents from their personal representatives after their death) are also relevant in determining whether a document was written "by or under the direction or control of Her Majesty or a Government Department". Copyright is not of course relevant in determining who owns the documents, but could be relied on to restrain publication by the archives trustees or, more significantly, by a purchaser from the archives trustees.

### Confidential information

The law of confidence is also relevant in this context. The 1946 settlement recited that some of the documents ought not to be made public, and clause 11(ii) expressly acknowledged this. Counsel is asked to advise whether publication of official information that has not come into the public domain under the Public Records Act could be restrained by injunction. Information of this type could fall into two categories. Where a document is duplicated in the Public Record Office, but the document remains closed to public access, a duty of confidence will presumably still exist in respect of it. Where a document is not duplicated in the Public Record Office



it would be necessary to determine whether it contained information to which a duty of confidence attached. Counsel is asked to advise what criteria should be adopted for determining this. Counsel is also asked to advise generally on how the passage of time since 1934 will have affected any action to restrain disclosure of confidential information. On the basis that breach of confidence as such is actionable in equity rather than contract or tort, the Limitation Act would presumably not apply. The doctrine of laches however would apply in a dispute between subjects, but historically it has not been possible to plead laches against the Crown (for a recent case see the decision of the Privy Council in Associated Minerals Consolidated Limited v. Wyong Shire Council [1975] AC 358).

#### Lord Randolph Churchill's papers

In principle the considerations stated above apply in relation to the ownership of and copyright or confidence in official documents contained in Lord Randolph Churchill's papers. The undertaking in clause 11(ii) of the 1946 settlement will not, however, apply since it relates only to documents created after 1900. However in view of the time that has elapsed it is not considered that any claim can realistically be made by the Crown in relation to Lord Randolph's papers. The same is true of the material used by Sir Winston Churchill in his *Life of the Duke of Marlborough*.

#### The Heinsius letters

The Heinsius letters were presented to Sir Winston Churchill by the Queen and Government of the Netherlands on 2 November 1945. In order to establish their ownership it will be necessary to consider the precise circumstances of the gift and any accompanying documentation. Counsel's opinion is not being sought on this aspect at this stage.

#### Questions for Counsel

Counsel is asked to advise generally, and in particular on the following questions:-

1. What criteria should be adopted for determining which documents in the Churchill archive originally belonged to the Crown, and in particular does Counsel agree with the conclusions of the Law Officers in 1934?
2. Does the Crown retain ownership of any of the documents? In particulars:
  - (a) does section 3(2) of the Limitation Act 1980 (previously section 3(2) of the Limitation Act 1939) apply?
  - (b) if so, have any of the following events started time running:-
    - (i) Churchill's refusal to return papers in 1935;
    - (ii) the settlement of 1946;
    - (iii) the settlement of 1963;
    - (iv) the assignment of copyright in 1963;
    - (v) Churchill's death in 1965;
    - (vi) any other event?
  - (c) how does the 1964 undertaking affect the position (see also question 7 below)?

3. If the Crown does retain ownership, by what form of legal proceedings could it be enforced?
4. Can the Crown maintain a right to possession of official documents in the archive on the basis of:
  - (a) the Public Records Act 1958; or
  - (b) any ancient right of the Crown to its records?
5. If an official direction is given to the trustees for the return of official documents would their failure to comply constitute an offence under section 8(5) or (6) of the Official Secrets Act 1989?
6. Is clause 11(ii) of the 1946 settlement valid? If it is, can it be enforced by the Crown, and if so, how?
7. Is the 1964 undertaking enforceable by the Crown against the present archives trustees? If so, how?
8. Does the Crown retain ownership of copyright in official documents?
9. Could the Crown restrain disclosure of confidential information in the documents, and what criteria determine which documents are affected?

(A)

THE CABINET OFFICE

RE: SIR WINSTON CHURCHILL'S PAPERS

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INSTRUCTIONS TO COUNSEL TO ADVISE IN  
CONSULTATION ON ~~MONDAY 8TH JULY 1991~~ WEDNESDAY 17 JULY  
AT 4.30PM. AND IN WRITING

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Counsel have herewith copies of the following:- *- at annex.*

- (1) Correspondence with Sir Winston Churchill in 1934-1936 about the return of official papers;
- (2) Settlement made between the Rt. Hon. Winston Churchill and others on 31st July 1946;
- (3) Settlement made between Lady Churchill and others on 5th December 1963;
- (4) Undertaking given by Lady Churchill and others on 9th April 1964;
- (5) Applications for exemption from estate duty and undertakings given under section 48 of the Finance Act 1950 by Lady Churchill on 27th November 1970 and by Sir Leslie Rowan and Mr J R Colville on 4th December 1970, and related undertakings given by the Treasury;
- (6) Contents page of catalogue prepared by the Public Records Office; sample page of catalogue; and sample page of Cabinet Office inventory;
- (7) Summary of papers on Cabinet Office files;
- (8) Law Officers' opinions relating to:
  - (a) return of Cabinet papers (1934);
  - (b) Register of Edward the Black Prince (1914);
  - (c) Memorandum of Works of Edward II (1956).

Background

Instructing Solicitor acts for the Cabinet Office. Counsel are asked to advise on the ownership of Sir Winston Churchill's papers and on other rights the Crown may have in respect of them.

The Churchill Archives Centre at Churchill College, Cambridge was built with funds provided by American admirers of Sir Winston and houses archive material relating to Churchill and the period during which he lived. Papers he acquired during his lifetime form a substantial part of the archive; these relate to his private and political life, and also include early family papers and heirlooms. They cover his ministerial career as Under-Secretary of State for the Colonies (1906-8), President of the Board of Trade

(1910-11), First Lord of the Admiralty (1911-15 and 1939-40), Chancellor of the Duchy of Lancaster (1915), Minister of Munitions (1917), Secretary of State for War (1918-21), Air (1918-21), and the Colonies (1921-22), Chancellor of the Exchequer (1924-29) and Prime Minister (1940-45). They include numerous official papers which he retained after leaving office, comprising large quantities of copy documents and a considerable proportion of original documents (papers, memoranda, correspondence, etc.) which had they remained in official custody would have become subject to the Public Records Act 1958.

In 1946 Sir Winston made a settlement (the 1946 settlement) in which he settled those papers (the pre-1945 papers) acquired by him prior to his resignation in 1945, together with certain other property, on various trusts for the benefit of his family. The pre-1945 papers were resettled in 1963 by a further settlement (the 1963 settlement). Instructing Solicitor understands that further changes have recently been made to the trusts on which the pre-1945 papers are held.

Papers created after 1945 (the post-1945 papers) were left by Sir Winston in his will to his wife. He intended that Lady Churchill should bequeath them to the trustees of the 1946 settlement (the archives trustees), but instead she left them to Churchill College, who now own them outright. This in outline is the background to the case.

The archives trustees have approached the Government to see whether they would be willing to buy the pre-1945 papers. In considering how to respond the Government needs to know whether it can maintain that it owns some of the documents already and what other rights it may have in respect of them. These instructions address questions of ownership, public records, official secrets, copyright and confidence and the enforceability of specific provisions in the settlements and undertakings given by the archives trustees.

### The 1946 and 1963 settlements

Counsel have before them copies of the 1946 and 1963 settlements ((2) and (3)). It is not necessary to consider in detail the precise terms of the trusts for the benefit of Sir Winston's descendents. Clause 1 of the 1946 settlement recites that the settlor has "in his possession the records and memoranda shortly mentioned in parts 1 and 2 of the Schedule hereto (some of which may be of such a nature that they ought not to be divulged to the public without due precautions being taken in the public interest)...". Clause 2 recites that the settlor has delivered to the trustees "the documents, boxes and casket shortly mentioned in the Schedule hereto". The Schedule lists four categories of papers: records and memoranda relating to Sir Winston's early and middle life up to 1934; records and memoranda relating to the period 1934-1945, including material relating to the first Duke of Marlborough; papers formerly belonging to Lord Randolph Churchill; and a tortoiseshell casket containing letters from the first Duke of Marlborough to the Grand Pensionary Heinsius of the Netherlands.

Clause 2 of the 1946 settlement also assigns to the trustees the copyright in the documents (so far as it belonged to Sir Winston).

Clause 11(ii) of the 1946 settlement is particularly important. It reads:-

"The Trustees shall not at any time make public or sell or dispose of any document or information relating to any office, ministry or department of the British Government since the year One thousand nine hundred or any official papers of a general character without the permission of the Prime Minister of England for the time being and the other Ministers (if any) for the time being representing the office, ministry or department concerned".

The 1963 settlement altered the trusts on which the papers were held. In particular the trustees were given power to vest the collection in a single beneficiary absolutely. Clause 2(j) of the 1963 settlement provides that clauses 9 to 13 inclusive of the 1946 settlement are to continue to apply; these of course include clause 11(ii).

### Copyright

In 1963 Sir Winston Churchill assigned the copyright in the post-1945 papers to a company called C&T Publications Limited, a subsidiary of the Daily Telegraph. The archives trustees assigned the copyright in the pre-1945 papers to that company also. This was done in connection with a biography of Sir Winston Churchill which was being prepared, initially by his son Randolph and subsequently by Martin Gilbert. Lord Birkenhead was also commissioned to write a short biography of Churchill. The assignment to C&T Publications provided that none of the papers should be made public until 10 years after publication of the last volume of the official biography. This did not take place until 1988. Instructing Solicitor understands that it has recently been agreed with C&T Publications that the period of 10 years be reduced to 2 years.

### Location of the papers

The pre-1945 papers were originally housed in the Muniment Room at Chartwell Manor. Subsequently they were kept at Lloyds Bank before being moved to the Bodleian Library at Oxford while Martin Gilbert worked on them. Finally they were transferred by the archives trustees to Churchill College in 1980. Instructing Solicitor is not aware of the terms on which the documents were transferred to Churchill College, but the transfer clearly did not involve any change of ownership.

### The 1964 undertaking

The provision in the 1963 settlement enabling the archives trustees to vest the collection in a single beneficiary absolutely was apparently intended to enable the collection to be given by the beneficiary to an institution such as Churchill College. The 1963 settlement does not however contain any limitation on the power of disposal of any beneficiary becoming absolutely entitled. In order to ensure that the protection given by clause 11(ii) of the 1946 settlement continued without a break an undertaking was obtained from the archives trustees in 1964 in the following terms, copies of which Counsel have before them (4):

"To:

The Secretary of the Cabinet,  
Cabinet Office,  
Great George Street,  
London, S.W.1.

### The Rt Hon. Winston Churchill's Archive Settlement

In consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive Settlement, to retain under our control the State Papers formerly belonging to Sir Winston and which came into existence prior to his resignation as Prime Minister in 1945 and any further State Papers formerly belonging to him which may come into our hands together with any Catalogues relating to them, we write to give you our formal assurance that we will not without your consent, vest such Papers in any Beneficiary without imposing upon him an obligation similar in terms to that contained clause 11(ii) in the Settlement known as "The Chartwell Trust" and receiving from such Beneficiary an undertaking to impose a similar

obligation on any further disposal of the State Papers and Catalogues

Dated 9th April 1964

(signed) C S Churchill  
T L Rowan  
John Colville  
Anthony Moir"

### Estate duty exemptions

In 1969 and 1970 there were extensive discussions about the form of undertaking to be given in connection with the Estate Duty exemptions claimed following the death of Sir Winston and his son Randolph. Exemption was granted in respect of both the pre- and post- 1945 papers under section 40 of the Finance Act 1930, as amended. Exemption under the section was subject to the following conditions, set out in section 48 of the Finance Act 1950:

- (a) the objects would be kept permanently in the United Kingdom, and should not leave it temporarily except for a purpose and a period approved by the Treasury; and
- (b) reasonable steps would be taken for the preservation of the objects; and
- (c) reasonable facilities for examining the objects for the purpose of seeing the steps taken for their preservation or for purposes of research would be allowed to any person authorised by the Treasury so to examine them.

The archives trustees (in respect of the pre-1945 papers) and Lady Churchill (in respect of the post-1945 papers) were unwilling to give an undertaking in terms of paragraph (c) above partly because they felt that some of the documents of a more intimate personal nature should not be open to public scrutiny, but mainly because the agreement under which copyright had been assigned to C&T Publications provided that access should not be permitted until 10 years after the last volume of Churchill's biography had been published. Eventually, undertakings were given in the form required by the tax legislation, in return for which the Treasury undertook that pending agreement on the terms of access they would not exercise their right to authorise access to the papers. Once agreement on the terms of access had been reached the Treasury would authorise access in accordance with the terms of the agreement. Counsel have before them copies of the undertakings and the counter-undertakings (5). Discussions have continued sporadically on the question of access, but no agreement has ever been reached.

### The ownership of the papers

In principle, each document would need to be considered separately in order to determine its ownership. This is clearly not practical. Counsel have before them copies of the contents page of the catalogue prepared by the Public Records Office in the early 1960s together with a sample page from the catalogue and a sample from the inventory which is currently being drawn up by a reviewer from the Cabinet Office. These give an idea of the sort of papers which the "official part" of the pre-1945 archive contains.

### The position before 1934

Prior to the First World War there were no restrictions on Ministers retaining papers. During the First World War, Cabinet Minutes became more formal and after August 1917 War Cabinet documents were headed "This document is the property of His Britannic Majesty's Government" with the addition of the word "secret". Cabinet documents have continued to bear this heading since then. In August 1917 the War Cabinet also decided that on leaving office Ministers should either hand over their

Cabinet papers to their successors or return them to the Cabinet Office. The first meeting of the post-War Cabinet in November 1919 considered a proposal imposing on the Secretary a duty to recover Cabinet papers from ex-Ministers or their executors, but the proposal was not adopted. Instead, each Cabinet at its final meeting (with the exception of the Conservative Government of 1924-29 which resigned after the General Election without a final meeting of the Cabinet) adopted a resolution enabling Ministers to retain such documents as they wished. This continued until the last meeting of the Labour Cabinet on 24 August 1931.

