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MISCELLANEOUS
VIRGINIA LAW REPORTS
1784-1809

being the reports of

CHARLES LEE, JOHN BROWN,
DAVID WATSON,
&
DAVID YANCEY

edited by
W. Hamilton Bryson

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PREFACE

Printed law reports of American cases from the early federal period are sparse. Therefore, these recently discovered manuscripts of Virginia cases dating from 1784 to 1809 are published here in the belief that they may shed more light on the law of Virginia and the United States and on the courts whose practitioners included Edmund Randolph, Charles Lee, John Marshall, Bushrod Washington, and others.

In order to aid the reader as much as possible in following the points being made in these terse case reports, modern spelling has been used and modern punctuation has been added. This is also reasonable and appropriate according the rule of *idem sonans*, which is that a word is the oral word not the written word. The words enclosed within square brackets were added by the editor to aid the flow of the reports.

I would like to express my appreciation to E. Lee Shepard, who brought to my attention the existence of the manuscripts of the reports of David Watson and David Yancey, and who gave me other invaluable information and editorial assistance. I would also like to acknowledge the kind assistance of Margaret Cook, Charles T. Cullen, John W. Dudley, Charles Kelly, William Ray, and Emily Jones Salmon. Thanks are also due to Robert P. Kline and Russell W. Updike, who helped with the proofreading, and to Carolyn Riley, who typed the manuscript.

The reports of John Brown are published with the permission of the Virginia State Librarian, and those of Charles Lee with the permission of The Colonial Williamsburg Foundation and the Manuscript Department of the University of Virginia Library; an earlier version of them was printed in the *University of Richmond Law Review*, volume 11, pages 695-741 (1977), which is reprinted here with permission. An earlier version of the introduction was published as "Virginia Manuscript Law Reports" in *Law Library Journal*, volume 82, pages 305-311 (1990), and is reprinted with permission.

Finally I would like to thank the University of Richmond for subsidizing the financial cost of this book.

*W. H. Bryson*

Richmond, Virginia

May 15, 1990
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INTRODUCTION

The common law is in its essence case law. And this is so fundamentally believed by the practitioners of the common law that, whatever their heads may tell them about the constitutional place of a statute to alter the common law, they cannot in their hearts 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. Moreover, the written reports of cases are the life blood of the common law because over time the memory fades and because different people have different memories of the same events and lawsuits and judicial opinions.

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. These Virginia 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, were used by Thomas Jefferson, and their existence was generally known in Virginia legal circles around 1800. They were published by Robert T. Barton in 1909.

The manuscript reports of Edward Barradall covering the period 1733 to 1741 were also known to Jefferson. J. W. Ran-
dolph proposed in 1852 to publish Barradall’s reports, but this was not accomplished until 1909.

William Hopkins compiled a series of cases dating from at least October 1731 to April 1733. There were at least two manuscript volumes, but they are now lost. Jefferson used them shortly before Independence when they were 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.

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 on the eve of 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 were published in 1829, after his death, by his grandson, Thomas Jefferson Randolph.

From later citations, we know that John Randolph, the son of Sir John Randolph, also made manuscript reports of cases. (He was the last colonial attorney general; he died in England in 1784, but his body was returned to Virginia for burial in Williamsburg.) Unfortunately his manuscript books have been lost, but several of the cases reported by him were cited...


6 See the publisher’s notice in G. Wythe, Decisions of Cases (2d ed. by B. B. Minor, 1852), pp. [v], [xiv]. See note 4.


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in later cases. 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) 450, 470, 487 (1800). Wallace v. Taliaferro at pages 450, 470, and 488 also cites Bronaugh v. Cocke and at page 470 Smyth v. Lucas, these last two cases also being 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 (1809), and it was discussed by the court and printed in a footnote by the reporters.10

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. It is also to be noted that 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 George Wythe from the High Court of Chancery, an intermediate appellate court that also had original jurisdiction.11

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. He reported cases from many different courts though not many from any single one. There are cases from the Virginia Court of Appeals, the General Court, the High Court of Chancery, the District Court of Fredericksburg, and the Federal Court.

9 See generally J. J. Reardon, Edmund Randolph (1974).
10 13 Va. (3 Hen. & M.) 322 at 335-337, 362, 374-375, 384 (1809).
During the period covered by Charles Lee's reports, April 1784 to January 1794, there were no reports of Virginia cases in print. Whether he was aware of the existence of the manuscript collections of colonial Virginia cases is unknown, nor is it known whether he knew that Bushrod Washington, John Marshall, and St. George Tucker were making notes of cases at the same time that he was. 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, Ventriss, 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; Coke Upon Littleton; Sir William Blackstone, Commentaries on the Laws of England; and John Joseph Powell, Essay on the Law of Contracts and Agreements (1790).

John Brown was the clerk of the Court of Appeals of Virginia from 1785 to 1810. There were no printed reports of Virginia cases when John Brown began making his notes of cases in the Court of Appeals, but by October 1799, when his last surviving note was made, George Wythe's reports and both volumes of Bushrod Washington's reports had been published. We have no way of knowing the dates of the cases in Brown's lost second volume, but they may well have continued until his death in 1810. Conway Robinson cited six cases from a third but now lost volume of cases from the General Court, cases dating from 1788 to 1794. Brown made notes of legal points decided in the Court of Appeals of Virginia concentrating on appellate procedure and court costs. They were no doubt for his own personal future use as clerk of that court. He was not acting as either an advocate or as a judge, and thus 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. All of them are earlier than Bushrod...
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Washington's first volume which was printed in 1798, so that could not have been the source of the information.

