

Diplomatics: New Uses for an Old Science (Part III)

by LUCIANA DURANTI

This is very true: for my words are my own, and my actions are my ministers."¹

The statement of Charles II made in response to his premature epitaph written by Lord Rochester encapsulates one of the most significant problems encountered by historical enquiry on sources: the discrepancy which may exist between historical facts and juridical facts.

The distinction between historical truth and juridical truth is one of the pillars of diplomatic criticism. This distinction does not imply that the two entities are necessarily in conflict or that either of them constitutes the higher truth; rather, it means that they belong to different logical categories, and that a direct connection between them would lead to arbitrary and perhaps unwarranted conclusions. When juridical facts manifest themselves in documentary forms, they constitute the documentary truth, which can be revealed by an analysis of the formal elements of documents. On the contrary, when historical facts enter documents they manifest themselves in their informational content, in the message expressly conveyed by the documents, and an examination and interpretation of that message is necessary to ascertain the historical truth. We can say that a document *is* a juridical fact and it *is about* historical facts. In the case of Charles II, the documentary truth is that he was the author of all his actions, which were done in his name and by his command, and which could achieve their effects only because they were actions of the King. The historical truth that Charles II did not know about many of those actions, or explicitly opposed them, has been revealed by historians' interpretations of information conveyed by various sources, but has no bearing on the effects of the actions themselves within the juridical system of the time.

The distinction between historical truth and documentary truth corresponds to the distinction postulated by diplomatics between the *moment of action* and the *moment of documentation*.² Any action or *act* originates from at least one will: are the will producing an act and the will producing the related document one and the same? If not, how do they differ? How are they related? Which one has effects in a given juridical system? As there is no act without an actor and no document without an author, the present article will answer the above questions indirectly, by introducing the persons who intervene in the creation of a document, and discussing the nature of documents in relation to them.³

The Persons Concurring in the Formation of a Document

Persons are the central element of any document. We identify, acquire, select, describe, communicate, and consult documents largely in relation to the persons they come from, are written by, directed to, concerned with, or have effect on. Persons have been the focus of diplomatic theory since its first formulation, and their identification has constantly presented problems to diplomatists, because persons are the element most tightly linked to juridical conceptions and systems, and the most influenced by their subtlest variations.

In a diplomatic context, as well as in the legal one, persons are the subject of rights and duties; they are entities recognized by the juridical system as capable of or having the potential for acting legally. Just as collections or successions of human beings (juridical persons) derive their qualification of persons from a legislative authority, individual human beings are not automatically persons because they are human, but become such if rights and duties are ascribed to them. Every full citizen is a person; subjects may be persons; but human beings having no rights are not persons. The person is the legal subject or substance of which the rights and duties are attributes. Because a person is a character in virtue of which certain rights belong to a human being or to a collection or succession of human beings, and certain duties are imposed upon him or it, one human being or a group of human beings may unite many characters as, for example, the characters of father, husband, president of a club, or the characters of professional association, publishing company, and investor. The term person derives from the Latin word *persona*, which means mask, character, part. With respect to their own juridical system, human beings are what they represent at any given time; with respect to the documents they create and receive, human beings are what they impersonate in each given document; they coincide with the part they play. It is not a coincidence that in legal documents the concerned persons are often called parties.⁴

Diplomatic theory posits that, for a document to come into existence, the concurrence of at least three persons is necessary: the two protagonists of the action and the writer of the document. In some documents, two of those persons, or all three, are one and the same entity or juridical person, individual, or group, but such entity plays different roles, and diplomatics focuses on the roles, the parts, the masks.

The terms used by diplomatics to designate the three necessary persons are: *author*, *addressee*, and *writer*. There may be other persons intervening in the creation of a document, such as witnesses, registration or authentication officers, or clerks. These persons do not participate in the creation of every document, and diplomatics designates them by the function they accomplish in the document under examination.

The *author of a document is the person(s) competent for the creation of the document, which is issued by him or by his command, or in his name* (e.g., the testator in a will, the King in a letters patent, the university in an honorary degree diploma). The name of the author may appear in impersonal form in the heading of the document (e.g., The University of British Columbia), or at the beginning of the writing (e.g., George The Third, by the grace of God . . .), or in any section of it, or in the subscription of the document.

Usually, the author of a document coincides with the author of the act put into being or referred to by the document, because the person whose will has given origin to the act

documented tends to be also the person competent for the creation of the related documentation. Thus, a jury is author of a verdict, a university of a letter of appointment of a professor, a Queen of a patent for an invention, a city of its by-law, a student of his examination paper, and so on.

Sometimes, the person competent to document an act is different from the author of the act itself. This is more common in the sphere of private law, when acts accomplished by private persons are documented by public officers, lawyers, or notaries. For example, in a contract of sale created by a lawyer, the author of the act is the seller, while the author of the document is the lawyer. Both French and Italian diplomatists have recognized the conceptual distinction between author of the act and author of the document, but only German diplomatists have coined distinct terms for them: *Urheber* (author of the act), and *Austeller* (author of the document).⁵ The wording of the document and a knowledge of the juridical system within which the document is created are the keys to identifying the author of the document. Chanceries or offices entrusted with the documentation function can never be authors of documents in so far as they act in the name of the person they serve.