#### Developments in 1934

In 1934, in the wake of Edgar Lansbury's biography of his father George Lansbury, the Cabinet decided that it was the duty of all Cabinet Ministers on vacating office to return all Cabinet minutes and papers to the Secretary. At the same time an opinion was sought from the Law Officers on the extent to which Cabinet papers were recoverable from Ministers. Counsel have before them copies of the instructions and the opinion, which sets out the history more extensively, including the full text of the 1934 Cabinet resolution (8a). The Law Officers were asked to advise on a number of different categories of document. Their advice was that an informal draft prepared by a Minister at home might never become an official document, but that once a draft had been initialled by the Minister for an official purpose it would have become an official document. The other types of document under consideration were all held to be official documents. The Law Officers decided that on the basis of the concluding resolutions of each successive Cabinet (with the exception of the 1924-29 Government) Cabinet Ministers were entitled to refuse to return Cabinet papers. On balance they felt that there was no right of retention in the case of papers held by Ministers not in the Cabinet, but they felt that the arguments were so finely balanced that no distinction should be drawn. In either case, they felt that the right was personal to the Minister concerned and did not apply after his death. They advised that a right of action would lie against the personal representatives of a deceased Minister for the return of official documents. They also considered that an offence would be committed under section 2 of the Official Secrets Act 1911 if a Minister or personal representative refused to return an official document.

#### The law in 1934

The Law Officers advised that the appropriate method of proceeding would be the issue of a writ of information. This was a particular form of action - correctly described as an information of devenerunt - used by the Crown to recover property which had come into the hands of a third party. It was abolished by section 13 of the Crown Proceedings Act 1947 and is no longer available. The law of limitation as it affects the Crown has also changed since 1934. The old doctrine "nullum tempus occurrit regi" still applied so that an action by the Crown to recover its property could not be time barred. Similarly it was established that the Crown was not affected by the equitable doctrine of laches. However, these doctrines were modified by section 30 of the Limitation Act 1939, now section 37 of the Limitation Act 1980.

#### The present law

The changes in the law made by the Limitation Act 1939 and the Crown Proceedings Act 1947 mean that the question of ownership is to be determined in accordance with the ordinary law. The law relating to public records and to official secrets is also relevant however, and will be examined below. Consideration will also be given to whether clause 11(ii) of the 1946 settlement or the undertakings given by the archives trustees and by Lady Churchill in 1964 are capable of founding a cause of action. Finally the question of copyright and confidence will be considered.

## Conversion and detinue

Prior to 1 January 1978, the correct form of action for the recovery of property wrongfully retained by another was an action in detinue. Detinue was abolished by section 2(1) of the Torts (Interference with Goods) Act 1977 on the basis that the tort of conversion would be available in all situations where detinue was available (except in the case of loss or destruction of the goods by a bailee which is dealt with by section 2(2) of the 1977 Act but is unlikely to be material in the present case). It has been argued that the abolition of detinue has left a gap in the law as conversion would not necessarily have been committed in every case where detinue was available: see N E Palmer (1981) 44 MLR 87. However, any deficiency in this area is unlikely to be material if ownership is determined by events prior to 1 January 1978.

Section 3(2) of the Limitation Act 1939 provided that where a cause of action in respect of the conversion or wrongful detention of a chattel accrues to a person, and he does not recover possession of the chattel for six years, his title to the chattel is extinguished. Section 3(2) of the 1980 Act is in similar terms.

It has been argued that because section 37 of the 1980 Act (and section 30 of the 1939 Act) states that the Act applies "to proceedings by or against the Crown", section 3(2) does not bind the Crown since it relates to title, not proceedings. The Law Officers considered this question in 1956 in the context of an opinion they gave on the possible recovery of a Memorandum of Works of Edward II (referred to below (8c)). They felt that although the question was not free from doubt, they were inclined to the view that section 3(2) was so related to section 3(1) and to proceedings that notwithstanding the limitations of section 30(1) section 3(2) would be held to apply to the Crown. Even if the Law Officers were wrong, and section 3(2) does not bind the Crown, it would not seem to assist the Crown since it would still be barred from bringing proceedings to recover its property. It is necessary to consider whether any event has started time running under the Limitation Acts.

## Events after 1934

In 1934 Churchill was asked along with other ex-ministers to return official documents in his possession. Churchill refused. Counsel have before them copies of this correspondence (1). Churchill refers in his letter of 19th November 1934 to a settlement by Lord Randolph Churchill of State papers, with a prohibition on publication without Government consent, and states that he has himself executed a similar deed with a similar provision. In June 1935 Sir Maurice Hankey, then Secretary of the Cabinet, wrote to Churchill setting out the Cabinet Office view of the law (following the 1934 Law Officers' Opinion) and stating their reasons for wishing the papers to be kept under their control. The letter acknowledges that a Minister may retain documents during his lifetime if he insists. Churchill replies by asserting his intention to retain documents during his lifetime. He questions what was meant by Cabinet papers and states that many important notes about Cabinet business which he had dictated were his own property. The Cabinet Office replied, conceding that original informal drafts prepared by a Minister at home which never became official documents, fell outside the scope of their definition. Later in 1935 it was decided (with the approval of the Cabinet) not to take any further action against Churchill during his lifetime. In April 1936 the Cabinet Secretary noted that Churchill had returned all Cabinet Minutes and that he was hopeful that he would recover a great part of the Cabinet papers. (Churchill was of course then holding a large number of other official papers that were not Cabinet documents.) Apart from a note on the Cabinet Office file in 1945 to the effect that Churchill was said to be taking away the printed copies of his minutes but that copies would remain in HMG possession, nothing further appears to have happened until the settlement of 1946. These events are also referred to in slightly more detail in the summary of the Cabinet Office files on the



subject which Counsel have before them (7).

The first question to be considered is whether Churchill's refusal to return papers when requested in 1934 has resulted in the Crown's title to them being extinguished. All the papers created by Churchill prior to 1934 were created by him at a time when Ministers were permitted to retain documents. As the Law Officers recognised in their opinion of 1934, and Sir Maurice Hankey acknowledges in his letter of 15th June 1935, this meant that Ministers could if they chose decline to return documents. On this basis the documents could not be said to be "wrongfully retained". The Limitation Act 1939 had not of course been enacted in 1934; it came into force on 1 July 1940. Although the Act is not stated to be retrospective, and section 33 provides expressly that actions already barred and pending actions are not to be affected, section 3(2) would appear to have the effect of extinguishing the title of a person to a chattel which had been wrongfully detained more than six years previously.

Counsel are asked to advise whether the Crown's title to papers which Churchill refused to return in 1934 and 1935 would have been extinguished in 1940 or 1941 following the coming into force of the Limitation Act 1939.

#### Events after 1939

Churchill returned to office as First Lord of the Admiralty between 1939 and 1940 and of course held office as Prime Minister from 1940 to 1945. It does not appear that any specific demand was made to him for the return of papers, although he was aware of the terms of the Cabinet resolution of 1934. As has been mentioned in 1946 he made a settlement of all the pre-1945 papers which might now be the subject of a claim of official ownership. He would have been aware not only of the Cabinet resolution of 1934, but also of the Cabinet Office view that in relation to pre-1934 documents he was entitled to retain them only during his lifetime and they would be recoverable from his personal representatives.

The 1946 settlement could therefore be regarded as a conversion of the documents. It is not clear when the Cabinet Office became aware of the settlement, but their files would seem to indicate that it was not until nearly six years later in June 1952 when the Cabinet Secretary met Churchill's solicitor, Anthony Moir. The 1946 settlement does not purport to transfer property in all the documents to the trustees. Clause 1 recites that Churchill "having in his possession" the documents "lately decided to make proper provision for safeguarding the same and to settle therewith the other property hereinafter assigned". Clause 2 recites that Churchill had delivered the documents to the trustees and he assigns the copyright in them "so far as such copyright belongs to him". Clause 11(ii) (the restriction on disclosure) is silent on the question of ownership. It could therefore be argued that the 1946 settlement did not amount to a conversion of the official documents in Churchill's possession. It could, however, have amounted to a breach of any implied agreement to the effect that he was allowed to retain documents for his lifetime only. Counsel are asked to advise whether the settlement of 1946 could constitute a conversion such as to start time running under section 3(2) of the Limitation Act 1939, and if so whether the date when the Government became aware of the settlement would make any difference to the date when Crown ownership would be extinguished.

#### Events after 1963

As explained above, Churchill made a further settlement in 1963, following which the archives trustees undertook in 1964 not without the Cabinet Secretary's consent to vest the papers in any beneficiary without imposing on him an obligation in the terms of clause 11(ii) of the 1946 settlement. The undertaking was expressed to be given "in consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive

settlement, to retain under our control the State Papers formerly belonging to Sir Winston". The expression "belonging to" is ambiguous but could be interpreted in this context to mean "in the possession of". The trustees by the use of the expression "State Papers" clearly recognised a State interest in the papers and could be interpreted as having acknowledged Crown ownership, particularly when taken with the reference to retention, which seems to imply that were it not for the undertaking the Government could have demanded the State papers back. This document will presumably be of limited value if Crown ownership had already been extinguished, but it would appear to be evidence in support of the view that it had not. Section 23 of the Limitation Act 1939 (now section 29 of the 1980 Act) (which provides for a fresh accrual of action on acknowledgement or part payment) did not apply to the acknowledgement of title to chattels. The 1964 undertaking could not therefore, in the view of Instructing Solicitor, be used to revive title if it had been extinguished. Nevertheless, it could perhaps operate as some form of estoppel, preventing the trustees from denying the Crown's title. Counsel are asked to advise on this.

### Public records

The law relating to public records is now contained in the Public Records Act 1958, which replaced the Public Record Office Act 1838. There does not appear to be any procedure in the 1958 Act for the recovery of strayed public records. Records which are not in the Public Record Office or a place of deposit appointed by the Lord Chancellor under the Act (Churchill College has not been so appointed) are the subject of section 3. Section 3(1) provides that it is the "duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit... to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping". Subsection (2) provides that duties under this section are to be performed under the guidance of the Keeper of Public Records; and subsection (4) provides that public records selected for permanent preservation under the section are to be transferred not later than 30 years after their creation to the Public Record Office or an appointed place of deposit. Subsection (7) provides that "Any question as to the person whose duty it is to make arrangements under this section with respect to any class of public records shall be referred to the Lord Chancellor for his decision". Section 10(1) defines "public records" by reference to Schedule 1. Paragraph 2(1) of that Schedule provides that with certain exceptions "administrative and departmental records belonging to Her Majesty... and, in particular, records of... any department... or records of any office, commission or any body or establishment whatsoever under Her Majesty's Government... shall be public records. Section 3 is on the face of it capable of applying to public records in the custody of Churchill College but the clear intention of the section is that it should apply to government departments and other creators of potential public records and not to existing records that may have strayed from public possession.

Counsel are referred to two opinions which were obtained from the Law Officers in the present century, one relating to a Memorandum of Works of Edward II, and the other to a Register of his grandson, Edward the Black Prince (8). The Memorandum turned up in a shop in Pall Mall in 1956; the Register turned up in the course of a move by a firm of solicitors from Bedford Row to New Square in 1913. In both cases the opinion of the Law Officers was sought on whether the documents could be recovered. Both opinions were decided on the basis of the Public Record Office Act 1838. Section 20 of that Act defined "record" as "all rolls, records, writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature belonging to Her Majesty..." Section 1 of the 1838 Act, which established the Public Record Office under the control of the Master of the Rolls, referred to "records belonging to Her Majesty which now are or ought to be deposited in the several record offices, courts, places and custody hereinafter mentioned..." Section 2 enabled Her Majesty to order that records "deposited in any office, court, place, or custody other

than as hereinbefore mentioned" should be under the charge of the Master of the Rolls; and section 3 contained a procedure under which the Master of the Rolls could issue a warrant for the delivery of records. In 1956 the Law Officers held that "custody" meant "official custody" and that notwithstanding the reference in section 1 to records which "ought to be deposited" in the places mentioned, the Act could not operate in relation to public records held in private hands. The Law Officers went on to express the view already mentioned that any title the Crown might have had to the memorandum would have been extinguished by section 3(2) of the Limitation Act 1939.

Although the instructions make it clear that the Law Officers were aware of the earlier opinion relating to the Register of Edward the Black Prince their 1956 opinion does not refer to it and they appear to have reached the opposite conclusion. (The earlier opinion was given before 1939 so the question of limitation did not arise, but this does not seem to have been the reason for their change of mind.) The 1914 instructions asked for the Law Officers' view on whether the Register could be recovered either under the 1838 Act or "by force of the indefeasible right of the Crown to its official records". The Law Officers held that the documents were "records" within the meaning of section 20 of the 1838 Act and that the Crown was prima facie entitled to their custody under the terms of the Act and an Order in Council made under section 2 (covering documents in any place other than the places mentioned in section 1). The Law Officers went on, however, to express an opinion on whether the documents could have been alienated by the Crown since their creation. They stated that their opinion preceded "on the hypothesis which on the whole we think accurate that the Crown never owned these documents as private and personal property and could not effectively transfer their ownership to third parties". This and the reference in the Instructions to the "indefeasible right of the Crown to its official records" raises an interesting question about whether public records are capable of being alienated. A thorough search of old books would be necessary to establish whether such a principle ever existed, but Instructing Solicitor in a brief search has found no mention of it. In any event if there were any such principle in ancient times, even if it survived until 1914, it is unlikely, in the view of Instructing Solicitor, that it would have survived the Public Records Act 1958, and it would also now be subject to the Limitation Act. Instructing Solicitor understands from the Lord Chancellor's Department that the possibility that public records are inalienable was considered in the context of the Australian Constitution (Public Record Copy) Act 1990 (c.17). That Act was passed to enable the record copy of the Commonwealth of Australia Constitution Act 1900, which was on loan to Australia, to be kept there permanently. The 1990 Act sidesteps the issue of alienability by declaring that the copy of the 1900 Act on loan to Australia should cease to be included in the public records to which the Public Records Act 1958 applies.

