

N.C. v. B. C. West, Jr.

WILLIAM S. PRICE, JR.

ALTHOUGH I PLAYED AN EARLY ROLE in the decision by the North Carolina Division of Archives and History to undertake a replevin action against a private dealer, B. C. West, Jr., my role was a relatively minor one. The person who should be before you today is Thornton W. Mitchell, State Archivist of North Carolina. If this piece has a protagonist, it is Mitchell; he has been the driving force in pursuing the litigation. Without his devotion to it, without his own expertise and that of his staff, the West Case (as it has come to be called) would never have been undertaken, much less pursued through the appellate courts. However, Mitchell is not here today for a variety of reasons; I am, and I shall attempt to narrate the events surrounding the case and something of our rationale.

In May 1974, Paul P. Hoffman, assistant Archivist of North Carolina, discovered that Sotheby Park Bernet was offering for sale a letter dated August 26, 1790, from George Washington to the governor and Council of State of North Carolina. Among other things, the letter congratulated the state on its ratification of the Constitution. In the course of various negotiations with Sotheby, and after consulting with the state attorney general's office, Mitchell and his staff began looking into the legal grounds for the recovery of the document, particularly in the area of common law actions. I was head of the Colonial Records Branch at the time, a publications and archival project of the Division of Archives and history, concentrating on court records, and was consulted on questions of common law origins and administrative procedures of North Carolina courts prior to and during the American Revolution. Throughout May matters proceeded rather deliberately.

Then, in June 1974 the State Archives sustained a sizable theft of manuscripts. We could not immediately ascertain how many items had been taken and, in an effort to locate any such documents that might turn up in the manuscripts market, we began to read closely as many sales catalogs as we could.

In November 1974 and January 1975, two catalogs from B. C. West, Jr., a part-time autograph dealer in Elizabeth City, North Carolina, listed for sale two indictments from the Salisbury District Court in 1767 and 1768. The documents were signed by William Hooper, at the time crown attorney but ultimately a signer of the Declaration of Independence. West's total asking price was \$850.

While we knew that the June thieves had not taken any district court records, we did believe that the documents might have been stolen at some earlier time. The State Archives contained numerous other 1767 and 1768 indictments from the Salisbury court. The cases described in the two pieces West was offering were

The author is assistant director of the North Carolina Division of Archives and History. This paper was read at the 1977 annual meeting of the Society of American Archivists, in Salt Lake City. A slightly different version was published in the November 1977 issue of *Carolina Comments*.

docketed in our records, and they had been tried. The Hooper indictments were demonstrably public records.

Calling the attention of the state attorney general to these facts, Thornton Mitchell expressed his conviction that the Hooper indictments were public records out of custody. The state formally asked West to return the manuscripts, as had been done on past occasions when public records were discovered out of custody. West declined to return them. To our knowledge, he did not offer the items for sale to the state, other than through his catalog advertisements.

In February 1975, the attorney general's office filed a civil complaint in Pasquotank Superior Court in Elizabeth City for return of the manuscripts. In the early months of that year I was consulted on four different occasions to assist the attorney general's office in responding to interrogatories about the administration and operation of North Carolina courts during the Colonial and Revolutionary periods. In March I did research at the UNC Library in Chapel Hill looking for precedents that might be helpful in the replevin action. I found several references to instances in the reign of James I of England (1603–25) when crown papers had been recovered from individuals who had taken them as their own upon leaving the service of the king. In some instances the language of the recovery writs defined these records as part of the king's treasure and ultimately as records of the nation. Robert J. Cain, who was at the time locating and copying records in England relating to North Carolina, searched out at the Public Record Office in London many of the documents I had found reference to, and he sent copies of them to Mitchell.

In the meantime Mitchell's staff was looking into other sources for supporting information, and one archivist discovered that during the early years of the Revolution one Thomas Frohock had been jailed by the Salisbury court for refusing to surrender to the new state court his records as crown clerk. The attorney general's office found all such information particularly helpful in building its case. Indeed, the work of Mitchell and his staff was indispensable to ultimate success in the litigation.

In October 1975, the case of *North Carolina v. B. C. West, Jr.*, went on trial in Pasquotank, without a jury. The state filed a motion for summary judgment based on the briefs and interrogatories. The presiding judge declined to rule on the motion, however, until the close of the trial (a decision for which he would subsequently be criticized by the Court of Appeals). The state called no witnesses. Thornton Mitchell was called by the defendant as an adverse witness, and he spent nearly four hours on the stand. Witnesses for West included dealers Charles Hamilton and Mary Benjamin, Richard Maass of the Manuscript Society, and Winston Broadfoot of Duke University. The Spring 1976 issue of *Manuscripts*, a quarterly publication of the Manuscript Society, published excerpts of the various testimonies. The court found that while the law was with the state, the age of the documents and their indefinite length of time out of custody warranted an equity ruling for West. The state filed notice of appeal.