It has been suggested by some archivists that, with electronic records, authorship should be partially attributed to systems designers, who provide the systems with "knowledge" necessary to the creation of records. This writer strongly disagrees with this proposal because, as Margaret Hedstrom puts it, electronic systems do not possess more knowledge than a code of administrative procedure used in a complex records office: they both are "embodiments of human choices," adopted because they satisfy the needs and requirements of those whose *will* determines the creation of records.⁶ For example, there is no difference between entering the amount of a sale into a spreadsheet with the understanding that the system will calculate the related taxes and totals according to the instructions received by its designer, and providing a records office with the same initial information with the understanding that an accountant will make the calculations and a secretary will compile the final document according to the established administrative procedure. Briefly, if I write a letter using WordPerfect, the author of the letter is not WordPerfect. This does not mean that diplomatics does not consider it important to know about the electronic systems used for records creation, and how they work. It means that diplomatics does not consider them to be "persons," but instruments for the realization of the will of persons, and, as such, part of the broad area of procedures and processes for records creation, which will be treated in the fourth article of this series.

The addressee of a document is the person(s) to whom the document is directed. The name of the addressee may appear on the top of the document, or in its text, or at the bottom, or on the *verso*. The addressee of a document usually coincides with the addressee of the act put into being or referred to by the document (e.g., the heir in a will, the beneficiary in a concession, the appointee in a letter of appointment). There is no document without an addressee because documents result from actions and any action falls on somebody. An action may be directed to an entire collectivity, and in such a case the addressee of the related document may be all the people, or a social, ethnic, or religious group, and so on. An action may be directed to its author, who will be at the same time author and addressee of the related document (as in a personal diary, or in a cheque written to oneself). An action may be bi- or multilateral, that is, may involve reciprocal obligation of two or more parties: in such case each party will be author and addressee of the related document.⁷ Finally, if an action is unilateral, that is, if it

originates from the will of one person (either an individual or a body), the addressee of the document may be either active or passive, that is, may need to be notified of the action or not. For example, the offer to buy a house not only needs to be documented in writing, but also the resulting document needs to be communicated to the addressee for the action to take place; on the contrary, a last will, for which a written form is equally required, does not need to be communicated to the addressee for the action to be concluded (the action in question here is the last will-action, not an inheritance-action).

Sometimes, the addressee of the document is different from the addressee of the action. An example is offered by documents like licences, permits, and patents, the most solemn of which contain the expression "To all to whom these presents shall come," where the addressee of the document is whoever is concerned with the fact attested in it, while the addressee of the act is the person whose name appears in the document. The same is true for all forms of registration: in a land property registration the addressee of the action is the owner of the land, while the addressee of the document is the city holding jurisdiction over the land.

The writer of a document is the person(s) responsible for the tenor and articulation of the writing. The name of the writer, often accompanied by his qualification, usually appears at the end of the document, and assumes the form of a subscription, but sometimes we encounter it on the left margin or on the top left of the document.⁸ The writer of a document may coincide with the author or one of the authors of the document (if I write to somebody in my private capacity I am the author and the writer of the letter); or be a delegate of the author (I may ask a colleague to answer my correspondence while I am absent from the office, giving general directions on the content of the answers: I would be the author and my colleague would be the writer of those letters); or his representative (Alured Clarke, Lieutenant-Governor and Commander-in-Chief of the Province of Lower Canada, was the writer of all the letters patent authored by George the Third and related to that Province); or one of its officers, when the author is an abstract entity, such as a state, a city, a university (a mayor is the writer of the documents authored by the city he or she serves); or one or more of his members, when the author is a collective entity, such as a board, a committee, a task force (the chair of the Education Committee of the Association of Canadian Archivists would probably be the writer of the letters that the Committee as the author sends to the ACA Executive as the addressee). The writer is not a clerk or a secretary, because these individuals are not "persons" with regard to the documents they compile: they are not competent for the articulation of the discourse within the documents, unless they have delegated authority for it (a clerk may be competent for writing the entries in a register, but usually the responsibility belongs to an officer, who may have the title of Secretary, but with a meaning quite different from that which was referred to).

It may happen that the subscription of the writer is followed by another subscription, which may be qualified by the word "countersigner" or "secretary."⁹ This signature has the special function of validating the physical and intellectual form of the document and of guaranteeing that the document was created according to the established procedure and signed by the appropriate person. The countersigning person assumes responsibility only for the regularity of formation of the document and for its forms; that is, not for its content, and not for the wording chosen to express the content, but for the presence in the document of all the elements required for its effectiveness, such as title, date, address, conditions of the transaction, signature, stamp, mention of taxes paid, and the like.

Sometimes, the signature of the countersigner is not expressly qualified, or is qualified with the official title of the individual in the administrative hierarchy (for example, the signature of the City Clerk following that of the Mayor in a by-law is often not qualified by the word "countersigner," but by the title "City Clerk"): in such case it is essential to identify conceptually the function of the signature, and not to confuse the countersigner with the writer or with the author. Some documents, particularly solemn dispositive documents, present two countersignatures, one just under, or at the side, of the signature of the author and/or writer, and one much below, often at the left corner of the page. This second countersignature has the function described above, of procedure and form control, but the first countersignature has a very different function and sometimes is not accompanied by the second. It appears more frequently in documents whose author does not coincide with the author of the act put into being or referred to by the document itself, and belongs to the author of the act (e.g., the parties in a contract authored by a lawyer), or to the author's representative or, if the author of the act is an abstract entity, to one of its officers. It constitutes a declaration that the content of the document corresponds perfectly to the will of the authority, and it is easily distinguishable from the other type of countersignature because the signing person is qualified by a title which shows direct responsibility for the type of act mentioned in the document (e.g., commissioner of patent, legal counsel, managing director), and not for the functions associated with records or documentation offices.