### Official secrets

In their 1934 opinion the Law Officers expressed the view that an offence would be committed under section 2 of the Official Secrets Act 1911 if a Minister, or an executor or administrator or assign, retained official papers. Counsel will be aware that section 2 has been repealed (although in principle a prosecution could still be brought for an offence committed under it) and the relevant provisions are now contained in the Official Secrets Act 1989. The 1989 Act is more restricted in scope.

Section 8(4) provides that a person who fails to comply with an official direction for the return or disposal of a document or other article commits an offence. The subsection applies only to documents or articles "which it would be an offence under section 5 above for him to disclose without lawful authority". The documents were entrusted to Churchill College not by Churchill himself but by the archives trustees, and it would therefore appear that for section 5 to apply the documents must have been "disclosed" (which is defined in section 13(1) to include parting with possession)

"without lawful authority". The other requirements of section 5 would also need to be satisfied, in particular disclosure has to be "damaging" for the purposes of section 1 (security and intelligence), 2 (defence) or 3 (international relations).

Section 8(5) makes it an offence to fail to comply with an official direction to return or dispose of documents or other articles which it would be an offence under section 6 to disclose without lawful authority. Section 6 relates to information entrusted in confidence to other States or international organisations; this might conceivably be relevant.

Under section 9 of the Act no prosecution may be brought without the consent of the Attorney General. The prosecution of Churchill College for refusing to "return" the papers to official custody, or indeed of the archives trustees if they were to attempt to remove the documents from Churchill College and sell them, is a purely hypothetical possibility, but nonetheless Counsel are asked to consider it.

#### Clause 11(ii) of the 1946 Settlement

Counsel are also asked to consider the enforceability of clause 11(ii) of the 1946 settlement and the 1964 undertaking given by the archives trustees. Clause 11(ii) states the trustees "shall not make public or sell or dispose of any document or information" relating to a Government department since 1900 without the permission of the Prime Minister and the Minister concerned. The first question is whether the clause, as a restraint on alienation, is valid at all. There is a line of authority holding that a restriction on alienation in an absolute gift of property is void. A relatively recent example is the case of In re Brown [1954] 1 Ch 39. In that case a testator bequeathed and devised his business and business properties to his wife for life with remainder to his four sons. He directed that if a son disposed of his interest to any person other than one of his brothers his share was forfeited and held on certain discretionary trusts. Harman J held that the prohibition on alienation was void and not binding.

Harman J held that the doctrine applied to personalty as well as to realty (page 44). It is referred to in Coke upon Littleton (11th Edition, Part 1, Book 3, Section 360) where it is said "if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void". However Coke goes on: "but if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs or of the issue of such a one, etc, or the like, which conditions do not take all power of alienation from the feoffee, etc, then such condition is good". The cases seem mostly to relate to devises and bequests, but it could be argued that the principle was equally applicable to an inter vivos settlement since "feoffment" in Coke would appear to refer to an inter vivos form of conveyance. The restriction in the 1946 settlement prevents the trustees from selling without the consent of the Prime Minister and the Minister concerned. It could therefore be argued that it is not an absolute bar and is therefore not void. Reference might be made in this context to the case of In re Rosher (1884) 26 Ch 801. In that case a testator devised an estate to his son subject to a condition that if he should wish to sell the estate during the testator's wife's lifetime, she should have an option to buy it (for a substantial undervalue). The condition was held to be void. It would be necessary to distinguish this case from the case of the 1946 settlement on the basis that clause 11(ii) does not give the Government a right to buy the documents, it is merely that no sale can take place without the relevant consent.

Assuming that clause 11(ii) is not void, is it enforceable at the instance of the Crown? The Crown is not a beneficiary under the settlement and has provided no consideration for it. Counsel are asked to advise whether there is any form of action known to law which the Crown could use to enforce clause 11(ii), in the absence of a claim in contract or as cestui qui trust. The possibility of an action to restrain disclosure of confidential information is considered below.

### The 1964 undertaking

The same is not necessarily true of the undertaking given by the archives trustees in 1964. This, Counsel will recall, was given "in consideration of your permitting us, as Trustees of Sir Winston Churchill's Archive settlement, to retain under our control the State Papers formerly belonging to Sir Winston". The undertaking states that the trustees will not vest documents in any beneficiary without imposing upon him an obligation in terms of clause 11(ii). In the view of Instructing Solicitor "an obligation similar in terms to that contained in clause 11(ii)" could probably not be enforced by the Crown any more easily than the obligation contained in clause 11(ii) itself, so the undertaking may be of limited legal value. There is also some doubt about whether the parties intended the undertaking to be legally binding. A minute from the Cabinet Secretary to the Prime Minister in January 1964 referred to the desirability of concluding "some form of gentleman's agreement". The agreement does, however, appear to be phrased in legal terms: it is referred to in a covering letter from Anthony Moir to the Cabinet Secretary as "the Assurance in the agreed form". A further difficulty is that those who signed it are no longer the archives trustees, although it appears to be intended to have continuing effect, since it applies to "any further State Papers formerly belonging to [Churchill] which may come into our hands". Counsel are asked to consider whether the undertaking could be enforced by the Crown against the present archives trustees.

### Copyright

It is also necessary to consider the question of copyright. Copyright was assigned by Churchill to the archives trustees in the 1946 settlement "so far as such copyright belongs to him". Neither the assignment in the 1946 settlement nor the subsequent assignment to C&T Publications could have assigned the copyright in documents the copyright in which was vested in the Crown.

The law on Crown copyright is now found in section 163 of the Copyright, Designs and Patents Act 1988. Paragraphs 40 and 41 of Schedule 1 to that Act contain transitional provisions relating to works made before the coming into force of the Act on 1 August 1989. Under paragraph 40 section 163 of the Act applies to an existing work (a work made before 1 August 1989) if section 39 of the 1956 Act applied to the work immediately before commencement of the 1988 Act. Section 39(1) provided that Her Majesty should be entitled to the copyright in every original literary work "made by or under the direction or control of Her Majesty or a Government Department". Each document would need to be considered separately, but Counsel are asked to advise whether ownership of copyright would be coextensive with "official ownership" of the document itself at the time a document was created: in other words whether the tests set out by the Law Officers in their 1934 opinion for determining which documents could be recovered from Ministers (or in the case of pre-1934 documents from their personal representatives after their death) are also relevant in determining whether a document was written "by or under the direction or control of Her Majesty or a Government Department". Copyright is not of course relevant in determining who owns the documents, but could be relied on to restrain publication by the archives trustees or, more significantly, by a purchaser from the archives trustees.

### Confidential information

The law of confidence is also relevant in this context. The 1946 settlement recited that some of the documents ought not to be made public, and clause 11(ii) expressly acknowledged this. Counsel are asked to advise whether publication of official information that has not come into the public domain under the Public Records Act could be restrained by injunction. Information of this type could fall into two categories. Where a document is duplicated in the Public Record Office, but the document remains closed to public access, a duty of confidence will presumably still exist in respect of it. Where a document is not duplicated in the Public Record Office it would be necessary to determine whether it contained information to which a duty of confidence attached. Counsel are asked to advise what criteria should be adopted for determining this. Counsel are also asked to advise generally on how the passage of time since 1934 will have affected any action to restrain disclosure of confidential information. On the basis that breach of confidence as such is actionable in equity rather than contract or tort, the Limitation Act would presumably not apply. The doctrine of laches however would apply in a dispute between subjects, but historically it has not been possible to plead laches against the Crown (for a recent case see the decision of the Privy Council in Associated Minerals Consolidated Limited v. Wyong Shire Council [1975] AC 358).

### Lord Randolph Churchill's papers

In principle the considerations stated above apply in relation to the ownership of and copyright or confidence in official documents contained in Lord Randolph Churchill's papers. The undertaking in clause 11(ii) of the 1946 settlement will not, however, apply since it relates only to documents created after 1900. However in view of the time that has elapsed it is not considered that any claim can realistically be made by the Crown in relation to Lord Randolph's papers. The same is true of the material used by Sir Winston Churchill in his *Life of the Duke of Marlborough*.

### The Heinsius letters

The Heinsius letters were presented to Sir Winston Churchill by the Queen and Government of the Netherlands on 2 November 1945. (Churchill resigned as Prime Minister on 26th July 1945.) In order to establish their ownership it will be necessary to consider the precise circumstances of the gift and any accompanying documentation. Counsels' opinion is not being sought on this aspect at this stage.

### Questions for Counsel

Counsel are asked to advise generally, and in particular on the following questions:-

1. What criteria should be adopted for determining which documents in the Churchill archive originally belonged to the Crown, and in particular does Counsel agree with the conclusions of the Law Officers in 1934?
2. Does the Crown retain ownership of any of the documents? In particular:
  - (a) does section 3(2) of the Limitation Act 1980 (previously section 3(2) of the Limitation Act 1939) apply?
  - (b) if so, have any of the following events started time running:-

- (i) Churchill's refusal to return papers in 1935;
  - (ii) the settlement of 1946;
  - (iii) the settlement of 1963;
  - (iv) the assignment of copyright in 1963;
  - (v) Churchill's death in 1965;
  - (vi) any other event?
- (c) how does the 1964 undertaking affect the position (see also question 7 below)?
3. If the Crown does retain ownership, by what form of legal proceedings could it be enforced?
  4. Can the Crown maintain a right to possession of official documents in the archive on the basis of:
    - (a) the Public Records Act 1958; or
    - (b) any ancient right of the Crown to its records?
  5. If an official direction is given to the trustees for the return of official documents would their failure to comply constitute an offence under section 8(5) or (6) of the Official Secrets Act 1989?
  6. Is clause 11(ii) of the 1946 settlement valid? If it is, can it be enforced by the Crown, and if so, how?
  7. Is the 1964 undertaking enforceable by the Crown against the present archives trustees? If so, how?
  8. Does the Crown retain ownership of copyright in official documents in the archive?
  9. Could the Crown restrain disclosure of confidential information in the documents, and what criteria determine which documents are affected?

A consultation has been arranged for 4.30pm on Monday 8th July at Mr Hart's chambers. If Counsel require any further information before the consultation please would they telephone Mr Mark Blythe of Instructing Solicitor (210 3049).





THE CABINET OFFICE

RE: SIR WINSTON CHURCHILL'S PAPERS

---

INSTRUCTIONS TO COUNSEL TO ADVISE  
IN CONSULTATION ON MONDAY 8TH  
JULY 1991 AT 4.30PM. AND IN WRITING.

---

Mr Michael Hart, Q.C.  
2 New Square  
Lincoln's Inn  
London WC2A 2RU

with you

Mr William Charles  
13 Old Square  
Lincoln's Inn  
London WC2A 3UA

The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

Tel: 071-210 3049

Ref: T&M 69/340/CJG

Dated: 5 June 1991

(B)

THE CABINET OFFICE  
RE: SIR WINSTON CHURCHILL'S PAPERS

---

FURTHER INSTRUCTIONS TO COUNSEL  
TO ADVISE IN CONSULTATION ON  
WEDNESDAY 17 JULY 1991  
AT 70 WHITEHALL SW1  
AT 4.30PM. AND IN WRITING

---

Counsel have herewith copies of the following:-

- (1) Letter dated 20 May 1991 from Walker Martineau to the Capital Taxes Office together with a Deed of Resettlement dated 27 December 1990;
- (2) Re-typed page from the 1963 Settlement. -- put into 1963 Settlement (item (3) in original Instructions)

In the Instructions which Counsel already have before them Instructing Solicitor said that he understood that further changes had recently been made to the trusts on which the pre-1945 papers were held. Instructing Solicitor has now received a copy of the Deed of Resettlement and Counsel have copies before them. The Deed would not appear to affect the answers to the questions raised in the earlier Instructions, but Counsel will wish to see the document for the sake of completeness.

Counsel may wish to note that, unlike the 1963 settlement, the latest resettlement makes no reference to clause 11 of the 1945 settlement. Instructing Solicitor regrets that clause 2(j) of the 1963 settlement (which as stated in the previous Instructions applied various provisions of the 1945 settlement, including clause 11, to the 1963 settlement) is not very legible in the copies Counsel have before them. A re-typed copy of the relevant page is therefore enclosed with these Instructions.



THE CABINET OFFICE

RE: SIR WINSTON CHURCHILL'S PAPERS

---

FURTHER INSTRUCTIONS TO COUNSEL  
TO ADVISE IN CONSULTATION ON  
WEDNESDAY 17 JULY 1991  
AT 70 WHITEHALL SW1  
AT 4.30PM. AND IN WRITING.

---

Mr Michael Hart, Q.C.  
2 New Square  
Lincoln's Inn  
London WC2A 2RU

with you

Mr William Charles  
13 Old Square  
Lincoln's Inn  
London WC2A 3UA

The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

Tel: 071-210 3049

Ref: T&M 69/340/CJG

# Walker Martineau

64 Queen Street, London EC4R 1AD Telephone 071-236 4232 CDE 553 Fax 071-236 2525

GDFED/  
F60817/1968 J  
23. bro  
20th May 1991

Your ref.  
Our ref.

