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Virginia Manuscript Law Reports*

W. Hamilton Bryson**

Case law, including published cases and cases that have never been published, is the basis of the common law. Professor Bryson discusses the use of manuscript law reports in Virginia during the eighteenth and nineteenth centuries.

The common law is, in its essence, case law. This is believed so fundamentally by practitioners of the common law that although they know that a statute can alter the common law, they cannot accept the obvious meaning of a statute unless it is corroborated and expounded by a judge by means of a formal judicial opinion in a lawsuit. Reports of cases are and shall always be the foundation of the law. Because of this, it is important to examine case law from all available sources, even unpublished manuscripts. This article will examine manuscript law reports of Virginia cases.

In colonial Virginia, only five sets of law reports are known to have been made, although almost all of the printed English law reports are known to have been present and available.¹ These reports were compiled by Sir John Randolph, Edward Barradall, William Hopkins, Thomas Jefferson, and John Randolph, son of Sir John.

Sir John Randolph's manuscript reports, which cover the period October 1729 to April 1732,² were used by Thomas Jefferson, and their existence was generally known in Virginia legal circles around 1800.³ They were published by R. T. Barton in 1909.⁴

The manuscript reports of Edward Barradall⁵ covering the period 1733 to 1741, were also known to Jefferson. J. W. Randolph proposed in 1852

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1. W. BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA xii, 1-17 (1978).

2. Nance, *Sir John Randolph*, in VIRGINIA LAW REPORTERS BEFORE 1880, at 68, 69 (W. Bryson ed. 1977) [hereinafter VIRGINIA LAW REPORTERS].

3. Letter from Merit Moore Robinson to John Robinson (May 9, 1811) (at Swem Library at the College of William and Mary).

4. R. BARTON, VIRGINIA COLONIAL DECISIONS: THE REPORTS BY SIR JOHN RANDOLPH AND BY EDWARD BARRADALL (1909) (2 vols.) [hereinafter VIRGINIA COLONIAL DECISIONS].

5. Nance, *Edward Barradall*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 71, 73-74.

to publish Barradall's reports,⁶ but this was not accomplished until 1909.⁷

William Hopkins compiled a series of cases dating from at least October 1731 to April 1733. Jefferson used the compilation shortly before Independence, when it was in the possession of the last colonial attorney general, John Randolph (d. 1784), the son of Sir John Randolph. There are several extracts or fragments of cases abridged from Hopkins's reports in the Library of Congress in a manuscript book entitled "Virginia Reports," which also contains Sir John Randolph's reports.⁸ There were at least two manuscript volumes, but they are now lost.

The fourth set of colonial Virginia reports was made by Thomas Jefferson, when he was a young man engaged in the practice of law in Williamsburg prior to Independence. Jefferson extracted four cases from the manuscript of Sir John Randolph, twenty-six from Barradall, and one very short case from Hopkins. Jefferson followed these in his own manuscript book with eleven cases dating from October 1768 to October 1772. Jefferson's *Reports*⁹ were published in 1829, after his death, by his grandson, Thomas Jefferson Randolph.¹⁰

From later citations, we know that John Randolph made manuscript reports of cases. Unfortunately, these have been lost, but several of the cases he reported were cited in later cases.¹¹

The bar was particularly in need of reports of Virginia case decisions after Independence, when appeals to the Privy Council in England were no longer allowed and English judges were no longer the ultimate authority on Virginia law. After 1776, the judges of the higher courts were all former members of the bar, and thus the level of the opinions of the court improved considerably. However, it was not until 1795 that the first reports of any Virginia cases were printed and published; these were the cases of

6. See G. WYTHE, DECISIONS OF CASES [v], [xliv] (2d ed. B. Minor 1852) (publisher's notice).

7. VIRGINIA COLONIAL DECISIONS, *supra* note 4.

8. 1 *id.* at 1, 12, 184 (1909); T. JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA [v] (1829); Robinson, *Of Lawyers in Virginia Between 1704 and 1737*, 1 VA. L.J. 191, 194 (1877).