As pointed out at the beginning of this exposition, many other persons may concur in the formation of a document, such as witnesses, records officers, and records clerks. Such persons have many different functions with respect to the documents with which they are involved. For example, the signature of a witness may serve to confer solemnity on a document, or to authenticate the signature of the author (either of the act, or of the document, or of both), or to validate the content of the document, or its compilation, or to affirm that an act for which both oral and written form are required, such as an oath, took place in his presence, and so on and so forth. However, because those persons are usually clearly identified as to their function in the various documents in which they are named, and cannot be confused with the three persons essential to the formation of a document, their functions will, in the fifth article of this series, be discussed in the context of the extrinsic and intrinsic elements of documentary forms, and of the concepts of validation and attestation, authentication, and registration. Furthermore, differently from the three essential persons, witnesses and records officers or clerks do not have direct influence on the nature of the document in which they appear, but only on its effectiveness; therefore they are not relevant to the purposes of the present article.

When many persons intervene in the creation of a document and/or subscribe it, it may be difficult to identify their individual roles, but it is important to do so, because those roles have a bearing not only on the nature and effects of the document but also on the way the archivist will deal with it (e.g., in arrangement and description). In the identification of persons, there are two key words the diplomatist needs to keep in mind. The first is *responsibility*. Responsibility is the obligation to answer for an act. The second is *competence*. Competence is the authority and capacity of accomplishing an act. The two entities may or may not converge in one. In our juridical system, when responsibility is given to a juridical person for a specific function entailing a number of defined acts, that same person is often given also the competence for that function, and vice versa. In fact, in the modern administrative context, competence may be defined as

the area of responsibility within a function.¹⁰ However, it is not so in all juridical systems. While in a constitutional monarchy, for example, the sovereign is competent and responsible for some functions attributed to him by the constitution, in an absolute monarchy, the sovereign is competent but not responsible for all his actions. Therefore, the two concepts must be used separately in documentary criticism.

When looking for the persons concurring in the formation of a document, we have first of all to look for competences and then for responsibilities, and ask, in relation to the juridical system of the time and place concerned:

1. Who was competent to accomplish the act put into being or referred to in the document; that is, who had the authority and the capacity to accomplish it?
2. In whose name did the competent person act?
 - a) If in its own, which part was played (e.g., engineer, friend, husband, investor, coach of a team?)
 - b) If in the name of another person, did the responsibility for the act fall on the competent person or on the person represented?
3. Who was competent to issue the document?
4. In whose name did the person issue the document?
 - a) If in its own, which part was played?
 - b) If in the name of another person, who was responsible for issuing the document?
5. Who was competent to articulate the writing?
6. Who was competent to establish the formation and forms of the document?
7. To whom was the act directed?
8. To whom was the document directed?

In many cases, the answers to these questions are very simple and we need not even ask them. However, when we encounter documents created in a bureaucratic context, particularly if we are not familiar with that context, much research is necessary to answer these questions and identify the persons necessary to the existence of a given document. This may involve a study of intellectual and legal history, of juridical and administrative conceptions, of structures, organizational and procedural rules, and, of course, an analysis of the other documents created in the same context. The earlier diplomatists did not have available to them all the instruments and knowledge available to us today. Therefore, their sources consisted mainly of the documents created in the same context in which the document under examination was produced. This is the reason they brought together in published volumes documents issued by the same juridical person (Emperor, King, Pope, etc.) and preserved by the various addressees.

At this point we may try to identify the persons involved in the creation of two documents produced within two different juridical systems by answering the questions listed before.

Let us consider first the letters patent of *dedimus potestatem*, which appears in Figure 1.

Questions	Answers
1	George the Third
2	George the Third
2a	King of Great Britain, etc.

- 2b NA
 3 Alured Clarke, Lieutenant-Governor of the Province of Lower Canada
 4 George the Third, King of Great Britain, etc.
 4a NA
 4b George the Third
 5 Alured Clarke
 6 George Pownall, Secretary and Registrar of the Province of Lower Canada
 7 George Pownall and Jenkin Williams, Esquires
 8 George Pownall and Jenkin Williams

Persons

Author of the act: George the Third

Author of the document: George the Third

Addressee: George Pownall and Jenkin Williams, Esquires

Writer: Alured Clarke (signature on the top left, where the King himself would sign)

Witness: Alured Clarke (initials at the bottom)

Countersigner for procedure and forms control: George Pownall

The second document belongs to our juridical system, and is regularly created by a type of administration so familiar to us that we do not even need to visualize it as one specific document, but we may think of it as a typical documentary form: a letter of appointment of a professor in a Canadian university, shown in Figure 2.