The Controller  
Capital Taxes Office  
Designated Property Section  
Rockley Road  
London W14 0DF



Dear Sirs,

Churchill Archives Trust  
Randolph Churchill Deceased

We act for the Trustees of the Churchill Archives Trust of 5th December 1963 in respect of which there was an exemption claim made on the death of Randolph Churchill on the 6th June 1968.

The Trustees of the Archives Trust have recently exercised their powers of appointment and as a result part of the trust funds now become held on discretionary trusts.

We enclose a copy of the Deed of Resettlement. Although the trust assets remain with the same trustees they would like to renew the exemption consequent on the termination of Mr Winston Churchill's interest in that part of the trust which now becomes held on discretionary trusts.

You will see the part becomes held on accumulation and maintenance trusts and this is not a chargeable transfer. We imagine that no re-exemption is required but that portion remains subject to the tingent estate duty charge.

We would be grateful if you would let us have any necessary forms of undertaking to complete.

We confirm that the only assets in the trust are the exempted items.

Please let us know if there is any further information you need.

Yours faithfully,

May/0108

Josselyn Hill Peter Hawley Andrew Dixon Katrina Wingfield Terence Cole Adrian Scheps Roger Duncan Andrew Collins Richard Underwood Geoffrey Hudson Peter Wynter Bee Medwyn Jones Andrew Bond Peter Aldis Diana Benjamin Simon Mumford Rupert Wright Richard Ham Richard Hamersley Brian Daughtrey. *Consultants:* Rupert Woollcombe John Wynter Bee John Ryan (also qualified in New Zealand) Stewart Halstead (also qualified in New Zealand and Australia) David Fletcher Rogers *ACPA (not a solicitor)*

Thames Valley Office: Minerva House, Valpy Street, Reading RG1 1AR and 49 Church Street, Theale, Reading RG7 5BX Telephone 0734-591422 Fax 0734-583824

DATED 27 December 1990

H W S CHURCHILL

I MONTROSE

Resettlement of  
1963 Churchill Archives Trust

WALKER MARTINEAU STRINGER SAUL  
64 Queen Street  
London EC4R 1AD

RLU003. D68

THIS DEED of RE-SETTLEMENT is made the 27<sup>th</sup> day of December One thousand nine hundred and ninety

BY HENRY WINSTON SPENCER CHURCHILL of Fairdown Vernham Street Vernham Dean Andover Hants and IAN MONTROSE of 9-11 Fulwood Place Gray's Inn London WC1V 6HO ("the Present Trustees")

SUPPLEMENTAL to a Settlement dated 5th December 1963 ("the 1963 Settlement") and made between 1) Lady Clementine Ogilvy Churchill Anthony Forbes Moir Sir Thomas Leslie Rowan and John Rupert Colville 2) The Right Hon Sir Winston Leonard Spencer Churchill ("Sir Winston")

WHEREAS

- (A) The Present Trustees are the present trustees of the Settlement
- (B) The 1963 Settlement gives to the trustees for the time being a wide power ("the overriding power") in their absolute and unfettered discretion at any time or times to settle the property subject to the trusts of the 1963 Settlement for the benefit of the specified descendant (as defined in the 1963 Settlement) and his male issue
- (C) The Present Trustees wish to exercise the overriding power in the ways set out below
- (D) The property now subject to the trusts of the 1963 Settlement consists of the records and memoranda of Sir Winston and other materials more particularly set out and referred in the 1963 Settlement as the "Resettlement Property" and the "Trust Archives" which expressions have the same meaning in this deed as in the 1963 Settlement
- (E) The Trustees no longer own the copyright in the Trust Archives which reverted to the estate of Sir Winston by virtue of Section 5(2) of the Copyright Act 1911

NOW THIS DEED IRREVOCABLY WITNESSES as follows

1 Definitions

IN this deed where the context so admits

- (a) 'the Trust Fund' shall mean

- (i) the Resettlement Property
  - (ii) all money investments or other property paid or transferred by any person or persons to or so as to be under the control of and (in either case) accepted by the Trustees as additions and
  - (iii) all accumulations (if any) of income directed to be held as an accretion to capital and
  - (iv) the money investments and property from time to time representing the said money investments property additions and accumulations
- (b) 'the Perpetuity Date' means the twentieth anniversary of the date of the death of the last survivor of the descendants of Sir Winston living on the 31st July 1946 which descendants are named in the Second Schedule
- (c) 'the Trust Period' shall mean the period ending on the earlier of:
- (i) the Perpetuity Date
  - (ii) such date as the Trustees shall by deed specify (not being a date earlier than the date of execution of such deed or later than a date previously specified)
- (d) 'the specified descendant' shall mean the person who would be in the absence of any disclaimer or surrender entitled for the time being to a peerage of the United Kingdom limited to the heirs male of the body of Sir Winston
- (e) 'the specified descendant's share' shall mean that part of the Trust Fund set out in the Third Schedule
- (f) 'Randolph's Fund' shall mean that part of the Trust Fund set out in the Fourth Schedule
- (g) 'Jack's Fund' shall mean that part of the Trust Fund set out in the Fifth Schedule
- (h) 'Randolph' shall mean Randolph Leonard Spencer Churchill who was born on the 22 January 1965
- (i) 'Jack' shall mean John Gerard Averell Churchill who was born on the 27 August 1975



- (j) 'the Discretionary Fund' shall mean that part of the Trust Fund set out in the Fourth Schedule
- (k) 'the Beneficiaries' shall mean the following objects or persons (whether or not such objects or persons are now in existence or come into existence during the Trust Period):
- (i) the specified descendant
  - (ii) the male issue of any person who is or has been the specified descendant
- (l) references to children grandchildren and issue shall be construed so as to exclude
- (i) illegitimate and adopted children grandchildren and issue and
  - (ii) persons claiming descent through those so excluded

## 2 Resettlement

In exercise of the overriding power and of every or any other enabling them the Present Trustees HEREBY IRREVOCABLY APPOINT and DECLARE that the Trust Fund shall be held upon the trusts and with and subject to the powers and provisions set out in this deed

## 3 Trust for sale

THE Trustees shall hold the Trust Fund upon trust as to investments or property other than money in their absolute discretion to sell call in or convert into money all or any of such investments or property but with power to postpone such sale calling in or conversion and to permit the same to remain as invested and upon trust as to money with the like discretion to invest the same in their names or under their control in any of the investments authorised by this settlement or by law with power at the like discretion from time to time to vary or transpose any such investments for others so authorised

## 4 Power of appointment

THE Trustees shall hold the capital and income of the Trust Fund upon such trusts in favour or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares or proportions if more than

one and with and subject to such powers and provisions for their respective maintenance education or other benefit (including administrative powers and provisions and discretionary trusts and powers and in such manner generally as the Trustees (subject to the application (if any) of the rule against perpetuities) by any deed or deeds revocable during the Trust Period or irrevocable and executed during the Trust Period shall appoint Provided always that no exercise of this power shall invalidate any prior payment or application of all or any part or parts of the capital or income of the Trust Fund made under any other power or powers conferred by this Settlement or by law

5 Trusts in favour of the specified descendant

UNTIL and subject to and in default of any appointment under Clause 4

- (a) the Trustees shall pay or apply the income of the specified descendant's share upon trust during the Trust Period for the specified descendant for life
- (b) at the expiration of the Trust Period the Trustees shall hold the specified descendant's share upon trust for the person who is at that time the specified descendant in tail male
- (c) the Trustees shall have power to pay or apply any part of the capital of the specified descendant's share to or for the absolute benefit of the specified descendant for the time being and discharged from these trusts

6 Randolph's Fund

UNTIL and subject to and in default of any appointment under Clause 4

- (a) the Trustees shall pay the income of Randolph's Fund to Randolph for life
- (b) the Trustees shall have power to pay or apply the whole or any part of the capital of Randolph's Fund to or for the absolute benefit of Randolph freed and discharged from these trusts
- (c) subject as above the Trustees shall hold the income and capital of Randolph's Fund upon trust for such one or more of the male issue of Randolph in such shares and at such ages and upon such trusts and in such manner generally as the Trustees shall (subject to the application (if any) of the rule against

perpetuities) by deed or deeds revocable during the Trust Period or irrevocable and executed during the Trust Period appoint

- (d) subject as above the Trustees shall hold the income and capital of Randolph's Fund upon trust for the first oldest or only son of Randolph who shall attain the age of 30 years before the end of the Trust Period or be living and under that age at the end of the Trust Period
- (e) subject as above the Trustees shall hold the income and capital of Randolph's Fund upon the trusts declared below in relation to Jack's Fund and as one fund therewith
- (f) subject as above the Trustees shall hold the income and capital of Randolph's Fund upon the trusts declared below in relation to the Discretionary Fund and as one fund therewith

7 Jack's Fund *p. 27/217*

UNTIL and subject to and in default of an appointment under Clause 4 (but subject to sub clause (e) below)

- (a) the Trustees shall hold the capital and income of Jack's Fund upon trust for Jack if he shall attain the age of 25 years
- (b) subject as above Section 31 of the Trustee Act 1925 (as modified below) shall apply to Jack's Fund *12 20 21 22*
- (c) upon Jack attaining the age of 25 years Jack's fund shall not vest absolutely but shall be held by the Trustees upon the trusts and with and subject to the power set out in relation to Randolph's Fund but with the substitution of Jack for Randolph
- (d) Subject as above the Trustees shall hold the income and capital of Jack's Fund upon the trusts declared above in relation to Randolph's Fund and as one fund therewith
- (e) Notwithstanding anything else in this deed the powers in clause 4 shall not be exercisable in relation to Jack's Fund or any part unless at the time of such exercise an interest in possession subsists in Jack's Fund or the part in relation to which the power is being exercised

8 Trusts in default of appointment

UNTIL and subject to and in default of any appointment under Clause 4

(a) The Trustees shall pay or apply the income of the Discretionary Fund to or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them as shall for the time being be in existence and in such shares if more than one and in such manner generally as the Trustees shall in their absolute discretion from time to time think fit

(b) Notwithstanding the trusts powers and provisions declared and contained in this clause the Trustees may

(i) at any time or times during the Trust Period pay or apply the whole or any part or parts of the capital of the Discretionary Fund to or for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares if more than one and in such manner generally as the Trustees shall in their absolute discretion think fit

(ii) (subject to the application (if any) of the rule against perpetuities) pay or transfer any income or capital of the Trust Fund to the trustees of any other trust wherever established or existing under which all or any one or more of the Beneficiaries is or are interested (whether or not all or such one or more of the Beneficiaries is or are the only objects or persons interested or capable of benefiting under such other trust) if the Trustees shall in their absolute discretion consider such payment or transfer to be for the benefit of all or such one or more of the Beneficiaries

9 Ultimate default trusts

SUBJECT as above and if and so far as not wholly disposed of for any reason whatever by the above provisions the capital and income of the Trust Fund shall be held in trust for Winston Spencer Churchill absolutely

10 Administrative powers

THE Trustees shall in addition and without prejudice to all statutory powers have the powers and immunities set out in the First Schedule provided that the Trustees shall not exercise any of their powers so as to conflict with the beneficial provisions of this Settlement

11 Extended power of maintenance

SECTION 31 of the Trustee Act 1925 shall be deemed to apply as if the words 'may in all the circumstances be reasonable' had been omitted from paragraph (i) of subsection (1) and in substitution there had been inserted the words 'the Trustees may think fit' and as if the proviso at the end of subsection (1) had been omitted

12 Extended power of advancement

SECTION 32 of the Trustee Act 1925 shall be deemed to apply as if the proviso (a) of subsection (1) had been omitted

13 Trustee charging clause

- (a) ANY trustee which shall be a trust corporation or company authorised to undertake trust business shall be entitled in addition to reimbursement of its proper expenses to remuneration for its services in accordance with its published terms and conditions for trust business in force from time to time and in the absence of any such published terms and conditions in accordance with such terms and conditions as may from time to time be agreed between such trustee and the person or persons by whom the power of appointing new trustees is for the time being exercisable
- (b) Any trustee who is a solicitor or other person engaged in a profession or business shall be entitled to charge and be paid all normal professional or other charges for business done services rendered or time spent personally or by such trustee's firm in the administration of these trusts including acts which a trustee not engaged in any profession or business could have done personally

- (c) Any trustee shall be entitled to retain any brokerage or other commission which may be received personally or by such trustee's firm in respect of any transaction carried out on behalf of this Settlement for which such trustee or trustee's firm is in the normal course of business allowed brokerage or other commission notwithstanding that the receipt of such brokerage or commission was procured by an exercise by such trustee or the Trustees of powers over the Trust Fund

14 Appointment of new trustees

A person may be appointed to be a trustee notwithstanding that such person is not resident in the United Kingdom and remaining out of the United Kingdom for more than twelve months shall not be a ground for the removal of a trustee

15 Clause headings

THE clause headings are included for reference only and do not affect the interpretation of this settlement

IN WITNESS whereof the parties hereto have executed this deed the day and year first above written

THE FIRST SCHEDULE

[Administrative powers]

1 Power of investment

(a) SUBJECT as provided below any monies requiring investment may be invested in or upon any investments of whatever nature and wherever situate whether producing income or not (including the purchase of any immovable or movable property or any interest in such property and including purchases made for the purpose of enabling all or any one or more of the Beneficiaries to have the occupation use or enjoyment in specie of the asset purchased or other purposes which the Trustees consider to be in the interests of any one or more of the Beneficiaries) as the Trustees shall in their absolute discretion think fit so that the Trustees shall have the same full and unrestricted powers of making and changing investments of such monies as if they were absolutely and beneficially entitled to such monies and without prejudice to the generality of the above the Trustees shall not be under any obligation to diversify their investment of such monies