9. T. JEFFERSON, *supra* note 8.

10. Curtis, *Thomas Jefferson*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 75, 75.

11. Steger v. Moseley (1773), "October, 1773, M.S. Rep. by J. Randolph, 2 vol. page 232," was cited in argument by his son, Edmund Randolph, and by Judges Roane and Pendleton in *Wallace v. Taliaferro*, 6 Va. (2 Call) 447, 450, 470, 487 (1800). *Wallace v. Taliaferro* also cites *Bronaugh v. Cocke* (at 450, 470, 488) and *Smyth v. Lucas* (at 470), both of which are found in the younger John Randolph's reports. The case of *Dobson v. Taylor* (1755), which was found at page 77 of John Randolph's reports, was brought to the attention of the Supreme Court of Appeals by Edmund Randolph in the case of *Claiborne v. Henderson*, 13 Va. (3 Hen. & M.) 322 (1809). It was printed in a footnote by the reporters, *id.* at 335-36, and discussed by the court, *id.* at 362, 374-75, 384.

George Wythe from the High Court of Chancery,¹² an intermediate appellate court that also had original jurisdiction.¹³

Charles Lee, who later became the United States Attorney General from 1795 to 1801, compiled a small collection of Virginia cases while he was in practice in Alexandria.¹⁴ He reported a few cases from many different courts, including the Virginia Court of Appeals, the General Court, the High Court of Chancery, the District Court of Fredericksburg, and the Federal Court.

From April 1784 to January 1794, the period covered by Lee's reports, there were no printed reports of Virginia cases. It is not clear whether Lee knew about the manuscript collections of colonial Virginia cases, nor is it known whether he was aware that Bushrod Washington, John Marshall, and St. George Tucker were making notes of cases at the same time. Lee thus had no printed Virginia reports to use, but he cited numerous English reports and several English treatises: reports of cases by Lord Raymond, Saunders, Keble, Siderfin, Levinz, Ventris, Croke, T. Raymond, Jenkins, Wilson, Strange, Peere Williams, *Chancery Reports*, Atkyns, *Term Reports*, Coke, Davis, Barnes, and Burrow; Matthew Bacon's *New Abridgment of the Law* (1736); Sir Edward Coke's *Institutes of the Laws of England* (1628-1644); Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769); and John Joseph Powell's *Essay on the Law of Contracts and Agreements* (1790).

John Brown, clerk of the Court of Appeals of Virginia from 1785 until 1810,¹⁵ began making notes of Court of Appeals cases for the period 1791 to 1799.¹⁶ There were no printed reports of Virginia cases when he began, but by October 1799, when Brown's last surviving note was made,¹⁷ George Wythe's reports and both volumes of Bushrod Washington's reports¹⁸ had been published. We do not know the dates of the cases in Brown's lost second volume, but he may well have continued reporting cases until his death in 1810. Conway Robinson cited six cases dating from 1788 to 1794¹⁹ from a third (now lost) volume of cases from the General Court. Brown made notes of legal points decided in the Court of Appeals of Virginia,

12. G. WYTHE, *supra* note 6.

13. Shepard, *George Wythe*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 90, 93-94.

14. Bryson, *Charles Lee*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 85.

15. Bryson, *John Brown*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 87, 87-88.

16. These were not published until 1977. Bryson, *The Reports of Charles Lee and John Brown*, 11 U. RICH. L. REV. 691 (1977).

17. *Id.* at 695.

18. B. WASHINGTON, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF VIRGINIA (1798-1799) (vols. 1 & 2).

19. *See infra* note 52 and accompanying text.

concentrating on appellate procedure and court costs, probably for his own personal future use as clerk. Because he was not acting as either advocate or judge, his reports contain no references to printed materials other than Virginia statutes. Occasionally, he notes oral references to other cases that had been recently decided by the Court of Appeals. Bushrod Washington's first volume could not have been the source of the information, however, since it was not printed until 1798.

