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Thornton W. Mitchell

The case of State of North Carolina vs. B. C. West, Jr., really began about May 10, 1974, when Paul P. Hoffman learned that a letter from George Washington dated August 26, 1790, to the Governor and Council of State of North Carolina was to be auctioned by Sotheby Parke Bernet in New York City.¹ After consulting the Office of the Attorney General, and with the concurrence of the secretary of the Department of Cultural Resources, Mr. Hoffman inquired about the letter and expressed the interest of the state in it. The letter was not sold, and lengthy negotiations for its return began. In researching the background for possible litigation to recover it, Assistant Attorney General Thomas M. Ringer found that there were no modern precedents in case law supporting the civil recovery or replevin of public records. In spite of the absence of clear-cut precedents Mr. Ringer in November recommended that legal action be started to recover the letter. His approach was based primarily on state and federal cases relating to real property; all of the replevin cases he could find had resulted in adverse rulings.

One further preliminary should be noted. In June, 1974, the North Carolina archives suffered a major theft of documents. As a result, we began to read catalogs offering manuscripts for sale in an effort to trace those stolen from North Carolina. I

*This article is also to be published in the November, 1981, issue of Carolina Comments, the magazine of the North Carolina Division of Archives and History.

became concerned about the number of public records-- particularly from New Jersey and Connecticut--that were being offered for sale as autographs. I talked with the late Kenneth Richards and with Robert Claus (archivists of New Jersey and Connecticut, respectively) at some length about the removal of public records from public custody in their states, but in the absence of a strong archival tradition and statutory authorization for action, they felt they could do nothing about their loss.

On January 13, 1975, George Stevenson called Mr. Hoffman's attention to the fact that Dr. B. C. West, Jr., a manuscript dealer in Elizabeth City, North Carolina, was offering out-of-custody public records for sale. Stevenson's initial thought was that the appearance of these documents on the market was the result of the theft of the previous year. Mr. Hoffman sent the memo on to me with the comment that he thought we should take legal action because it appeared to be a perfect case. The documents concerned were two indictments dated 1767 and 1768 from the records of the Salisbury District Superior Court. I checked the descriptions in Dr. West's catalog against the court dockets and found that the indictments had been tried and that many, but not all, of the indictments of the same terms of court were in the archives. This was sufficient to confirm our opinion that they were public records.

Our first reaction, because of the suspected relationship to the 1974 thefts, was to ask the State Bureau of Investigation to check on Dr. West; we also called Charles Hamilton in New York to determine whether either of the documents had been consigned by one of the men convicted in the theft. In both instances, the results were negative. Before going any further, I talked with the attorneys in the Justice Department with whom we were working on the George Washington letter case.

We agreed, informally, that we had good evidence that the court documents were public records out of custody and that successful recovery would be advantageous in the Washington letter case. I cleared the matter with the director of the Division of Archives and History and the secretary of the Department of Cultural Resources, and on January 15, 1975, I asked the attorney general to initiate replevin action to recover the two documents from Dr. West. On February 3, the secretary of cultural resources formally demanded that the records be returned to public custody. Dr. West declined, and on February 5, 1975, a temporary restraining order was issued in Pasquotank County (North Carolina) Superior Court, which, in effect, impounded the documents pending the outcome of litigation.

I am well aware that there was general agreement that North Carolina under my leadership blundered into the West case without really knowing what it was doing. On the contrary, the West case was very carefully orchestrated. From the outset, we knew where we were going and how we were going to get there. We were also aware of the risks. The consensus was that we had a weak case and that we needlessly endangered our efforts to recover the George Washington letter. Few people realized that we got involved in the West case solely to provide a modern precedent to strengthen our pursuit of the Washington letter, and even fewer realized just how strong a case we had and eventually developed.² I must admit that it took some time to develop all facets of our case, but by the time of our first appeal in April, 1976, we had completely mobilized our strength.