(b) The acquisition of any such reversionary interest or any policy of insurance or assurance sinking fund policy or other policy of whatever nature or any annuity or securities or other investments not producing income or of a wasting nature or for any other reason not within the meaning of the word 'investment' strictly construed shall be deemed to be an authorised investment of trust monies if the Trustees shall consider the same to be for the benefit of any one or more of the Beneficiaries

(c) Where any such reversionary interest policy security or investment as is described in subclause (b) is comprised in the Trust Fund or where any other security or investment is sold with the right to receive the dividend or interest accrued or accruing no part of any accretion to the value or of any premium or bonus or other sum (whether in respect of arrears of or prospective dividend or interest or income or otherwise) which accrues or is payable when the same falls into possession or is redeemed or matures or on repayment of the capital monies so secured or when any sale or disposal is made shall be apportionable to or be treated as income

(d) The Trustees shall have power to exchange property for other property of a like or different nature and for such consideration and on such conditions as they in their absolute discretion think fit

2 Power to lend and to give guarantees

(a) THE Trustees shall have power to lend money or property to any one or more of the Beneficiaries either free of interest or on such terms as to payment of interest and generally as the Trustees shall in their absolute discretion think fit

(b) The Trustees shall have power to guarantee the payment of money and the performance of obligations in respect of any existing or future borrowings by any one or more of the Beneficiaries from third parties or guarantees indemnities or other commitments of like nature given to third parties by any one or more of the Beneficiaries including without prejudice to the generality of the above the power to pledge the whole or part of the assets comprising the Trust Fund in support of any such guarantee given as above by the Trustees and to enter into such indemnities as they shall in their absolute discretion think fit in connection with any such guarantee

3 Power to permit occupation of property and enjoyment of chattels

THE Trustees shall have power to permit any one or more of the Beneficiaries to occupy or reside in or upon any real or immovable property or to have the enjoyment and use of chattels or other movable property for the time being held upon these trusts on such terms as to payment of rent rates taxes and other expenses and outgoings and as to insurance repair and decoration and generally upon such terms as the Trustees shall in their absolute discretion think fit

4 Power to borrow

THE Trustees shall have power to borrow and raise money on the security of the Trust Fund for any purpose (including the investment of the monies so raised as part of the Trust Fund) and to mortgage charge or pledge any part of the Trust Fund as security for any monies so raised and to guarantee the payment of money and the performance of obligations in respect of



borrowings by any company fully or partly owned by the Trustees and in connection with such guarantees to enter into such indemnities as the Trustees shall in their absolute discretion think fit

5 Powers in relation to real property

WHERE the Trust Fund for the time being includes any real or immovable property (in this clause referred to as 'the land')

(a) The Trustees may lease all or any part of the land for any purpose and whether involving waste or not and for any term and either wholly or partly in consideration of a rent (whether fixed or variable) or fine or premium or the erection improvement or repair or any agreement to erect improve or repair buildings or other structures on the land and may accept (with or without consideration) surrender of any lease of all or any part of the land

(b) The Trustees may in executing any trust or power of sale sell all or any part of the land either wholly or partly in consideration of an annual sum payable either in perpetuity or for any term (whether definite or indefinite) and being either reserved out of the land sold or secured in such other manner as the Trustees shall in their absolute discretion think fit

(c) The Trustees may in executing any trust or power of sale or leasing:

(i) sell or lease all or any part of the land whether the division is horizontal or vertical or made in any other way

(ii) sell or lease or reserve any easement or right or privilege over all or any part of the land

(iii) sell or lease or except or reserve any timber or mines or minerals on or in or under all or any part of the land together with any easements rights or privileges of cutting or working and carrying away the same or otherwise incidental to or connected with forestry or mining purposes

(iv) impose and make binding for the benefit of all or any part of the land sold or leased any restrictions or stipulations as to user or otherwise affecting any part of the land retained

(v) accept in exchange for all or any part of the land to be sold or leased (either with or without any money paid or received for equality of exchange) any other real or immovable property or any lease

(vi) enter into any contract or grant any option for the sale or leasing of all or any part of the land or otherwise for the exercise by the Trustees of any of their above powers

(d) The Trustees shall not be bound to see to nor be liable or accountable for omitting or neglecting to see to the repair or insurance of any buildings or other structures on the land or to the payment of any outgoings or otherwise as to the maintenance of the land or any buildings or other structures on the land but may maintain repair or insure the same in such manner and to such extent as they shall in their absolute discretion think fit

(e) The Trustees may from time to time expend monies altering or improving the land or any buildings or other structures on the land (including erecting demolishing or rebuilding the same) to such extent and in such a manner as they shall in their absolute discretion think fit and any certificate in writing of any architect or surveyor employed by the Trustees to the effect that any work specified in such certificate is or includes an alteration or an improvement to the land or any such building or other structure shall be conclusive as between the Trustees and the Beneficiaries that any money expended on such work was properly expended in exercise of this power

#### 6 Powers in relation to chattels

WHERE the Trust Fund for the time being includes any chattels (in this clause referred to as 'the chattels')

(a) The Trustees may sell lease hire deposit store or otherwise deal with the chattels upon such terms as they shall in their absolute discretion think fit

(b) The Trustees shall not be bound to see to nor be liable or accountable for omitting or neglecting to see to the repair or insurance of the chattels but may repair and insure the chattels in such a manner and to such an extent as they shall in their absolute discretion think fit

7 Power to trade

(a) THE Trustees shall have power to trade or take part in any venture in the nature of trade whether solely or jointly with any other person and whether or not by way of partnership (limited or general) and for these purposes make such arrangements as they shall in their absolute discretion think fit and may delegate any exercise of this power to any one or more of their number or to a company or partnership formed for this purpose

(b) Any power vested in the Trustees under this Settlement shall (where applicable) extend to any arrangements in connection with any such trade or venture and in particular but without prejudice to the generality of the above the Trustees' powers of borrowing and charging shall extend to any borrowing arrangements made in connection with such trade or venture and whether made severally or jointly with others or with unequal liability and the Trustees shall be entitled to be fully indemnified out of the Trust Fund against all personal liability to which they may become in any manner subject in connection with any such trade or venture

8 Power to give indemnities

(a) THE Trustees shall have power to enter into any indemnity in favour of any former trustee or any other person in respect of any fiscal imposition or other liability of any nature prospectively payable in respect of the Trust Fund or otherwise in connection with this Settlement and to charge or deposit the whole or any part of the Trust Fund as security for any such indemnity in such manner in all respects as they shall in their absolute discretion think fit

(b) The Trustees shall have power to give or enter into any indemnity warranty guarantee undertaking or covenant or enter into any type of agreement that they shall in their absolute discretion think fit relating to the transfer or sale of a business or private company shareholding held or owned for the time being by the Trustees whether relating to the business or company itself its assets liabilities shares or employees or any other aspect of the business or company in favour of any transferee purchaser or other relevant party and including any limitation or restriction on value or otherwise as the Trustees shall in their absolute discretion think fit

9 Exclusion of apportionment

THE statutory and equitable rules of apportionment shall not apply to this Settlement and the Trustees shall be permitted to treat all dividends and other payments in the nature of income received by them as income at the date of receipt irrespective of the period for which the dividend or other income is payable

10 Power to deal with insurance policies

THE Trustees shall in addition and without prejudice to all statutory and other powers conferred upon them have the following powers in relation to any insurance policy ('the policy') from time to time comprised in the Trust Fund

(a) To borrow on the security of the policy for any purpose

(b) To convert the policy into a fully paid-up policy for a reduced sum assured free from payment of future premiums

(c) To surrender the policy wholly or any part or any bonus attaching to the policy for its cash surrender value

(d) To sell the policy or any substituted policy on such terms as the Trustees shall in their absolute discretion think fit

(e) To exercise any of the powers conferred by the policy or with the consent of the insurer to alter the amount or occasion of the payment of the sum assured or to increase or decrease the amount of the periodic premiums (if any) payable under the policy or to alter the period during which the premiums are payable and to do any of these things notwithstanding that the sum assured may be reduced subject always to production of evidence of insurability satisfactory to the insurer

11 Power to vary administrative provisions

THE Trustees shall have power at any time or times during the Trust Period by deed or deeds to revoke or vary any of the administrative provisions of this Settlement or to add any further administrative provisions as the Trustees may consider expedient for the purposes of this Settlement and without prejudice to the generality of the above for ensuring that, at all times there should be a trustee of this Settlement and that the Trust Fund shall be fully and effectively vested in

or under the control of such trustee and that the trusts of this Settlement shall be enforceable by the Beneficiaries provided always that the power conferred by this clause shall only be exercisable if the Trustees shall be advised in writing by a lawyer of at least 10 years' standing qualified in the law of the jurisdiction which for the time being is the proper law of this Settlement that it would be expedient for the purposes of this Settlement that the administrative provisions be revoked varied or added to in the manner specified in such written advice and that such power shall be exercisable only by the Trustees executing a deed in a form appropriate to carry such advice into effect

12 Release of powers

THE Trustees may by deed or deeds and so as to bind their successors as trustees release or restrict the future exercise of all or any of the powers by this Settlement or by law conferred on them either wholly or to the extent specified in any such deed or deeds notwithstanding the fiduciary nature of any such powers

13 Power of appropriation

THE Trustees shall have power in their absolute discretion to appropriate any part of the Trust Fund in its then actual condition or state of investment in or towards satisfaction of any interest or share in the Trust Fund as may in all the circumstances appear to them to be just and reasonable and for the above purposes from time to time to place such value on any or all investments or other property as they shall in their absolute discretion think fit

14 Power to vote and to employ nominees and custodians

IN respect of any property comprised in the Trust Fund the Trustees shall have power

(a) To vote upon or in respect of any shares securities bonds notes or other evidence of interest in or obligation of any corporation trust association or concern whether or not affecting the security or the apparent security of the Trust Fund or the purchase or sale or lease of the assets of any such corporation trust association or concern

(b) To deposit any such shares securities or property in any voting trust or with any depositary designated under such a voting trust

(c) To give proxies or powers of attorney with or without power of substitution for voting or acting on behalf of the Trustees as the owners of any such property

(d) To hold any or all securities or other property in bearer form or in the names of the Trustees or any one or more of them or in the name of some other person or partnership or in the name or names of nominees without disclosing the fiduciary relationship created by this Settlement and to deposit the said securities and any title deeds or other documents belonging or relating to the Trust Fund in any part of the world with any bank firm trust company or other company that undertakes the safe custody of securities as part of its business without being responsible for the default of such bank firm trust company or other company or for any consequent loss

15 Power to delegate management of investments

(a) THE Trustees shall have power to engage the services of such investments adviser or advisers as the Trustees may from time to time think fit ('the investment adviser') to advise the Trustees in respect of the investment and reinvestment of the Trust Fund with power for the Trustees without being liable for any consequent loss to delegate to the investment adviser discretion to manage all or any part of the Trust Fund within the limits and for the period stipulated by the Trustees and the Trustees shall settle the terms and conditions for the remuneration of the investment adviser and the reimbursement of the investment adviser's expenses as the Trustees shall in their absolute discretion think fit and such remuneration and expenses shall be paid by the Trustees from the Trust Fund

(b) The Trustees shall not be bound to enquire into nor be in any manner responsible for any changes in the legal status of the investment adviser

(c) The Trustees shall incur no liability for any action taken pursuant to or for otherwise following the advice of the investment adviser however communicated

16 Power to receive remuneration

NO trustee shall be liable to account for any remuneration or other profit received by such trustee in consequence of such trustee acting as or being appointed to be a director or other officer or servant of any company notwithstanding that such appointment was procured by an exercise by such trustee or by the Trustees of voting rights attached to securities comprised in the Trust Fund

17 Power to promote companies

THE Trustees may (without prejudice to the generality of their powers of investment) promote or join with any other person or persons in promoting or incorporating any company in any part of the world or subscribe for or acquire any of the shares or stock or debentures or debenture stock or loan capital of any company with a view to or in consideration of

- (i) the establishment and carrying on by such company of a business of any kind which the Trustees are for the time being authorised to carry on themselves and the acquisition of any of the assets comprised in the Trust Fund which may be required for the purposes of such business
- (ii) the acquisition of the assets and undertaking of any business being carried on by the Trustees under the above power
- (iii) the acquisition of all or any of the assets comprised in the Trust Fund to be held as investments of the company acquiring the same

18 Trustees not bound to interfere in business of company in which the settlement is interested

THE Trustees shall not be bound or required to interfere in the management or conduct of the business of any company wherever resident or incorporated in which the Settlement shall be interested although holding the whole or a majority of the shares carrying the control of the company but so long as the Trustees shall have no notice of any act of dishonesty or misappropriation of monies on the part of the directors having the management of such company the Trustees shall be at liberty to leave the conduct of its business (including the payment or non-payment of dividends) wholly to the directors and the Beneficiaries shall not be entitled to require the distribution of any dividend by any such company or require the Trustees to exercise any powers they may have of compelling any such distribution

19 Power to insure property

THE Trustees shall have power to insure against any loss or damage from any peril any property for the time being comprised in the Trust Fund for any amount and to pay the premiums out of the Trust Fund

20 Power to appoint agents

THE Trustees shall have power instead of acting personally to employ and pay at the expense of the Trust Fund any agent in any part of the world whether attorneys solicitors accountants brokers banks trust companies or other agents without being responsible for the default of any agent if employed in good faith to transact any business or act as nominee or do any act in the execution of these trusts including without prejudice to the generality of the above the receipt and payment of monies and the execution of documents

21 Power to permit self-dealing

THE Trustees shall have power to enter into any transaction concerning the Trust Fund notwithstanding that one or more of the Trustees may be interested in the transaction other than as one of the Trustees