David Watson, a prominent lawyer and politician in Louisa County, Virginia, compiled a series of case reports from the county courts of Louisa, Goochland, and Fluvanna, and the District Court of Charlottesville.²⁰ He covered cases from November 1799, after the publication of George Wythe's reports and both volumes of Washington's *Reports*. While Watson was making his compilation, the last case of which is dated August 1809, the first three volumes of reports by Daniel Call²¹ and the first two by William Waller Hening and William Munford²² were issued to the public. Watson, who practiced only in the county courts and in the district court in his neighborhood, cited cases in the first volume of Washington and the first volume of Call. A reference to volume one of Hening and Munford was added later to the end of Watson's report of *Ford v. Gardner* (1799). Watson also referred to St. George Tucker's 1803 edition of Blackstone's *Commentaries*; Isaac Espinasse, *Nisi Prius* (1791); and John Fonblanque, *Treatise of Equity* (1793-1795).

David Yancey, a close friend and neighbor of Watson, also kept notes of cases. Yancey's brief collection of cases in the District Court of Charlottesville, dating from April 1804 to April 1806,²³ was begun after the appearance of the works by Wythe and Washington and the first two volumes of Call's *Reports*. Yancey's cases cite authority from the first volumes of Washington and Call, and from the English reports by Wilson, Lord Raymond, and Douglas. Yancey also refers to Tucker's edition of Blackstone's *Commentaries*.

St. George Tucker compiled a series of reports of cases dating from 1786 to 1811; from 1788 to 1811, Tucker was a judge, and thus was reporting cases argued before him.²⁴ In 1825, Daniel Call wrote to Tucker

20. Library of Congress MS. David Watson Collection, MMC. 2514, box 2 [hereinafter Watson Collection].

21. D. CALL, REPORTS OF CASES ARGUED AND ADJUDGED IN THE COURT OF APPEALS OF VIRGINIA (1805) (vols. 1-3).

22. W. HENING & W. MUNFORD, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF APPEALS OF VIRGINIA (1808-1809) (vols. 1 & 2).

23. Yancey's reports are in the Watson Collection, *supra* note 20.

24. Tucker's reports are now in the Swem Library of the College of William and Mary and are being prepared for publication. See Cullen, *St. George Tucker*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 96, 99-100, 103.

for permission to print a selection of opinions from his manuscript reports.²⁵ The felicitous result was the publication in 1833 of volumes four, five, and six of *Call's Reports*; most, if not all, of the cases were from Tucker's manuscripts.

John Marshall also reported cases when he was in practice in Virginia. Unfortunately, these manuscript reports have been lost; however, fifteen of these cases dating from 1790 were printed in *Call's Reports*;²⁶ Marshall's report of *Turberville v. Self*²⁷ was also used by Call.²⁸

Even after the Virginia reports began to be printed, there was a need to resort to the manuscript cases. In 1811, after ten volumes of Virginia cases had appeared, Merit Moore Robinson, a Norfolk attorney, was trying to get access to Sir John Randolph's reports and St. George Tucker's notes of cases.²⁹ In the case of *White v. Jones*³⁰ in 1792, John Marshall, arguing for the appellee, and Edmund Pendleton, president of the Court of Appeals, discuss the case of *Chew v. Stevens*, as reported by Barradall and Jefferson.³¹ Pendleton noted that since the case had not been published, it was "known only to very few of the profession; and perhaps, hardly to any practising in the country only."³² Marshall and Pendleton also mentioned³³ *Hambleton v. Wells*,³⁴ which had been decided by Pendleton only sixteen months before, but it was no doubt cited from memory rather than in reference to a manuscript.

A manuscript report of *Hambleton v. Wells* (1791) was cited in St. George Tucker's 1803 edition of Blackstone's *Commentaries*.³⁵ The case was also remembered by counsel for the appellant in *Witherinton v. M'Donald* in 1807.³⁶

25. Letter from Daniel Call to St. George Tucker (Apr. 27, 1825) (at Swem Library, College of William and Mary); 8 Va. (4 Call) [v], xxviii (1833).