Questions

1

Answers

Various levels of the University hierarchy, as established by the regulations of the University

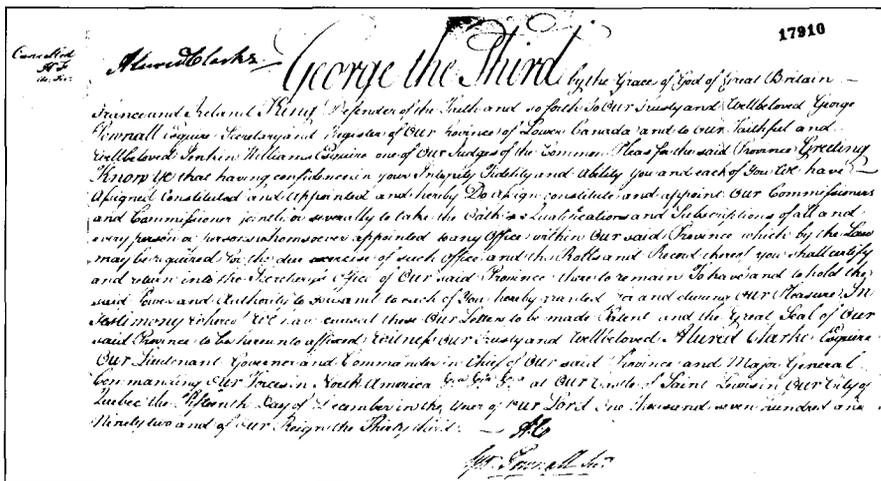


Figure 1: Letters Patent of George III, signed by Alured Clarke. Courtesy: National Archives of Canada, Civil and Provincial Secretary Lower Canada ('S' Series) 1760-1840, RG 4, A1, volume 54, page 17910. Copy negative number: C-135892.

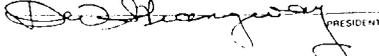
	THE UNIVERSITY OF BRITISH COLUMBIA	OFFICE OF THE PRESIDENT 107 - 8328 Memorial Road Vancouver, B.C. V6T 2B3
March 13, 1987		
<hr/> Name: Faculty: Department:		
The Board of Governors has authorized your appointment as indicated.		
Title:	Assistant Professor	
Term:		
Pay:		
Enquire at Faculty and Staff Services, Room 300, General Services Administration Building, 228-4541, for information on benefits (Retirement Plans, Group Life, and Disability Insurance, Medical and Dental care).		
This appointment is subject to the provisions of one of the agreements on Conditions of Appointment - (Faculty; Program Directors of Centre for Continuing Education; Professional librarians).		
This appointment is subject to the conditions on the reverse and the other provisions set forth in the Faculty Handbook and in the Manual of Policies and Procedures of the University, insofar as they may be applicable. Pages C-1 and C-2 of the Faculty Handbook indicate which classes of appointment carry an implication that the appointee will be considered for reappointment at the end of the specified term.		
Travel and removal allowance in accordance with PeB-12.		
Appointee	 PRESIDENT	

Figure 2: *Letter of Appointment of a Professor in a Canadian University.* Courtesy: private source.

2	The University
2a	NA
2b	The University
3	The President of the University
4	The University
4a	NA
4b	The University
5	The President of the University
6	The Office of the President
7	The appointee
8	The appointee

Persons

Author of the act: The University

Author of the document: The University

Addressee: The appointee

Writer: The President of the University

The two documents examined above are expressions of two different juridical systems. This is particularly evident from the answers to the first question. In fact, while a measure of delegation of power exists in every system, the nature of such delegation varies from system to system. In the case of the university, delegation is given the nature of competence by the existence of a written regulation providing various level of hierarchy with the authority and capacity of accomplishing defined actions. In the case of George the Third, while the Executive Council *de facto* exercised the choice of the servants of the Crown, it had no special legal qualifications for that act, and the authority and capacity for it resided in the person of the King. Even the Assembly of Lower Canada could exercise no influence on the nomination of a single servant of the Crown in the colony, and the Lieutenant-Governor was not free to follow his own judgement, being tied down by detailed instructions and constant supervision by the Executive Council, which made him legally incompetent.¹¹ The nature of delegation at the time of George the Third explains the meaning of the words of Charles II, quoted at the beginning of this article: "My actions are my ministers'." The ministers of the King carried out actions for which he was the only competent person, so that those actions were historically theirs, but juridically the King's.

Moreover, in the two juridical systems under examination, delegation, beyond having a different nature, proceeds in opposite directions and is linked to responsibility in different ways, as shown by the analysis of the two documents.

As to authorship, it may be worthwhile to restate that the author of the act is the person whose will produces the act. If this person is an abstract entity, like a university, its will coincides with the will of its representative(s) who act(s) in its name. The author of the document is the person having the authority and the capacity, that is, the competence to issue the document. If such competence is exercised in the name of another person, the author of the document is this latter person. The writer of the document is the person competent to articulate the writing. The addressee is the person to whom the document is directed within its intellectual form, and may or may not coincide with the person to whom the document is issued or delivered. For example, a letter of appointment of a professor is directed to the appointee, notwithstanding the fact that we may be