First, we had in the archives the record books and loose papers of the Salisbury District Superior Court which allowed us to trace specific cases from the dockets to the indictments. The indictments for many of the cases from the same period as those advertised by Dr. West had been preserved and were

among the archives of the state. These particular documents, although docketed, were missing from the records of the court. This proved that the two documents were public records and were of a type that had been preserved by the state.

Second, there is a provision in the General Statutes of North Carolina which makes it a misdemeanor to steal, or take from its place of deposit, any original documents belonging to a court of record or relating to any civil or criminal action begun in said court. This provision dates back to British legislation enacted during the reign of Henry VI in the fifteenth century. The West case involved court records, and the statutes of North Carolina have given special protection to court records since at least 1749.

Third, North Carolina is a common law state. In April, 1975, William S. Price, Jr., then editor of North Carolina's Colonial Records Project, investigated the common law background of the nature of public records and concluded that: "It seems clear that prior to the American Revolution, there was precedent in England (and consequently in its colonies) for state ownership of a broad array of letters and memoranda as well as official documents. Any record touching on the affairs of the realm was potentially a record of the sovereign government." Furthermore, citations developed by Dr. Price were forwarded to England, where Dr. Robert J. Cain, then our contract researcher at the Public Record Office, obtained copies of judgments that defined various records as "the King's treasure."

Fourth, continuity was not a problem. The Salisbury District Superior Court--in fact, all district superior courts--went out of existence in 1773, and none was reestablished until 1777. Beginning in June, 1774, however, courts of oyer and terminer and general gaol delivery were held in Salisbury to try criminal cases, including cases for

which indictments were returned by the court discontinued in 1773. When the district superior court was reestablished and met again in March, 1778, it also tried criminal cases on the basis of earlier indictments. Further, on March 13, 1778, Judges Samuel Spencer and James Iredell found Thomas Frohock, clerk of the court discontinued in 1773, in contempt and threw him into the Rowan County jail because he refused to turn over the records of the discontinued court to the newly appointed clerk of the reestablished court.³

Finally, we went into the West case for the specific purpose of supporting the matter of recovery of the George Washington letter. In the event that we lost the West case, our strategy was to take the position that it related only to court records and that the proper precedent for the Washington letter was City of New York vs. Lent, a case tried in New York Supreme Court in 1868. The latter case also involved a George Washington letter, and the circumstances were almost identical to our own case.

The weakest part of our case was that we did not know when the two documents offered for sale by Dr. West had left official custody. The Attorney General's office traced them back to 1960, when they were bought by a resident of Cary, a suburb of Raleigh. This person could not remember from whom he purchased them, but it was from one of three dealers in the general vicinity of Charlotte, North Carolina, all of whom were dead in 1975. On the other hand, other identical documents had remained in official custody and were in the archives.

The trial of North Carolina vs. West was held in Elizabeth City, North Carolina, on October 24 and 25, 1975. The Manuscript Society, to which Dr. West had appealed for assistance months earlier, paid the expenses of Charles Hamilton, Mara A. Benjamin, and Richard Maass to testify as expert witnesses. For

the duration of the trial (except for the time he was on the stand) Winston Broadfoot of the Duke University Manuscript Department and a licensed attorney, sat beside Dr. West's attorney and suggested questions to ask the various witnesses, particularly while I was on the witness stand.

On October 25, Judge John Webb handed down what was essentially an equity decision when he ruled that the law was on the side of the state, but he found for the defendant. Interestingly enough, although it does not appear in the formal judgment, Judge Webb held that the testimony of the witnesses for the Manuscript Society was irrelevant. The state then gave notice of appeal.

As I drove back to Raleigh on the afternoon of October 25, I went over in my mind the whole matter of the West case. The previous night, Mr. Costen, Mr. Ringer, and I had decided that if Judge Webb ruled against the state we would appeal to the Court of Appeals, but that if we lost in the Court of Appeals we would drop the case. Because of the judge's ruling, however, I felt we would win in the Court of Appeals and that, because of the manuscript curators and collectors who were supporting him, Dr. West would have no alternative but to appeal to the Supreme Court. Mr. Costen had told me that it might take two years more if the case went to the state Supreme Court--actually it was twenty months--and that if Dr. West and the Manuscript Society tried to take the case to the federal courts in case of a defeat, we might be tied up with the West case for an additional four years.