22 Indemnity

IN the execution of these trusts no trustee

- (a) shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by such trustee or by any of the Trustees although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by such trustee or by any of the Trustees or by reason of any matter or thing except wilful or individual fraud or dishonesty on the part of the trustee who is sought to be made liable
- (b) shall be obliged to ascertain before distributing amongst the Beneficiaries the whole or any part of the Trust Fund whether any person whose parents are not married to each other at the time of birth or who claim through such a person is or may be entitled to an interest in the Trust Fund nor shall a trustee be liable to any such person of whose existence the trustee has no notice or who claims through such a person



23 Delegation of powers

(a) THE Trustees may delegate to any one or more of their number the operation of any bank account in their names

(b) Any Trustee shall have power at any time (notwithstanding any rule of law to the contrary) by deed or deeds revocable during the Trust Period or irrevocable and executed during the Trust Period to delegate to any person (including in cases where there is more than one trustee to any other or others of the Trustees) the exercise of all or any powers conferred on such trustee notwithstanding the fiduciary nature of such power or powers

THE SECOND SCHEDULE

The descendants of Sir Winston living as 31st July 1946 and at the date of this deed

Winston Spencer Churchill MP  
The Lady Soames  
The Hon Julian Sandys Q C  
The Hon Edwina Sandys  
The Hon Celia Perkins

THE THIRD SCHEDULE

(The specified descendant's share)

Four tenths of the Trust Fund

THE FOURTH SCHEDULE

(Randolph's Fund)

One tenth of the Trust Fund

THE FIFTH SCHEDULE

(Jack's Fund)

One twentieth of the Trust Fund

THE SIXTH SCHEDULE

(The Discretionary Fund)

Nine twentieths of the Trust Fund

SIGNED as a deed by the said  
HENRY WINSTON SPENCER CHURCHILL  
in the presence of: -

}  
}  
}

*HWS Churchill*

*J. U. Mead*  
*2 Stoney Drive*  
*Verulam Street*  
*SP11 0EL*

SIGNED as a deed by the said  
IAN MONTROSE in the presence of: -

}  
}

*Ian Montrose*  
*by his attorney*

*Elvis Wald*  
*3 D WALSH*  
*9-11 FULWOOD PLACE*  
*GRAYS INN*

*Tjane M Rawston*

RLU003. D68      LONDON WC1

(C)

THE CABINET OFFICE

RE: SIR WINSTON CHURCHILL'S PAPERS

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FURTHER INSTRUCTIONS TO COUNSEL TO ADVISE IN CONSULTATION  
ON WEDNESDAY 17TH JULY 1991 AT 70 WHITEHALL SW1  
AT 4.30PM AND IN WRITING

---

Counsel have herewith copies of the following:-

1. Correspondence between Miss Andrews of the Cabinet Office and Mr Marchant of the Inland Revenue in July 1989 and July 1990.
2. Letter from Mr Tebbitt to the Prime Minister dated 27th March 1991 with attachments.
3. Note from Sir Robin Butler to the Prime Minister dated 10th May 1991.
4. Letter from Mr Montrose dated 24th June 1991.
5. Letter from Miss Andrews to Instructing Solicitor dated 10th July 1991 with attachments.

Mr Charles of Counsel has raised some queries with Instructing Solicitor.

1. If the papers are exported from the UK in contravention of the estate duty undertakings, what tax becomes payable?

This question is addressed in the exchanges of correspondence between Miss Andrews of the Cabinet Office and Mr Marchant of the Inland Revenue (1). Counsel will see that duty is payable at the rate applicable when the exemption was granted and not at current rates. However duty is payable on the current value of the items.

2. Are the papers subject to restriction on export?

Goods manufactured or produced more than 50 years before the date of exportation may not be exported without a licence granted by the Secretary of State for Trade and Industry under the Export of Goods (Control) Order 1989 (S.I. 1989/2376) made under section 1 of the Import, Export and Customs Powers (Defence) Act 1939. The proposed export of items which may be of national importance is considered by the Reviewing Committee on the Export of Works of Art (a committee of experts appointed by the Minister for the Arts). If the Committee considers an item to be of national importance they would normally recommend that the Secretary of State defers his determination of the licence application for a period of up to six months, to provide an opportunity for an offer to be made by a public or private purchaser at the fair market price. If such an offer is made during the deferred period the Secretary of State will normally refuse the licence.

An Open General Export Licence permits the export of certain items below specified values. However, "manuscripts, documents and archives" do not benefit from this licence and a specific licence must therefore be sought for the export of archive material over 50 years old.

Mr Charles indicated to Instructing Solicitor that it would be helpful if Counsel had some further background material in relation to the trustees' offer to sell the pre-1945 papers to the Government. The proposal is put forward in a memorandum sent by Mr Norman Tebbit to the Prime Minister (2). It was discussed at a lunch Sir Robin Butler had with the trustees (Mr Ian Montrose and Mr Peregrine Churchill), together with Lord Goodman and Mr Winston Churchill MP, on 1st May. Counsel have before them a copy of Sir Robin's note to the Prime Minister following that lunch (3). Counsel also have a copy of a further letter written by Mr Montrose asking when the trustees might expect a response. Sir Robin has replied simply that he hopes to respond soon.

Counsel also have before them a letter from Miss Andrews to

Instructing Solicitor dated 10th July 1991. It refers to the events surrounding Lord Hankey's request to Churchill to return the papers in 1934. It also has attached to it a letter from Randolph Churchill submitting his part of Churchill's biography for clearance and undertakings signed by Churchill's other biographers, Martin Gilbert and Lord Birkenhead.

If Counsel have any further queries before the Consultation please would they telephone Mr Colin Gregory of Instructing Solicitor (071-210 3344).

THE CABINET OFFICE

RE: SIR WINSTON CHURCHILL'S  
PAPERS.

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FURTHER INSTRUCTIONS TO  
COUNSEL TO ADVISE IN  
CONSULTATION ON WEDNESDAY  
17TH JULY 1991 AT 70 WHITEHALL  
SW1 AT 4.30PM AND IN WRITING

---

Mr Michael Hart QC  
2 New Square  
Lincoln's Inn  
London WC2A 2RU

with you

Mr William Charles  
13 Old Square  
Lincoln's Inn  
London WC2A 3UA

The Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
London SW1H 9JS

Tel: 071-210 3344

Ref: T&M 69/340/CJG

Date: 12 July 1991



*Contents of letter discussed with  
and approved by Mr Wright*  
Inland Revenue  
Capital and Valuation Division *lel 6/7*

Somerset House  
London  
WC2R 1LB  
Telephone 071-438

1

Miss P M Andrews  
Cabinet Office  
Historical Section  
Hepburn House  
Marsham Street  
LONDON  
SW1P 4HW

Your ref H090/189

Our ref CAP/IHT/39/88

Date 6 July 1990

*Dear Pat*

CHURCHILL/CHARTWELL PAPERS

You wrote to me on 7 June to inquire whether the heritage exemption on the Trust Archives can be cleared by payment of the original Estate Duty (ED) liability.

I am afraid that there is no statutory provision for an exemption to be "bought out" in the way you suggest. The ED rules do provide for a recapture charge to be levied on a breach of the undertakings given in return for exemption and it is of course possible that the trustees might attempt to engineer such a breach if that served their purpose. However, this is certainly not something which we would wish to encourage and it should not be mentioned as a possibility to the trustees.

The recapture charge would be calculated on the current value of the Trust Archives, thus the absence of a valuation at an earlier date would be irrelevant. ED would be charged at the rate which would have applied to the death estate in respect of which the exemption was granted. In the present instance this is 50 per cent.

One practical option open to the trustees is a private treaty sale of the Trust Archives to one of the bodies within Schedule 3 to the Inheritance Tax Act (copy enclosed for your information). In that event no ED would be payable and the conditional exemption would be converted into an absolute exemption. But the sale price at which the Trust Archives would be offered to the Schedule 3 body would have to reflect the ED exemption. The position might best be illustrated by the following example which assumes that the Trust Archives have a current value of £1 million. On that basis the special price would be calculated thus:

Present Value	£1,000,000
Deduct ED liability at 50%	500,000
	<u>£ 500,000</u>
Add back 25% of the ED liability (the "douceur")	£ 125,000
Price to be paid by Schedule 3 body	<u><u>£ 625,000</u></u>

*cc Mr Wright*

The above simplifies the true position since it ignores the Capital Gains Tax (CGT) liability which the trustees would incur on a sale. As with ED, the CGT liability would be deducted from the current value and 25 per cent of it (the "douceur" applies to CGT as well as to ED and its successors capital transfer tax and inheritance tax) added back.

Unless you have any immediate questions I think we now need to wait to see precisely what the trustees propose before being able to consider the possible tax implications further.

*Yours ever*

*John.*

J G MARCHANT

Encl.





Inland Revenue  
Capital and Valuation Division

Somerset House  
London  
WC2R 1LB  
Telephone 01-438 6583

Miss P M Andrews  
Cabinet Office  
Historical Section  
Hepburn House  
Marsham Street  
LONDON SW1P 4HW

Your ref HO 89/330  
Our ref CAP/IHT/39/88  
Date 7 AUGUST 1989



Dear Miss Andrews

**CHURCHILL/CHARTWELL PAPERS**

Thank you for your letter of 28 July.

I am sure it will come as no great surprise to learn that the first of your 2 questions cannot be answered with a definitive 'yes' or 'no'!

Exemption from estate duty on the death on 6 June 1968 of Randolph F E S Churchill was claimed, and granted, in respect of "the bound and unbound documents boxes and casket comprised in the definition of "The Trust Archives" contained in Clause 1(d)(i) of the said Settlement and now [date of application 4 December 1970] a subject to the trusts of the said Settlement". Whether the term "The Trust Archives" covers items 2, 3 and 4 as shown in the 3rd paragraph of Ian Montrose's letter dated 13 June 1989 is a question of fact which, I'm afraid, cannot be resolved on the basis of the information contained in the Revenue files. Whereas Ian Montrose claims that "All these items are specified in the original deed of settlement of 31 July 1946" (a copy of which I enclose together with a copy of the 1963 Settlement) I can only find a specific reference to item 3 (the Heinsius Letters) - see Part 4 of the Schedule to the Settlement. The matter is further complicated by the apparent dispute over ownership of some of the papers - see the penultimate paragraph of Peregrine Churchill's letter of 21 April 1989 and the 4th paragraph of Ian Montrose's letter of 13 June 1989. Having regard to the terms in which the latter is couched, and while nothing may hang on it from the Revenue's viewpoint, you may wish to try to establish with the Solicitors (a) precisely which papers are claimed to be now owned personally by Peregrine and Winston, and (b) when and in what circumstances those 2 became entitled to the ownership of the papers as against the trustees of the Settlement. No doubt this is something on which you will be seeking the Treasury Solicitor's advice.

The second question, at least, can be answered with certainty and rather more briefly. I have confirmed with Brian Wright of the CTO that, in accordance with the terms of Section 40 Finance Act 1930, any estate duty claim arising in the present case will be charged at the rate which would have applied to the death estate in respect of which exemption was last granted and not at current rates.

I have not copied this letter to anyone other than Brian Wright but please feel free to do so if you wish.

I hope you had an enjoyable week away from the Office. I myself am on leave for the 2 weeks commencing 7 August.

Yours sincerely



for

J G MARCHANT

cc Mr Wright (CTO)



73

CABINET OFFICE

HISTORICAL SECTION

Hepburn House, Marsham Street, London, SW1P 4HW

Telephone: 01-~~2000~~ 217 6506

Our Ref: HO 89/330 ✓  
Your Ref: CAP/IHT/39/88

28 July 1989

J G Marchant Esq  
Inland Revenue  
Capital and Valuation Division  
Somerset House  
LONDON  
WC2R 1LB

Dear John

CHURCHILL/CHARTWELL PAPERS

I wonder if you are yet in a position to let me have answers to two questions which have arisen in the course of the recent correspondence with the Trustees of the Churchill Archive Settlement. The first, in my letter to Miss Court of 19 June 1989 (copied to you) is whether the Lord Randolph Churchill Political Papers 1874-1895, Heinsius Letters from John Churchill 1701-1714 and First Duke of Marlborough Six Volumes of letters 1697-1711, (items 2, 3 and 4 respectively in Mr Montrose's letter of 13 June 1989 to Mr Correlli Barnett) are covered by the estate duty exemption arrangements. The second is the question of the rate at which estate duty would be charged if there was a breach of the exemption conditions, a point raised again in Mr Montrose's letter of 13 July to me and in my letter of 18 July to Miss Court (both copied to you). I think it would help to be armed with these answers against the time when Mr Montrose returns to the charge.

You, and other members of our Group to whom I am copying this letter, might be interested to know that I visited Churchill College 26 July to be present when the Sotheby's valuers started work on the Archive. From the small proportion we saw during the day it was apparent that the Archive still contains a large proportion of official papers, (including many about the Duke of Windsor) many of them now very old and doubtless many of them released and/or releasable but checking that will take a long time.

Relations between the College and the Trustees are now bad, with the College having refused to let Sotheby's take away the Heinsius papers until further advice had been sought. This further advice is being sought of the Foreign Office but, as the papers seem fairly clearly to belong to the Trustees, it is not clear what the FCO could do unless and until there should be any proposal to sell, at which point, depending upon the answer to the first question in paragraph 1 above, we would all have an interest! At present the line is that the valuation being undertaken by Sotheby's is for insurance purposes only.

I am on leave next week. On my return I shall be meeting Miss Wheldon, Treasury Solicitor's Department again and will hope to circulate a further draft letter to Mr Montrose shortly thereafter.

/I am

I am copying this letter to June Court and Mike Ellis, LCD, Duncan Chalmers and Nicholas Cox, PRO, Brian Wright (IR) and Yvonne Woodbridge (HMT).