examining the copy sent to the department concerned. Here, we are still concerned only with the persons concurring in the creation of a document, not yet with those who may intervene in the document early in its formation process, or interact with the document at later stages. The three necessary persons intervening in the creation of a document are to be identified with reference to the original. The persons involved in the formation of drafts and copies may be different.¹² Let us take as example a type of document with which we are all familiar: a set of guidelines on any subject issued by the Association of Canadian Archivists, and addressed to its membership. Examining the original, that is, the version published in the bulletin of the association (the first perfect document, that is, the first document issued in a form which enables it to produce the consequences wanted by the author), we can say that the author is the association, and the writer is the concerned committee. If we look at the draft sent to the executive of the association for approval, it is clear that the author is the committee, and so is the writer. However, an identification of the persons involved in the formation of drafts and copies has no bearing on the definition of the relationships between the document, the act generating it, and the juridical system within which it is created. From a diplomatic point of view, it has relevance only at the last stage of diplomatic criticism. Therefore, it will be discussed in the context of the analysis of the extrinsic and intrinsic elements of documentary forms, in the fifth article of this series.

Why is it so important not only to determine the persons concurring in the formation of a document, but also to distinguish, among them, who played which role? Certainly, it is important for historical purposes, but beyond them, it is essential for identification and authentication purposes, considering that in the cases of so many documents of past centuries we do not know the provenance, either archival (who created or received them), or custodial (who kept them, and who gave them to the archival institution); neither do we know their documentary context (they are found in groups of documents to which they do not belong). The determination of these persons is also useful to understand and control the many multi-provenance series resulting from frequent administrative changes, and to reconstruct organization, functions, competences, activities, and procedures of records creators, even when we have other sources about them, because documents are the most impartial and authoritative source.¹³

Undoubtedly, archival description benefits the most from the identification of the persons. It is true that archivists rarely describe individual documents, as diplomatists do, but they write administrative histories, and are deeply concerned with authority control. Authority control involves vocabulary control, and David Bearman writes that an "area in which controlled vocabularies may be powerful is the retrieval of names of entities . . . that are unambiguously involved in the creation of records." He adds that "correct identification of fields that are candidate for authority control in archives is only the first step." He lists some of those fields as contained in the National Information Systems Task Force data dictionary and the MARC format. It is possible to see a clear correspondence between them and those identified by diplomatics. For example: "creator" can be rendered as "author," "occupation" as "qualification of signature," and "relator" as "writer."¹⁴ Of course, the usefulness of diplomatic terminology for purposes of authority control is not limited to the terms already introduced in this series of articles, but may be extended to the major part of the terms used by diplomatics to express its fundamental concepts. The final article of this series will deal with this matter.

To return to the persons involved in the creation of a document, it may be observed that such persons have been discussed in relation to textual documents, be they on paper

or in machine readable form. With electronic records, identification of the persons may require a more detailed study of procedures and processes, but is based on the same principles. What about aural and visual documents? This writer does not believe that any difficulties are to be encountered in extending those concepts to them. Their application may even be easier than with textual documents, because archivists who deal with special media are accustomed to distinguishing, particularly in visual documents, between the persons competent and responsible for their content, their articulation, their formation, and their form. They even have a special vocabulary distinguishing those persons, and the only thing which remains to be done is to establish the correspondence between the terms of that vocabulary and diplomatic terms.¹⁵

Identifying the persons concurring in the creation of a document serves many archival and historical purposes, but to diplomatists it was and is essential for one main purpose: to define the nature of documentary forms, their public or private character.

The Nature of Documentary Forms: Public and Private Documents

The general validity of the distinction between public and private documents is easy to acknowledge, but to find a reliable criterion for it is another matter. The language of ancient Rome made that distinction apparent: public was what involved the people as a whole, private had the negative meaning of that which was not public, that is, "deprived." Thus, a private document was a document created by a person "deprived" of public office, without public title. Given the circumstances of its creation, a public document dealt with matters concerning all the people, gave full faith and credit to the facts it attested, belonged to the people (it had to be given to the Tabularium, the public archives, as a condition for its effectiveness), and was accessible to the people.¹⁶ Over time, in different juridical systems, the term public came to mean any one or more of the characteristics mentioned above as consequences of public nature, quite independently of the circumstances of creation of the document to which it was attached, so that a document created by a private person could be considered public if it presented any one of those characteristics.

Today, in our juridical system, private has still the negative meaning of non-public, while public lacks a standard definition. In the Anglo-Saxon common-law system, a document may be defined as public with regard to either (1) its *provenance* (if it is created by a public authority, that is, by a body having jurisdiction on matters relating to, or affecting the whole people of a state, nation, or community), or (2) its *pertinence* (if it relates to matters regulated by public law, that is, by the law concerned with the state in its political or sovereign capacity), or (3) its *effects* (if it makes full faith and credit), or (4) its *ownership* (if it belongs to a public body), or (5) its *destination* (if it is accessible to the public).¹⁷ From a legal point of view, if a document is public as to provenance, it is also public as to pertinence, ownership, and effects, but not necessarily as to destination. Only public documents result from the exercise of the state's political, legislative, administrative, judicial, consultative, and controlling functions. However, if a document is private as to provenance, it can be public in other respects.

From an archival point of view, documents are public when they are created or received by a public office, that is, publicity is conferred on documents not only in relation to their provenance but also in respect of the fundamental rule governing every collectivity, according to which each individual element acquires the nature of the whole

of which it is part. An archival fonds is a documentary whole; if the fonds is public as to provenance, each document within it is public as well, and vice versa. For example, a letter written by a government department to a private individual is a public document as to provenance, but it is private archivally, because it is part of the archival fonds created by the addressee.