I resolved, therefore, to make myself the principal protagonist in the West case because a possible six additional years would bring us to the fall of 1981, when I expected to retire. If I were the "villain" in the piece, my retirement would minimize criticism of the Division of Archives and

History, and criticism directed towards me would not adversely affect the programs of the Archives and Records Section. I thought it best to take any blame for the West case because I would soon be out of the picture if it continued for its maximum period; if anyone thinks otherwise, I will be happy to share such epithets as "evil bureaucrat," "thief," and "pirate".

While preparation of the appeal was pending, several things happened. Dr. West, in a letter to the attorney general, accused the archives of concealing information and reported that an "archivist" had contributed \$250 toward his expenses. Early in 1976, Dr. West, who was a Republican, attempted to exert political pressure on the Republican state administration to discontinue the appeal of the case. These political and other pressures caused Larry E. Tise, who had become director of the Division of Archives and History in September, 1975, and who had not previously been involved in either the Washington letter or West cases, to get cold feet. He queried Mr. Costen, deputy attorney general handling both cases, about their relationship, and he asked Dr. Price to call various archivists or former archivists for their opinion about the West case.

Mr. Costen informed Dr. Tise late in February that he considered the West matter as a prelude to further pursuit of the Washington letter and concluded, "If there is serious consideration of abandoning the West matter because of policy considerations arising from protests of collectors, the same policy considerations would appear to apply to the Washington matter." Dr. Price queried four persons, and their reactions varied from enthusiastic support to extreme disapproval. By April 1, six days prior to the deadline for filing the formal appeal, Dr. Tise was prepared to recommend that the West case be abandoned because he felt it was weak; there was a need to define replevin in our statutes because of

the possible damage to private institutions; other states were not willing to join in the action; and the Washington letter case was stronger and should be pursued.

The recommendation was never made because in a meeting called by the secretary of cultural resources, it became obvious that the case was unusually strong and that--as Mr. Costen stated--if the West matter was dropped, the state "might as well kiss the George Washington letter goodbye." The appeal was filed, and in November, 1976, Judge Webb's finding for Dr. West was reversed by the Court of Appeals. Dr. West then appealed to the North Carolina Supreme Court.

The Supreme Court had before it not only briefs from the state and Dr. West, but also amicus curiae briefs submitted by Duke University, the American Library Association, and H. Bartholomew Cox. Of the three briefs, only that submitted by Cox showed any real understanding of the issue the state was pursuing. Dr. Cox confused the issue, however, by his efforts to be too scholarly and by his introduction of issues such as the Nixon papers which were of only minimum relevance to the case. The case was argued before the Supreme Court on March 9, 1977. In a 5-2 decision written by Associate Justice I. Beverly Lake, the Supreme Court on June 13, 1977, upheld the decision of the Court of Appeals and ruled that the two documents advertised by Dr. West were the property of the state.

I had been principally concerned about obtaining a modern precedent to support our efforts to recover the George Washington letter. I also felt as a matter of principle that someone had to have the guts to try to slow, or to stop, the flow of public records into the manuscript market which had so impressed us as we read catalogs after the 1974 theft from the North Carolina archives. I felt from the

beginning that we had a better than even chance of winning the West case, but win or lose I was willing to take a position on the recovery of public documents out of custody.

I knew also that my general reputation as a person who tended to leap before he looked and to blunder into matters without thinking them through would minimize any effects of our pursuit of the West case among other members of the profession, regardless of whether we won or lost. Further, I was not concerned about alienating manuscript curators or disturbing the balance between archivists and related professions, because I felt that balance no longer existed and the relationship between archivists and manuscript custodians had already been critically damaged. Finally, I knew I had risen as high, professionally, as I ever would; I was not going anywhere because I was already there. I was not a candidate for anything; I was not an applicant for anything. Unlike some of my colleagues, I did not have to avoid stepping on anyone's toes.