*Yours ever*

*Pat*

MISS P M ANDREWS



2

HOUSE OF COMMONS

LONDON SW1A 0AA

27 March 1991

Rt Hon John Major MP  
Prime Minister  
10 Downing Street  
LONDON SW1

Dear John,

It was good of you to allow me to tell you of the problem facing the Trustees of the Archive Settlement.

The enclosed memorandum describes how Churchill's papers came to be divided. In essence his pre-1945 personal papers have been since 1963 in the ownership of The Archive Settlement. The trustees are required to manage the trust to the benefit of the lineal descendants of Sir Winston and the principal beneficiary is now Winston Churchill.

The post-1945 papers are now in the possession of Churchill College. In 1971 an attempt was made to raise funds to enable the purchase of the pre-1945 papers in order that they could be donated to Churchill College. This failed.

So we now have the Archive Centre at Churchill College, built to house his papers but the major part of those papers are there only on loan and subject to a trust which must now move to sell them in the interest of the beneficiary.

Page 5 of the memorandum puts forward proposals to avoid the break-up and dispersion (probably abroad) of the archive. That would require a negotiated private sale with the State. I am told the sum would not be huge.

The trustees wanted you to be aware of this proposal before it is taken forward in order that deadlocked positions are not reached with all the unhappy publicity that might arise before the issue had come to your notice.

If I can help as an intermediary in any way I would be happy to do so.

*J. ...*  
*N...*

MEMORANDUM CONCERNING THE PAPERS OF SIR WINSTON CHURCHILL

The archives of Sir Winston Churchill comprise a collection of the highest importance, which has been recognised as of national interest. The material is divided into two ownerships. The greater part, papers from early life until Churchill's resignation as Prime Minister on 27 July 1945, are owned by the Trustees of the Archives Settlement ('the Family Papers'). The papers of the post Second World War period are owned by Churchill College Cambridge ('the College Papers'). Both the Family Papers and the College Papers are held at Churchill College.

The separation of ownership, contrary to the wishes of Sir Winston Churchill, indirectly arose as a result of the establishment of Churchill College Cambridge. The College was founded as a memorial to Churchill's life and work. In the early 1970s an Archive Centre was set up to provide a special feature for the College, otherwise primarily scientific in character, which would focus upon the political, military and diplomatic life of the Churchill era. Central to its success was the acquisition of the Churchill archives. Hitherto the archives had been located at Chartwell or in recent years at The Bodleian Oxford where they remained until removal in 1980 to Churchill College.

On 31 July 1946 Sir Winston Churchill had settled his papers together with the copyright upon trusts widely drawn for the benefit of his family. Arrangements were put in hand for publication of his war memoirs - The History of the Second World War - and consideration received by the Trustees for the sale of copyright permitted support to be given to the family of Sir Winston Churchill. For some twenty years until the funds were exhausted the 1946 Settlement represented the principal source of financial independence for the Churchill family.

By 1963 the original purpose of the 1946 Settlement had run its course. A re-settlement was effected by Sir Winston Churchill on 5 December 1963 ('the Archives Settlement') to create more restrictive trusts in favour of his lineal descendants. The assets of the Archives Settlement were confined to the Family Papers. The principal beneficiary was originally the Honourable Randolph Churchill. Upon his death on 6 June 1968 he was succeeded by his son Mr. Winston Churchill MP. The Trustees have exercised their power to cut down the interest of the principal beneficiary and thereby pass down to succeeding generations the greater part of the beneficial interest. Exemption from Estate Duty arising on the death of the Honourable Randolph Churchill was granted under Section 48 (1) Finance Act 1950 upon undertakings being given in modified form permitting restricted access during the period of the publication of the official biography.

Sir Winston Churchill died in 1965. By the terms of his will the post 1945 papers were left absolutely to Lady Spencer-Churchill. The gift was not subject to any trust, nor were the papers designated heirlooms as in the case of other personal property. The wish was expressed however that if the post 1945 papers were not sold by Lady Spencer-Churchill during her lifetime they should be left to the Trustees of the Archives Settlement. The intention was to unite the entire Churchill archive in one ownership for the benefit of the family. That wish was not complied with. Lady Spencer-Churchill survived her husband twelve years, during which period Churchill College and its Archive Centre came into existence. By her will Lady Spencer-Churchill left the post 1945 papers to Churchill College.

Among the principal instigators of Churchill College had been Sir John Colville and Lady Soames, who were executors of the wills both of Sir Winston Churchill and Lady Spencer-Churchill. Sir John Colville was trustee also of the 1946 Settlement and of the Archives Settlement until his death in November 1987. Not only is it probable that Lady Spencer-Churchill was influenced by the establishment of Churchill College as a memorial to her late husband, but it was also perhaps anticipated that the Family Papers would in some manner find their way into the ownership of the College.

In 1971 active fund raising had taken place for the Archive Centre and an attempt was made to secure sponsorship for the



purchase of the Family Papers from the Archives Settlement in order that they could be donated to Churchill College. After the failure of this attempt a proposal was briefly mooted that the Archives Settlement should be broken to permit the voluntary surrender of the Family Papers to the College. As this would have amounted to a serious breach of trust, the proposal was abandoned. Left unresolved therefore was the inherent contradiction of the Archive Centre; an institution built for the purpose of holding the Churchill archive, of which the major part was deposited only on a temporary basis, and subject to a private trust drawn for the benefit of the lineal descendants of Sir Winston Churchill.

*to Winston Churchill's will?*

The resources of the Archive Centre are modest. It relies for the greater part of its funding upon Churchill College which itself has limited resources. The ownership of the College Papers is not fettered, and while it is highly unlikely that they will be disposed of by the College in the foreseeable future, there is concern long term that the principal objectives of the College may take precedence over the support of the Archive Centre. As the College Papers do not constitute permanent endowment and are subject to no restriction upon sale, their dispersal is therefore possible.

It is necessary to state that until lately the fiduciary obligations of the Trustees of the Archives Settlement towards the beneficiaries have been obscured by external factors - completion of the official biography and the general family

support of Churchill College and the Archive Centre. This resulted principally from the role played by the late Sir John Colville with the tacit agreement of Mr Winston Churchill MP as the beneficiary of the Archives Settlement, of which he was for a short period a Trustee. In addition he is an Honorary Fellow of Churchill College and a Trustee of the Archive Centre. The present Trustees of the Archives Settlement are conscious of the need to fulfil the original objective of Sir Winston Churchill in making the re-settlement in 1963 - namely to secure the financial independence of his lineal descendants, by means of the only material asset obtained during his life, that is the papers he had written himself or created during his long political and literary career. The fulfilment of that original objective can only be carried out by the sale of the Family Papers.

For these reasons the Trustees of the Archives Settlement put forward the following proposals for consideration:

- 1 That the Family Papers should be acquired by the State through a negotiated private treaty.
- 2 That ownership be vested either in Churchill College or in the British Library.
- 3 That if vested in Churchill College terms are imposed which ensure the inalienability both of the Family Papers and the College Papers.

4 That to encourage an appeal for independent funding of the Archive Centre a contribution would be made by the Trustees of the Archives Settlement at the direction of the beneficiaries.

The Trustees of the Archive Settlement have instructed Sotheby's to advise as to value and following investigations during the last year they are now in a position to proceed with a negotiated sale. This would necessarily have regard to customary arrangements concerning the 'douceur' upon sale to the State. Short particulars prepared by Sotheby's of the various items are attached hereto.

? discount.

It will be noted that subsidiary items are contained in the Family Papers: material relating to the First Duke of Marlborough and to Lord Randolph Churchill. The former are more properly regarded as belonging to the corpus of the Marlborough Papers acquired by the State in lieu of Estate Duty following the death of the 10th Duke of Marlborough in 1972, where ownership was transferred to the British Library.

Were these proposals to be adopted, the position would be achieved that this pre-eminently important archive would no longer be in divided ownership, subject as to the major part to the terms of a private family trust and hence to withdrawal and sale, but in place transferred to the public domain, as a permanent record of the life and work of Sir Winston Churchill

IM/25.x.90

SIR WINSTON CHURCHILL (1874-1965)

THE CHURCHILL ARCHIVE (1874-1945)

Archive of Sir Winston Churchill, from his earliest years until the end of his term of office as Prime Minister in 1945, comprising in the region of 2000 archive boxes of papers, many hundreds of thousands of pages in all, formerly preserved at Chartwell.

The collection covers in extenso Churchill's private, political and literary life throughout this period, and includes detailed documentation of his life as a schoolboy; as a correspondent in South Africa (including his own draft account of his escape from the Boers); as M.P. for Oldham (1900-1905); as President of the Board of Trade (1908-1910); as Home Secretary (1910-1911); as First Lord of the Admiralty (1911-1915); as Minister of Munitions (1917); as Secretary for War and Air (1919-1920); as Secretary for the Colonies (1921-1922); as Chancellor of the Exchequer (1924-1929); as First Lord of the Admiralty again (1939-1940); and as wartime Prime Minister (1940-1945), among various other appointments, positions and responsibilities he occupied in these years.

The archive contains extensive correspondence throughout this period from many hundreds of people, including many of Churchill's family, colleagues and major political associates and world leaders (among them such figures as Lloyd George, Lord Beaverbrook, Chaim Weizmann, Edward VIII, George VI and President Roosevelt), with retained drafts or carbon copies of many letters by Churchill himself.

His early, pre-1900, private papers include a series of letters by him to his parents and notebooks and diaries by him. His political papers, relating to all his various official and public activities over half a century, include his drafts or typescripts of some hundreds of his speeches from 1900 onwards; draft letters justifying his proceedings at the Sidney Street affair in 1911; some hundreds of memoranda exchanged with Admiral Fisher in the Admiralty; his draft plans for the Gallipoli campaign and statements for the subsequent Dardanelles Commission of Enquiry in 1916; many other reports and memoranda relating to the First World War; his extensive papers relating to the organisation of the Air Force in 1918-1919; and innumerable other papers about subjects as diverse as India, Irish Home Rule, Bolshevism, Palestine, the Budget, the Abdication of Edward VIII (including Churchill's draft statement about the affair) and the rise of Nazism.

In addition there are a substantial number of Churchill's literary manuscripts, papers and corrected proofs, including extensive files for The World Crisis, The Aftermath, Marlborough, Great Contemporaries, A History of the English Speaking Peoples and some hundreds of articles for newspapers and magazines. Some of Churchill's legal and financial papers in the archive relate directly to his literary work.

Churchill's extensive wartime papers for 1939-1945 (in several hundred boxes containing intelligence received by him on all aspects of the war and drafts or copies of his outgoing memoranda) include his drafts of letters and telegrams to his generals, Stalin, Roosevelt, De Gaulle, Eisenhower and others; his notes on conferences with Stalin and others; and his annotated

drafts and typescript reading copies of many of his speeches, among them the celebrated Battle of Britain speech ('...This was their finest hour...'). They also contain Attlee's autograph letter thanking Churchill for his congratulations on Attlee's election victory on 26 July 1945.

## THE RANDOLPH CHURCHILL ARCHIVE

Over 4500 letters and memoranda constituting Lord Randolph Churchill's papers from 1870 to 1895, including extensive correspondence by such major political associates as Sir John Gorst, Sir Henry Wolff, Lord Salisbury, A.J. Balfour, the Earl of Rosebery and Lord Rothschild, as well as Disraeli (letter of congratulation of Churchill's maiden speech), Gladstone, Roberts, Curzon, W.T. Stead, Charles Dilke, G.A. Sala and very many others and also including retained drafts or copies of about 500 letters and memoranda (some of them lengthy and important ones) by Randolph Churchill himself: the correspondence covers every aspect of Churchill's political life and all the major issues in which he was involved, including the formation of Salisbury's government, Gladstone's Home Rule bill, Ireland, various elections, the Primrose League and realignment of the Conservative Party, India, the Army and Navy estimates, his resignation as Chancellor of the Exchequer and much else, many thousands of pages, bound in 31 large albums, morocco, with an additional detailed index volume, 1870-1895

This collection was used by his son, Winston Churchill, as the major source material for his biography Lord Randolph Churchill (1906).

## FIRST DUKE OF MARLBOROUGH PAPERS

Collection of about 600 letters and documents relating to Marlborough, the majority bound in six volumes, including c.120 autograph letters signed by Marlborough and c.150 letters signed by him, almost all campaign letters from 1697 to 1710 with detailed military and political intelligence, including his four-page account of the Battle of Blenheim written immediately afterwards (14 August 1704) and the announcement of his victory at Ramillies (24 May 1706), with details of various other sieges and engagements, a number also concerning his arrangements and negotiations with the Dutch States General: the other documents including letters addressed to him, despatches by others sent to the Secretary of War, articles signed by him in 1702, copies of other related letters, some drafts of treaties and articles of surrender (Liege, Bonn), a series of French plans of battle made afterwards and a document signed by Walpole and others giving the Duchess of Marlborough £5000 in 1727.

This collection was used by Sir Winston Churchill as source material for his Marlborough (1933-1938).

## HEINSIUS PAPERS

Collection of well over 600 letters by the first Duke of Marlborough to Anthonie Heinsius, Grand Pensionary of Holland, 1701-1711, the great majority entirely autograph, together with a number of other related letters, being detailed political and campaign letters. This collection was presented to Sir Winston Churchill in 1945 by Queen Wilhelmina on behalf of the people of the Netherlands as a token of gratitude for his part in the liberation of that country, and it is accompanied by an illuminated certificate to that effect signed by the Queen.

The letters were all edited by B. Van 'T Hoff in 1951.

Ref. A091/1146

PRIME MINISTER

CABINET OFFICE	
EA	<i>Initial</i>
13 MAY 1991	
FILING INSTRUCTIONS	
FILE No.	