Diplomatists have debated for a long time about the meaning of public document versus private document. Harry Bresslau considers to be public only the documents issued by independent or semi-independent authorities, and restricts the concept of authority only to Emperors, Kings, and Popes, mainly because he deals with medieval documents: we may take his "authorities" to mean government bodies.¹⁸ Artur Giry defines only private documents, considering them to be the documents related to matters of private law and issued by non-public persons.¹⁹ Cesare Paoli defines as public the documents issued by public authorities in public forms, either related to public matters or to specific persons and places, and as private the documents created according to private law and issued by notaries and private persons.²⁰ Alain de Bouard calls public the documents issued by public authorities. He feels the need, however, to specify that private documents are not only those issued by private persons but also those issued by public persons which are associated for their nature with private law, and similar in their forms to those created by private persons.²¹ Finally, Georges Tessier accepts the general opinion that public documents are those issued by public authorities, but agrees with Giry and Paoli in that private documents are those issued by private persons and related to matters which are the concern of private law.²²

It is clear that there are three elements identified by different diplomatists as central to the public or private nature of a document:

1. the person creating the document (provenance)
2. the juridical content of the document (pertinence)
3. the forms of the document.

There is no doubt that these elements are all substantial to the definition of the nature of a document, but why are we defining that nature? There is no such thing as an absolute definition. We always define for a purpose, and a definition must be tailored to that purpose. There may be many correct substantial definitions of the same thing, but only one appropriate for each given point of view. Diplomats define the public or private nature of a document for purposes of identification and evaluation. The means to reach these purposes is the analysis of the forms of the document. Such analysis needs to be based on an hypothesis in order to be fruitful, and the hypothesis advanced by diplomats is that the forms of a document are conditioned by its author. Therefore, it is vital for diplomats to define the nature of a document in relation to its author and to make of that definition the fundamental assumption around which the entire diplomatic criticism revolves. The forms of the document cannot constitute the core of the definition. They are not an autonomous entity (the concepts of public and private form have no theoretical existence²³) and they are the object of diplomatic enquiry. Since they are what has to be analysed, identified and evaluated, they cannot be defined by means of terms and elements which have to be identified and evaluated on the basis of the definition of that entity.

As to the juridical content of the document, the most valid argument against its adoption as the focus of the definition of public and private documents is advanced by

Alessandro Pratesi. He states that, in addition to the facts that there is no clear distinction between public and private law in any juridical system and that a single document may deal with matters concerning both, diplomatic analysis is not applied to the content of individual documents, but to their formal elements; therefore content should not be the foundation of its theoretical construct and methodology of enquiry.²⁴

The conclusion of this discussion is that the definition of the nature of a document which is most suitable to diplomatic purposes must put the document into relationship with its author. Accordingly, *a document is public if it is created by a public person or by his command or in his name*, that is, if the will determining the creation of the document is public in nature. A public person is a juridical person performing functions considered to be public by the juridical system in which the person acts and, in so doing, vested with the exercise of some sovereign power. By contrast, *a document is private if it is created by a private person or by his command or in his name*; that is, by a person performing functions considered to be private by the juridical system in which the person acts. This implies that the documents created by a public person in his private capacity, that is, performing private functions, are private in nature. Here, it is essential to reiterate that the creator referred to is the author of the original document. In fact, some confusion may derive from the status of transmission of the document when trying to establish its public or private nature. For example, if a public officer copies public documents for his own private purposes, and includes them within his own fonds, there could be the temptation to consider those copies to be private documents. On the contrary, they are public documents for two fundamental reasons, the first being of diplomatic nature, and the second of both legal and diplomatic nature. It has been stated that a document is public if its author is public, the author of a document being the person whose will determines the creation of the complete document (medium, physical and intellectual form, content). A person who copies a document has an influence on its medium, sometimes on its physical form (e.g., imitative copy), but it is not his will generating the whole document. Moreover, within most juridical systems, the legal system expressly considers to be public as to provenance and ownership the informational content of documents created within the public sphere, at the point of prosecuting those who disseminate it without authorization. And, diplomatically, documents must be identified and evaluated within their juridical system. Thus, once again, the will is the prevalent element which identifies both the author of a document and its nature.

It seems that at this point we have solved all the problems inherent in the definition of the nature of documents and may proceed to the examination of the two categories of public documents and private documents. Why, then, did such an obvious conclusion not find consensus among diplomatists: what obscured their vision and confused their ideas? The answer is easy: too many of the documents they were examining could not be categorized so simply. To say that a document owes its nature to the nature of the will creating it is easy, but what is the nature of a document generated by more than one will when those wills are of a different nature? We do not need to look back to medieval documents to see examples of this situation. We have many such documents all around us, maybe on our desk. Think of an income tax return, a census form, an information and complaint for a crime, or a contract between a public and a private person. Diplomatists approached the problem either by broadening and specifying the definitions of public and private documents to include all observed cases, or by creating a third category of documents. We have already examined the attempts made to