26. 7 Va. (3 Call) 506-97 (1805). See also 5 THE PAPERS OF JOHN MARSHALL 473-74 (C. Hobson ed. 1987).

27. 8 Va. (4 Call) 580, 590 (1795).

28. J. WALLACE, THE REPORTERS 590 n.3 (4th ed. 1882); 5 THE PAPERS OF JOHN MARSHALL, *supra* note 26, at 474.

29. Letters from Merit Moore Robinson to John Robinson (May 9, 1811, and Sept. 3, 1811) (at Swem Library, College of William and Mary). I would like to thank E. Lee Shepard for these references and the next one.

30. 8 Va. (4 Call) 253, 257 (1792).

31. Legan, Lessee of Chew v. Stevens, 2 VIRGINIA COLONIAL DECISIONS, *supra* note 4, at B166, T. JEFFERSON, *supra* note 8, at 30.

32. 8 Va. (4 Call) at 257.

33. *Id.*

34. 8 Va. (4 Call) 213 (1791). This case is also reported in Brown's reports. Bryson, *supra* note 16, at 714. The fourth volume of *Call's Reports* was not published until 1833.

35. 3 BLACKSTONE'S COMMENTARIES 261 n.10 (S. Tucker 1803 ed.).

36. *Witherinton v. M'Donald*, 11 Va. (1 Hen. & M.) 306 (1807).

Judge Roane inquired whether the case of *Hambleton v. Wells* had ever been reported. On being answered in the negative; he observed that he had a ms. note of it, copied from one in the handwriting of *Judge Pendleton*; and, if no better report could be had, he would submit that to the inspection of the Court; of its accuracy he had no doubt, though it was but a brief note.³⁷

Judge Spencer Roane, in his opinion in the controversial case of *Hunter v. Fairfax's Devisee*,³⁸ cited three earlier Virginia cases which had not yet been printed.³⁹

Berryman v. Booth (1734)⁴⁰ in Edward Barradall's reports was cited by Judge Dabney Carr in 1835 in his opinion in *Worsham v. Worsham*.⁴¹ William Green mentioned that he had consulted *Taylor v. Graves* (1736)⁴² as found in Barradall's reports in his celebrated argument in *Moon v. Stone*,⁴³ Conway Robinson cited seven cases from the manuscript reports of Barradall:⁴⁴ *Rose v. Cooke*,⁴⁵ *Brooking v. Dudley*,⁴⁶ *Edwards v. Bridger*,⁴⁷ *Micou v. Corbin*,⁴⁸ *Murdock v. Thornton*,⁴⁹ *Spicer v. Pope*,⁵⁰ and *Winston v. Henry*.⁵¹

Robinson also cited from John Brown's lost volume of reports of cases in the General Court: *Graham, adm'x v. Graham, adm'r* (1788), *Jones v. Goode* (1789), *Brownlow v. Custis* (1789), *Bird v. Scott* (1791), *Johnson v. Braxton* (1792), and *Bradley v. Barnett* (1794).⁵²

St. George Tucker's manuscript reports were relied upon in the following cases: *Blount v. Gee* (1805)⁵³ was cited in *Dilliard v. Tomlinson*.⁵⁴

37. *Id.* at 307. *Hambleton v. Wells* is reported briefly in a footnote, *id.*

38. 15 Va. (1 Munf.) 218, 225-27 (1810).

39. *Reed v. Reed*, 15 Va. (1 Munf.) 611 (1805); *Marshall v. Conrad*, 9 Va. (5 Call) 364 (1805); *Commonwealth v. Bristow*, 10 Va. (6 Call) 60 (1806). I would like to thank Professor John Paul Jones for these references.

40. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 4, at B42.

41. 32 Va. (5 Leigh) 589, 592 (1835).

42. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 4, at B56.

43. 60 Va. (19 Gratt.) 130, 320-21 (1869).

44. 1 C. ROBINSON, PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA 161, 288, 123, 404, 76, 137, 527 (1832); 2 *id.* at 98, 121 (1835).

45. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 4, at B192, B229 (1736).

46. *Id.* at B256 (1737).

47. *Id.* at B117 (1740).

48. *Id.* at B37 (1733).

49. *Id.* at B33 (1733).

50. *Id.* at B232 (1736).

51. *Id.* at B213 (1736).

52. 1 C. ROBINSON, *supra* note 44, at 390, 592, 535-36, 657, 551, 616 (1832).

53. Later reported in 9 Va. (5 Call) 481 (1805).

54. 15 Va. (1 Munf.) 183, 197 (1810).

Triplett v. Dunlop (1806)⁵⁵ was cited in his argument by Call in *Templeman v. Steptoe*.⁵⁶ *Sorrell's Case* (1786)⁵⁷ and *Bailey's Case* (1798)⁵⁸ were cited in *Commonwealth v. Myers*.⁵⁹ *Dudley v. Crump* (1786) was cited by William Green in his argument in *Moon v. Stone*.⁶⁰ *Clayton v. Latham*, "1 Tuck. MSS. 388," was cited by Green in an *American Law Review* article.⁶¹ *Dunlop v. Harris* (1804)⁶² was cited by Tucker's son, Henry St. George Tucker, in his *Notes on Blackstone's Commentaries*⁶³ and *Commentaries on the Laws of Virginia*.⁶⁴

In 1824, a judge of the Court of Appeals cited a manuscript opinion⁶⁵ in the possession of Daniel Call in the case of *Braxton v. Winslow* (1791). Although Call's manuscript version of this case was later published in 1833,⁶⁶ it does not seem to have come from St. George Tucker, because Call's letter requesting permission to see Tucker's manuscripts was dated 1825.⁶⁷ In his argument in *Martin v. Stover*, Call cites the case of *Calvert v. Bowdoin* (1791) from a "M.S. Rep. in this Court" (i.e., Court of Appeals).⁶⁸ Call goes on to copy it as a footnote to the principal case. Call and Wickham, in their arguments in *Ross v. Overton*,⁶⁹ cited manuscript reports of *Deane v. Cunliffe* (1797) and *Brown v. Ross*.

The reports of Lee and Brown have been printed,⁷⁰ and those of Watson and Yancey are presently being prepared for the press. If it had not been for Lee Shepard, a librarian at the Virginia Historical Society, I would never have found the manuscripts of Watson and Yancey. If other manuscript reports are known to exist, their publication might shed much light on a very interesting period of American history.

55. Later reported *sub nom.* *Triplett v. Wilson et al.*, 10 Va. (6 Call) 47 (1806).

56. 15 Va. (1 Munf.) 339, 349 (1810).

57. Later reported in 3 Va. (1 Va. Cas.) 253 (1786).

58. Later reported in 3 Va. (1 Va. Cas.) 258 (1798).

59. 3 Va. (1 Va. Cas.) 188, 210, 215 (1811).

60. 60 Va. (19 Gratt.) 130, 321 (1869).

61. Green, *Stare Decisis*, 14 AM. L. REV. 609, 645 n.8 (1880).

62. Later reported in 9 Va. (5 Call) 16 (1804).

63. H. TUCKER, NOTES ON BLACKSTONE'S COMMENTARIES 442 (1826) (book 2).

64. 1 H. TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 336 (1831) (book 2).

65. *Munford v. Overseers of the Poor*, 23 Va. (2 Rand.) 313, 316 (1824). This reporter was Peyton Randolph, son of Edmund Randolph. See Tavenner, *Peyton Randolph*, in VIRGINIA LAW REPORTERS, *supra* note 2, at 47, 48.

66. *Braxton v. Winslow*, 8 Va. (4 Call) 308 (1791).

67. Letter from Daniel Call to St. George Tucker, *supra* note 25.

68. 6 Va. (2 Call) 514, 518 (1801).

69. 7 Va. (3 Call) 309, 312, 313, 316 (1802).

70. Bryson, *supra* note 16.