The reaction to the West decision among manuscript collectors and curators was as expected. P. William Philby, president of the Manuscript Society, called the case a "travesty". The dissenting opinion, which was just that and not the rule of the court, has been quoted extensively; except for Dr. Price's papers at the Society of American Archivists meeting in Salt Lake City, I have yet to see the rationale of the majority opinion stated. As expected, I received no accolades following the decision. As a matter of fact, the only commendation I received came from Charles Hamilton several months later, when he told me that if he had been a North Carolina state archivist he would have done exactly what I did.

A great deal has been made of the alleged fact that the two documents were acquired by the state "without compensation", usually written in italics or in capital letters, completely ignoring what the

Supreme Court actually said. Justice Lake pointed out that state statutes did not permit the court to order payment to Dr. West either by the court itself or by the Division of Archives and History. Any reimbursement to Dr. West would have to be approved by the General Assembly; as far as we know, Dr. West did not seek payment from the legislature. Nor do we know whether he sought redress from Charles Hamilton, who guarantees clear title to documents which he sells; in the case of the two indictments this obviously was not the case.

I have never understood why the Manuscript Society did not buy the two documents from Dr. West and give them to the state, thus pulling the rug out from under our case. The society spent \$750, the amount Dr. West paid for the documents, in sending three witnesses to Elizabeth City for the October, 1975, trial. The society apparently decided to join the fight as a matter of principle, without really understanding our purpose. Anyone who fights as a matter of principle runs the risk of losing. We fought as a matter of principle. We won; the Manuscript Society lost. If we had lost, I think we would have taken our defeat with better grace than the society has.

The appeal to the federal courts never appeared, although the Executive Board of the American Library Association early in July, 1977, directed its counsel to prepare papers to take the West case to the United States Supreme Court. Counsel recommended, however, that the case not be appealed. He considered that the decision of the North Carolina Supreme Court was ill conceived and that it provided inadequate rationale for determining the ownership of public records out of custody. He also felt that the full implication of the decision was not fully understood, and pointed out that constitutional issues had not been raised or considered during the trial and that, accordingly, the record of the case was deficient.

He felt, further, that the case did not involve issues in a manner to encourage the type of decision required. And finally, he could see no consensus regarding the ownership of public records and how such ownership should be determined.⁴

The George Washington letter that started it all? North Carolina had filed discovery action in federal court to determine the name of the person in possession of the document in order to bring action to recover; the action had been defeated in both district and appeals courts on procedural grounds. On the suggestion of judges on the court of appeals, however, action was brought in New York state courts about the time of the North Carolina Court of Appeals decision. Negotiations looking toward an out-of-court settlement were initiated on March 7, 1977, and were successfully concluded on June 10, 1977, three days before the Supreme Court decision on the West case was handed down. On July 28, 1977, I went to New York, where I signed a receipt and a release, and returned the George Washington letter to North Carolina.

One final irony: The person who told Paul Hoffman about the George Washington letter was B.C. West.

NOTES

¹The information in this article has been taken from the file relating to the West case in the Archives and Records Section, Division of Archives and History; from the file relating to the case in the Attorney General's office; and from the records of the secretary of cultural resources and the director of archives and history.

²The pursuit of the West case was not a one-man operation, but a team effort involving many people. The contribution of T. Buie Costen and Thomas M. Ringer of the attorney general's staff was of major significance. The initial impulse came from Paul Hoffman, who was instrumental in gathering information for the attorney general's staff members. The file on the West case is filled with memos and notes from George Stevenson who, among other things, prepared the reply to the interrogatory requested by Dr. West. Catherine J. Morris prepared a lengthy statement of court records accessioned by the archives, and the local records archivists compared the Salisbury District Superior Court dockets with the indictments in the archives for a period of four years.

³Information about the Salisbury District Superior Court has been taken from the records of the court in the North Carolina archives.

⁴Counsel also recommended that the American Library Association design an appropriate form of law suit in order to force the North Carolina Supreme Court to reverse itself.