broaden the definitions, and discussed the reasons why they are unsatisfactory. Diplomats of the Italian school, in particular Alessandro Pratesi, see the need to identify a third category, "semi-public documents," defined as the documents issued by private persons by command of and in the forms established by public persons.²⁵ A number of arguments may be used against this proposal. First, if the will originating the document belongs to a public person, and the private person has no choice but to obey, the author is definitely the public person, and the private person is the writer (e.g., an income tax return). Secondly, if a meeting of wills of a different nature is a necessary condition of the existence of the document, the procedures and forms imposed by the public person are necessary as well, and because diplomatics is mainly concerned with procedures and forms, it is possible to consider the will determining them as the prevalent will in the document. Thirdly, if we accept the third category identified by Pratesi as distinct from the other two, we have to contemplate the possibility of constituting a fourth category for all those documents which are created by a convergence of wills of opposite nature in a form typical of private acts (e.g., a deed of land between a public and a private person). How do we consider this type of document? David Bearman proposes two alternative approaches: (1) "one could arbitrarily take the position (sometimes too true) that such a contract is an uneven match and that the private citizen is in effect always the second party," or (2) one could simply follow the convention already established by diplomatics that, in a contract of reciprocal obligation, the first party is the author and the second party is the addressee.²⁶ This writer thinks that the second approach is the most appropriate because it avoids the creation of another category by assimilating this type of document with all documents of reciprocal obligation, concentrates the analysis on procedures and forms rather than on philosophical conceptions which may differ within the same juridical system, and is therefore consistent with diplomatic theory. In conclusion, she believes that (1) documents are either public or private depending on the nature of their author; (2) the type of document identified by Pratesi as semi-public belongs to the category of public documents; and (3) the documents resulting from reciprocal obligations between private and public persons, if not created according to procedures and forms imposed by the public person, may be either public or private, depending on the nature of the first party. It remains established that the status of transmission has no influence on the public or private nature of a document.

The preceding exposition and discussion has been conducted from a diplomatic point of view, and serves the diplomatic purposes of identification and evaluation of individual documents. How can the diplomatic theory about public and private documents be applied to groups of documents strictly interrelated by the act producing them? Most modern bureaucratic acts are compound acts, and specifically acts on procedure. These acts do not manifest themselves in one document, but in files and even in series.²⁷ By answering the above question, diplomatic theory could be extended to meet the boundaries of archival theory. David Bearman writes:

The archivist adopts a view entirely with respect to *transmission* of the document — it is public if it is created by or sent to a public institution. Could we find in the principle of the "will" that commands the creation of the document a similar principle? Obviously, it helps us to distinguish matters of procedure from those of process within the body of records created in a public agency. I think that if we view the documents created to

participate in juridically relevant procedures as being created in a form commanded by the public authority responsible for the procedure, we can distinguish between the large number of documents received by public agencies those which could not be considered records (e.g., they were not intended to participate in an established procedure) and those which are records. Of the latter, many have also their form prescribed by the will which authors the procedure".²⁸

What Bearman is suggesting as a means for broadening the application of diplomatic theory and reconciling it with archival theory is to consider a fourth element as the possible focus in the definition of public and private nature, namely *the author of the procedure*.²⁹ Because any development of diplomatic theory should not contravene its own fundamental principles, Bearman's proposal should be examined in the same light as the other proposed elements. First, is the identification of the author of the procedure which generates the documentation of an act as the element determining public or private nature of the resulting documents in contrast with the fundamental assumption that the forms of a document are conditioned by its author? The answer is clearly negative, because forms are conditioned by procedure as well. This latter relationship has no influence on the former and is independent of it. Moreover, procedures and their authors are a concern of diplomatics without being the direct object of diplomatic analysis like forms. In fact, procedures are revealed by the examination of forms, not by direct observation of the procedures themselves. Secondly, we should examine the extent of the usefulness of Bearman's criterion. Is there a clear distinction between public and private procedures in any given juridical system, and, in the presence of a group of documents resulting from an interplay of private and public procedures, is it possible to determine which one is prevalent, or, if they are equal, which one belongs to a first party? The answer to these questions is positive because the concepts of public and private procedure are theoretically definable in relation to their author, and differ from the concepts of public and private forms, which are not necessarily linked to the nature of those creating them.

On the basis of this brief analysis, it seems perfectly adequate in diplomatic terms to consider procedure as a valid focus in defining public and private documents in all those cases in which an action results in a body of documents, rather than in one isolated document. However, when examining single documents, particularly for purposes of identification, even if they belong in a group, it is essential to establish their nature, public or private, in relation to the nature of their author. Diplomats should broaden its scope by developing new principles and methods for the analysis of documentary material not created at the time in which its theory was formulated, but it should not change the foundations of that theory!

A broadening and enrichment of diplomatic theory and methodology is especially needed for the analysis of "the genesis of public and private documents." This will be the purpose of the fourth article of this series, which will deal with procedures and their authors.

Notes

- 1 These words are the reply of Charles II (1630-1685) to Lord Rochester's premature epitaph: "Here lies our sovereign lord the King/ whose promise none relies on;/ He never said a foolish thing,/ Nor ever did a wise one."