(3) 5

c- Miss Andrews

Churchill/Chartwell Archive

I met the Trustees of the Archive Settlement, Mr Peregrine Churchill and Mr Ian Montrose of Goodman Derrick, at lunch on 1 May 1991. Mr Winston Churchill MP and Lord Goodman were also present. The proposals contained in the Memorandum which Norman Tebbit passed to you under cover of his letter of 27 March 1991 were raised and I agreed to discuss them with you before advising Mr Winston Churchill on how the Trustees should now proceed. The Annex to this minute sets out the background to the issues raised and the situation as it appears today to form the basis for our discussion.

2. The Trustees told me at our meeting that their first proposal would be to sell the papers to the Government but if that was not possible they would look for another beneficiary to buy the papers and lodge them with Churchill College. Only if this failed would they instruct Sotheby's to find another buyer. Their strong wish is that the papers should remain in this country and both Mr Winston Churchill and Lord Goodman expressed the view that if there was a risk of the papers going abroad, the Government would be bound to step in and acquire them. The Trustees would require an export licence for that part of the archive which was more than 50 years old.

3. The first issue for consideration is therefore whether the papers should be purchased by HMG, given that the Trustees are looking for a price of £12.5 million. Initial legal advice is that there is nothing intrinsically difficult, from a legal viewpoint, in the purchase of the Trustees' interest in the papers. There is no doubt that the collection is of unique historical importance to the nation and that there would be a considerable public outcry if it was sold into private hands,


particularly abroad. Such a purchase could lead to requests for the holders of other archives of national importance with similar threats that refusal would lead to a sale abroad; conversely, refusal to purchase such an important archive could lead to more sales abroad if the holders/owners interpreted the refusal as a lack of Government interest.

4. An important point to be taken into account is that the Government has never waived its rights over the 'official' papers in the Chartwell "Family" collection. Whether, legally, the Government could claim "ownership" is something on which we shall need to take further advice. However, although the present Trustees appear to wish to contest the matter, HMG's interest in the papers was fully recognised in the earlier Trust deeds quoted in the Annex and has been sustained in recent correspondence between the Trustees and the Cabinet Office. It would, in any event, seem wrong on the face of it for the Government to be put in the position of buying back papers which are or have been public records or copies of them.

5. There would appear to be two possible courses of action; either to seek to prevent the sale of the "Family" papers on which our main bargaining card, apart perhaps from public opinion, would seem to be our claim to ownership, or at least an interest in, the 'official' papers, which amount to something between one-third and a half of the 'Family' papers and which cannot be sold without the permission of the Prime Minister of the day; or to invite a formal proposal from the Trustees and negotiate with them.

6. The other potential purchasers mentioned by the Trustees - Churchill College, which has all along been the intended home of the archive (for which its Archive Centre was primarily built), or the British Library - would both require substantial financial assistance from the National Heritage Memorial Fund and/or from the Government if they were to buy the papers. Churchill College is believed to have adequate funds to maintain the Archive but is





unlikely to be able to raise the funds to purchase it; the British Library has just over £600,000 to spend on acquisitions for the "Special Collection" in 1991-92 of which some may already been committed. The National Heritage Memorial Fund is unlikely to be able to provide more than £2 million (if that). Thus, even if the 'Official' papers were adjudged to comprise half of the "Family" papers and the sale price was thus reduced to something like £6 million, a substantial sum would be required direct from the Government to enable us to buy out the Trustees' interest. Subject to your views I shall take further advice on these points.

7. The immediate issue is the question of what guidance I should give to the Trustees about how they should now proceed. Subject to your views, I am inclined to advise them that there could hardly be a worse time for the Government to be faced with a proposal to find a substantial sum of money for a purpose of this sort; that the Government will be bound to consider very carefully its own rights in the matter, but that if the Trustees want to dispose of their interest, the next step is for them to make a formal proposal which the Government can then consider, though without any commitment.

R.E.R.B.

ROBIN BUTLER


10 May 1991

1. The Archive Settlement, which has recently been re-written for the benefit of future generations of the Churchill family, covers the Chartwell papers, now referred to by the Trustees as the "Family Papers" and comprises a collection of some 2,000 boxes relating to Sir Winston Churchill's private life from his childhood to 1945; to his literary and political careers; to his official (Ministerial) positions in the Colonial Office, the Board of Trade, the Home Office, the Admiralty, Munitions, War and Air, the War Council, the War Cabinet of 1917-1919 and his Premiership 1940-45, also early family papers and heirlooms acquired by Sir Winston.

2. These pre-1945 papers are, with the possible exception of the 'official' papers which the collection contains (including large quantities of copy documents, and a proportion of original documents taken away by Sir Winston when he left the various offices), owned by the Trustees and are deposited in the archive Centre at Churchill College, Cambridge. Also at Churchill College are the post-1945 papers which were left by Sir Winston Churchill to Lady Churchill who in turn left them in her will to the College. They comprise mainly personal papers but with an 'official' component, albeit smaller than that which resides in the "Family" papers; they are owned outright by Churchill College.

3. The original Trust Deed drawn up by Sir Winston Churchill in 1946 to cover the Chartwell "Family" papers said, in Clause 11(ii):

"The Trustees shall not at any time make public or sell or dispose of any document or information relating to any office, Ministry or Department of the British Government since 1900 or any paper of an official character without the permission of the Prime Minister of England for the time being and the other Ministers (if any) for time being representing the office, Ministry or Department concerned."



4. The Archive Settlement, containing the same provision in respect of the official papers, replaced the 1946 Trust in December 1963. It, however, made provision for the Archive to be transferred to one of the male heirs at any time and so, to avoid a break in the protection afforded by Clause 11 the Secretary of the Cabinet concluded a "gentlemen's agreement" with the Trustees which was signed in April 1964. It said:-

"In consideration of your permitting us, as Trustees of Sir Winston Churchill's Archives Settlement, to retain under our control the State Papers formerly belonging to Sir Winston and which came into existence prior to his resignation as Prime Minister in 1945 and any further State Papers formerly belonging to him which may come into our hands together with any Catalogues relating to them, we write to give your our formal assurance that we will not without your consent, vest such papers in any Beneficiary without imposing upon him an obligation similar in terms to that contained in Clause 11(ii) of the Settlement known as "The Chartwell Trust" and receiving from such Beneficiary an undertaking to impose a similar obligation on any further disposal of the State Papers and Catalogues".

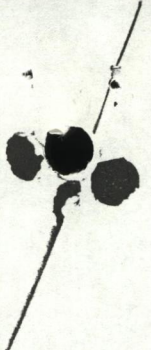
5. In 1970 Estate Duty exemption was granted in respect of the pre-1945 CHARTWELL "Family" papers and the post-1945 CHURCHILL "College" papers under Section 40 of the Finance Act 1930 on condition that:-

- a. the documents were kept permanently in the United Kingdom;
- b. reasonable facilities for examining the objects for purposes of research were allowed to any person authorised by the Treasury so to examine them.

11 c.

The Trustees could not comply with the access condition at c. because in 1963 they had sold their copyright to the firm which

c) reasonable facilities for examining the objects for purposes of research were allowed to any person authorised by the Treasury so to examine them.



was to publish the biography of Sir Winston and had also agreed that access would not be allowed until 10 years after the publication of the last Volume of the biography. The Treasury therefore agreed an extra-statutory concession under which their right to authorise access should not be exercised until an agreement on access had been concluded between the Trustees and Her Majesty's Government (HMG).

6. Sothebys have valued the pre-1945 "Family" papers at £20 million. However, any sale price has to reflect the estate duty exemption granted in 1971. Taking that into account the Trustees say that they are looking for a figure of £12.5 million, a figure which Inland Revenue agree reflects the estate duty position and the usual private treaty discount of 25 per cent, assuming that the valuation itself is accurate.

GOODMAN DERRICK & CO.

SOLICITORS

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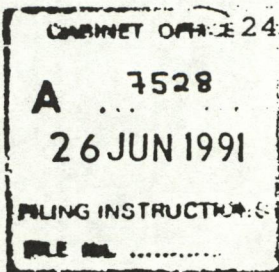
YOUR REF

OUR REF

DATE

IM/ep

CABINET OFFICE 24 June, 1991



c- Miss Andrews

Dear Sir Robin,

I refer to our meeting on 1 May, when it was agreed that the Memorandum concerning the Churchill Archives would be treated as officially tabled, and you kindly undertook to let the trustees have a response indicating the Government's attitude.

I should be most grateful to know whether the matter is still under consideration, and when the trustees may expect to have your response. If you require any further clarification the trustees would be please to attend you for this purpose.

Yours sincerely,

*Ian Montrose*

Ian Montrose



Private & Confidential

Sir Robin Butler KCB, CVO,  
Cabinet Office,  
Whitehall,  
LONDON SW1



5

CABINET OFFICE

Historical Section

Hepburn House, Marsham Street, London SW1P 4HW  
Telephone 071-217 6050

Our Ref: HO91/447  
Your Ref: T&M69/340/CJG

10 July 1991

C J Gregory Esq  
Treasury Solicitor  
Queen Anne's Chambers  
28 Broadway  
LONDON SW1H 9JS

Dear Sir

CHURCHILL/CHARTWELL ARCHIVE

In your letter of 20 May 1991 you said that we needed to know why Hankey asked Churchill to return his official papers in the face of the Law Officers' Opinion that such papers could be retained during an ex-Minister's lifetime.

It may be that the exchange between Hankey and Churchill which refer to the public interest comprises sufficient explanation but I have been looking through the 1934 papers to see whether there was ever any discussion of the implications of the Law Officers' Opinion. I have found none. There is an exchange between Sir Rupert Howarth Cabinet Office and Sir Thomas Barnes, Treasury (?Treasury Solicitor) in July 1934 in which Sir Thomas, having looked at the letters in draft, says:-

"Having regard to the Law Officers' Opinion,..... I think it is permissible to write upon the footing that the documents are the property of the Government and I have stiffened up the letters a little to accord with that assumption."

It was agreed that nothing should be said at the outset to the recipients of the letters about the legal position, it could be explained to them if they enquired!

On another point I wondered whether it would be of interest to Counsel to know that the biographers of Churchill gave undertakings which refer to the restrictions imposed by Clause 11 of the 1946 Chartwell Trust. I enclose a copy of those given by Martin Gilbert and Lord Birkenhead - researchers permitted access to the papers gave similar undertakings.

I have not found a similar undertaking signed by Randolph Churchill, presumably because he was a member of the family, but he submitted for clearance the text of that part of the biography which he wrote (see copy letter attached) [and accepted the Cabinet Secretary's ruling that one document he wished to reproduce could not be used.]

This was  
Montague  
Brown, not  
R Churchill

This seems to me to indicate that it was all along accepted that Her Majesty's Government had "rights" over the papers and the information they contain.

Yours sincerely

Pat Andrews

MISS P M ANDREWS

THE MAP HOUSE  
HARCOURT HILL  
OXFORD

TELEPHONE 46307

OFFICE  
A 2084  
25 FEB 1969  
FILING INSTRUCTIONS  
FILE NO. 80/5



24 February 1969

Dear Sir,

In consideration of the Crown permitting me to have access to papers (other than duplicates of papers to which the public have authorised access) to which Clause 11 of the Chartwell Trust applies, and to other papers of a similar character to which I may be permitted access in future, I HEREBY UNDERTAKE THAT

- (i) I will make use of such papers only for the purpose of writing the official biography of Sir Winston Churchill pursuant to an agreement of 24 October 1968 made between C. & T. Publications Limited and myself;
- (ii) I will be bound by the provisions of the Official Secrets Acts 1911 and 1939 in respect of such papers;
- (iii) I will submit to you two copies of the galley proofs of the main and ancillary volumes of such biography and will accept any amendments or deletions which you may ask me to make on grounds of public policy;
- (iv) I will ensure that the name and address of any assistant I employ now, or may propose to employ in the future, on work requiring similar access to the papers shall be sent to you, and that before the assistant takes up work he or she shall sign an assurance addressed to you in similar terms to paragraphs (i) and (ii) of this letter.

Yours faithfully,

*Martin Gilbert*

Martin Gilbert

The Secretary  
Cabinet Office

23 April, 1969

Dear Sir,

In consideration of the Crown permitting me to have access to papers (other than duplicates of papers to which the public have authorised access) to which Clause 11 of the Chartwell Trust applies, and to other papers of a similar character to which I may be permitted access in future, I HEREBY UNDERTAKE THAT

- (i) I will make use of such papers only for the purpose of writing a single-volume biography of Sir Winston Churchill pursuant to an Agreement which is intended to be entered into between C. & T. Publications Limited and myself;
- (ii) I will be bound by the provisions of the Official Secrets Acts 1911 and 1939 in respect of such papers;
- (iii) I will submit to you two copies of the galley proofs of such biography and will accept any amendments or deletions which you may ask me to make on grounds of public policy;
- (iv) I will ensure that the name and address of any assistant I employ now, or may propose to employ in the future, on work requiring similar access to the papers shall be sent to you, and that before the assistant takes up work he or she shall sign an assurance addressed to you in similar terms to paragraphs (i) and (ii) of this letter.

Yours faithfully,

*Birkenhead*

The Secretary,  
Cabinet Office.



EAST BERGHOLT 363

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STOUR  
EAST BERGHOLT  
SUFFOLK

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4 March 1967

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Dear Sir Burke

Further to my letter of 4 March 1967, I send you herewith a list of all the Crown Copyright which I would like to use in Volume II. I send also a full set of marked galleys so that the items maybe more readily identified. A6155

I cannot believe that I am using anything that would be contrary to the public interest, but I fully see that you have to be satisfied upon this point.

Apologising once more for troubling you with this so late in the day.

Yours sincerely

*Randall J. Christie*

Sir Burke Trend, KCB, CVO,  
Cabinet Office,  
LONDON, S.W.1.