During August of 1976 the case was presented in the North Carolina Court of Appeals. In its decision rendered in November, the higher court reversed the finding of the Pasquotank Superior Court. By a two to one majority, the appellate court held that a public record cannot be destroyed, defaced, or given up, without authority from the source that required it to be made (31 N.C. App. 431). Title to public records may pass only in a manner prescribed by a duly

constituted legislative body and cannot be forfeited through the oversight, carelessness, negligence, or intentional conduct of an agent of the government. The court held also that mere possession is not evidence of ownership and that public records are the property of the state and not of the individual who happens to have them in his possession. The court cited *City of New York v. Lent*, 51 Barb. 19 (1868), which held that there can be no bona fide purchase of a public document until a duly authorized public authority has legally disposed of the document. West then filed notice of appeal.

In March 1977, the State Supreme Court heard arguments in the West case. The court had permitted three *amicus curiae* briefs to be filed in support of West: from Duke University, the American Library Association, and H. Bartholomew Cox. On June 13 the state's highest court rendered its opinion (293 N.C. 18). By a five to two margin it upheld the Court of Appeals ruling.

The majority opinion written by Justice I. Beverly Lake echoed and strengthened the finding of the Court of Appeals. In an intriguing analysis, Lake found that sovereignty does not lapse—that at some time between the outbreak of the Revolution and the Treaty of Paris in 1783 the sovereignty of the crown became the sovereignty of the state. Thus public ownership of the Hooper indictments had never been broken. In addition, to quote Justice Lake: "These documents, being bills of indictment, bear upon their face notice to all the world that they were part of the court records of the Colony of North Carolina and, therefore, the property of the State." A public record created by and for the state can be legally disposed of only by the state, and there is no evidence that the Hooper documents had ever been so disposed. The court also found that it had no authority to order reimbursement of the defendant and ruled that only the legislature could authorize state funds for such a purpose. The Hooper indictments were returned to custody of the State Archives on September 19, 1977.

What of the George Washington letter that had really started this whole process? In July of 1977 it was returned to the possession of the state. After the state, during 1975 and 1976, had made a series of efforts to discover the letter's owner through the United States District Court for the Southern District of New York followed by appeal to the U.S. Court of Appeals for the Second Circuit, the state pondered whether or not to bring action in New York state courts, as the United States Court of Appeals had suggested. In October 1976, North Carolina filed a discovery action in the New York Supreme Court in an effort to identify the letter's owners. By the following March, negotiations had begun with the law firm of Coudert Brothers, in New York, for voluntary return of the letter.

When the North Carolina Supreme Court ruling on West came down in June, matters in New York began to transpire quickly. In July the state and Coudert Brothers reached an out of court agreement rendering the letter (in Washington's own hand, by the way) to North Carolina, but not revealing the name of the person who had offered it for sale. Late in the month Mitchell went to New York, picked up the letter, and returned it to the State Archives. Recovery of the Washington letter represented an especially satisfying result of the West case.

In conclusion I would emphasize several points. The West case turned on common law, not statute. Despite the passage in 1975 of a North Carolina law providing for recovery of public records, that statute was not a factor in the West case.

The two Hooper indictments were demonstrably public records by virtue of the existence in the State Archives of numerous supporting documents and of similar indictments from the same court. Furthermore, there was no evidence that the Hooper indictments had ever *legitimately* left public custody. These factors are crucial to remember for any individual or institution anticipating future replevin actions.

Mitchell sought the action against West in the hope of providing a precedent to assist in the recovery of the Washington letter. Mitchell had become concerned also by the large number of public documents being offered for sale in catalogs from all over the country. (Incidentally, most of those documents were from states other than North Carolina. Relatively few of North Carolina's public records remain out of custody.) Faced with retirement by 1981 and feeling strongly that, as he puts it, "Someone had to stand up and be counted," Thornton Mitchell pursued litigation. By his own reckoning he had less to lose than some other archivists just beginning their careers.

I must confess that I myself was less convinced than Mitchell. I feared an adverse ruling in the West case and that such a ruling would undermine recovery of the Washington letter. But Mitchell always believed that the state had at least an even chance of winning and that a victory would greatly strengthen our hand in the matter of the Washington letter. On the other hand, if we lost the West case we still had the precedent of *City of New York v. Lent* working for us in New York state. Also, since we had so few documents out of custody, a loss in the West case would not be a serious blow.

I cannot overemphasize the extent to which Mitchell maintained a consistent vision of where he was headed and how he was going to get there. He was carefully prepared at most steps in the long process and, in fact, he orchestrated much of that process as it concerned preparation of briefs and responses to interrogatories. It is no exaggeration to say that without his perseverance and direction the state of North Carolina would not have won its case against B. C. West, Jr.

In the future, the state of North Carolina intends to use replevin only to preserve public records that might be endangered by remaining out of custody or to insure that such records be made available for research; as I have stated earlier, few North Carolina public records are out of custody. What the West case may mean for other states and for the archival profession at large, only the future will tell.

Mea Culpa Editionis

Hugh A. Taylor's paper, "The Discipline of History and the Education of an Archivist," appeared in our October issue without the note that it had been read at the joint SAA-OAH luncheon at the annual meeting of the Organization of American Historians, in Atlanta, in April 1977. This editorial oversight may have caused some readers to wonder about the reference to the "solemn festival of *Clio Americana Invicta*." CFWC