- 2 See Luciana Duranti, "Diplomatics: New Uses for an Old Science. (Part II)," *Archivaria* 29 (Winter 1989-1990), p. 5.
- 3 For the purposes of this study, the term "person" is used in the sense of "juridical person," as defined in Luciana Duranti, "Diplomatics: New Uses for an Old Science," *Archivaria* 28 (Summer 1989), p. 25, endnote 20.
- 4 The Italian writer Luigi Pirandello argues that in our daily life too, we wear as many masks as the relationships we engage in (see *One, Noone, Onehundred*), and that we have no existence outside our network of formal relationships (see *The late Mattia Pascal*). Crying on the grave of his mother, Pirandello mourned the death of one of his own characters: he could not be a son anymore! His conclusion seems to be that, because there are as many truths as the parts we play and each of them is nothing else but a mask, the one and real truth about ourselves transcends us and exists only in front of God.
- 5 See Alain de Bouard, *Manuel de Diplomatie Française et Pontificale. Diplomatie Generale* (Paris: Editions Auguste Piscard, 1929), p. 40; and Alessandro Pratesi, *Elementi di diplomatica generale* (Bari: Adriatica Editrice, n.d.), p. 26.
- 6 Margaret Hedstrom, "A Research Agenda for Automated Records," speech given at the School of Library, Archival and Information Studies, The University of British Columbia, 6 March 1990.
- 7 Notwithstanding this fact, for purposes of description, diplomatics has established a convention by which the first party mentioned in the document appears as the author, and the second and other parties as addressees. Thus, in an agreement for a sale, even if conceptually seller and buyer are at the same time both author and addressee, the seller is considered to be the author and the buyer the addressee.
- 8 The subscription or signature may be an autograph or not, the difference between the two being that the autograph needs to be handwritten by the very hand of the signer, while the subscription or signature does not. For example, a telegram is subscribed or signed, not autographed.
- 9 In diplomatics, *qualification of signature* is the term used to refer to the title of the signer, or his position, or his function with respect to the subject of the document. For instance, an archivist may have his signature followed by the words "state archivist," or "chairman ICA Education Committee," or "member, parents association." Whatever the words used, they qualify the preceding signature and give a place to the subscriber in the context of the document. This intrinsic element of intellectual form will be analyzed in the fifth article of this series.
- 10 Function and competence are a different order of the same thing. Function is the whole of the activities aimed to one purpose, considered abstractly. Competence is the authority and capacity of carrying out a determined sphere of activities within one function, attributed to a given office or an individual. For example, the archival function consists of all the activities whose aim is the preservation and communication of archival material. Within this general function are sub-functions like appraisal and arrangement. Each archival institution has the competence for fulfilling a defined portion of the general function (e.g., preservation and communication of the archival material created by a determined provincial government), and each archivist has the competence for accomplishing a defined portion of the subfunctions (e.g., the reference archivist of a provincial archives makes available the material preserved by that institution; or, the archivist competent for the judicial records of a given province, acquires, selects, arranges, and describes those records). Therefore, a competence practically coincides with a portfolio. While a function is always abstract, a competence must be attached to a juridical person.
- 11 See R. MacGregor Dawson, *The Government of Canada*, fifth edition, revised by Norman Ward (Toronto 1970), pp. 12-13. See also J.R. Mallory, *The Structure of Canadian Government* (Toronto 1984).
- 12 For an exposition of the concepts of original, draft, and copy, see Duranti, "Diplomatics . . .," pp. 19-21.
- 13 For example, when this writer worked as archivist in the State Archives of Rome, she examined diplomatically the so-called documents of the French Government in Rome (1809-1814), and found out that, contrary to the information provided by statutes, regulations, and the like, there never was an autonomous French government in Rome.
- 14 David Bearman, "Authority Control Issues and Prospects," *American Archivist* 52 (Summer 1989), pp. 290-292.
- 15 It is this writer's hope that this series of articles will generate another series, in which archivists knowledgeable about special media archives will make an effort to apply diplomatic concepts to the material in their care. This series is conceived as a starting point, not as a point of arrival!
- 16 See Luciana Duranti, "The Odyssey of Records Managers," *Records Management Quarterly* 23 (July 1989), pp. 8-9.
- 17 If we try to define what public nature, public law, and public body mean within that same juridical system, we may get even more confused. Those who are interested in finding out from whence all the confusion derives may read George H. Kendal, *Facts* (Toronto 1980), pp. 43-55.

- 18 Harry Bresslau, *Handbuch der Urkundenlehre für Deutschland und Italien* 2 vols. (vol.1: Berlin, 1889; vol.2: Leipzig, 1912-1931), vol. 1, p. 3.
- 19 Artur Giry, *Manuel de diplomatique* (Paris, 1893), p. 823.
- 20 Cesare Paoli, *Diplomatica* (Firenze, 1899), p. 27.
- 21 Alain de Bouard, *Diplomatique generale*, pp. 40-41.
- 22 Georges Tessier, *La Diplomatique* (Paris 1966), pp. 65, 99.
- 23 This writer is referring to theory in its meaning of verifiable generalization of a high order which is derived from the observation of phenomena and explains them.
- 24 Pratesi, *Elementi di diplomatica*, p. 24.
- 25 *Ibid.*, p. 25.
- 26 David Bearman, letter to the writer, 28 October 1989.
- 27 Duranti, "Diplomatics . . . (Part II)," p. 14.
- 28 Bearman, letter to the writer, 28 October 1989.
- 29 The other three were: (1) the person creating the document; (2) the juridical content of the document; (3) the forms of the documents.