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. They were begun in 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 in which is dated August 1809, the first three volumes of reports by Daniel Call and the first two by William Waller Hening and William Munford 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 his report of Ford v. Gardner (1799). Watson also referred to St. George Tucker's 1803 edition of Blackstone's Commentaries; Isaac Espinasse, Nisi Prius; and John Fonblanque, Treatise of Equity.

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 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 of 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 until 1811, Tucker was a judge and thus was reporting cases argued before him. In 1825, Daniel Call wrote to Tucker for permission to print a selection of opinions from his manuscript reports. The felicitous

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13 Tucker's reports are now in the Swem Library of the College of William and Mary and are being prepared for publication. See C. T. Cullen, "St. George Tucker" in W. H. Bryson, Virginia Law Reports Before 1880 (1977) pp. 96-105.
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 books.\textsuperscript{14}

John Marshall also reported cases when he was in practice in Virginia. It is truly unfortunate that Marshall’s manuscript reports have been lost. However, fifteen of these cases dating from 1790 were printed in Call’s Reports, volume 3, pages 506-599, and Marshall’s report of Turberville v. Self, 8 Va. (4 Call) 580, 590 (1795), was also used by Call.\textsuperscript{15}

Even after the printing of the Virginia reports was begun, 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.\textsuperscript{16} In the case of White v. Jones\textsuperscript{17} in 1792, John Marshall arguing for the appellee and Edmund Pendleton, president of the Court of Appeals, discuss the case of Chew v. Stevens (1736) which was reported by Barradall and Jefferson.\textsuperscript{18} Pendleton noted that since it had not been published, it was “known only to very few of the profession; and perhaps, hardly to any practicing in the country only.” (Marshall and Pendleton also mentioned the case of Hambleton v. Wells,\textsuperscript{19} 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.)

\begin{itemize}
\item \textsuperscript{14} Letter of Daniel Call to St. George Tucker, April 27, 1825, Swem Library, College of William and Mary; D. Call, Reports, vol. 4, pp. [v], xxvii (1833).
\item \textsuperscript{16} Letters of May 9, 1811, and September 3, 1811, from Merit Moore Robinson to John Robinson, Swem Library, College of William and Mary. I would like to thank E. Lee Shepard for these references and for the next.
\item \textsuperscript{17} 8 Va. (4 Call) 253, 257 (1792).
\item \textsuperscript{18} Legan, lessee of Chew v. Stevens, 2 VCD B166, Jeff. 30 (1736).
\item \textsuperscript{19} 8 Va. (4 Call) 213 (1791); this case is also reported in Brown’s reports, infra. Note that the fourth volume of Call’s Reports was not published until 1833.
\end{itemize}
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A manuscript report of Hambleton v. Wells (1791) was cited in St. George Tucker’s 1803 edition of Blackstone’s Commentaries. The case was also remembered by counsel for the appellant in Witherington v. M’Donald in 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 manuscript 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.

It was published in a footnote by the reporters. Judge Spencer Roane, in his opinion in the controversial case of Hunter v. Fairfax’s Devisee, 15 Va. (1 Munf.) 218 at 225-227 (1810), cited three earlier Virginia cases which had not yet been printed.

Berrysman v. Booth (1734) in Edward Barradall’s reports was cited by Judge Dabney Carr in 1835 in his opinion in Worsham v. Worsham, 32 Va. (5 Leigh) 589 at 592 (1835). William Green mentioned that he had consulted Taylor v. Graves (1736) as found in Barradall’s reports in his celebrated argument in Moon v. Stone, 60 Va. (19 Gratt.) 130 at 320, 321 (1869). Conway Robinson cited seven cases from the manuscript reports of Barradall. They are Rose v. Cooke, 2 VCD B192, B229 (1736); Brooking v. Dudley, 2 VCD B256 (1737); Edwards v. Bridger, 2 VCD B117 (1740); Micou v. Corbin, 2 VCD

22 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.
23 2 VCD B42.
24 2 VCD B56.
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B37 (1733); Murdock v. Thornton, 2 VCD B33 (1733); Spicer v. Pope, 2 VCD B232 (1736); and Winston v. Henry, 2 VCD B213 (1736). 25

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). 26


In 1824, a judge of the Court of Appeals cited 32 a manuscript opinion in the possession of Daniel Call in the case of

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25 C. Robinson, Practice in the Courts of Law and Equity in Virginia, vol. 1, pp. 161, 288, 123, 404, 76, 137, 527 (1832); vol. 2, pp. 98, 121 (1835).
27 Later reported in 9 Va. (3 Call) 481 (1805).
28 Later reported sub nom. Trippett v. Wilson et al., 10 Va. (6 Call) 47 (1806).
29 Later reported in 3 Va. (1 Va. Cas.) 253 (1786).
30 Later reported in 3 Va. (1 Va. Cas.) 258 (1798).
31 Later reported in 9 Va. (5 Call) 16 (1804).
32 Munford v. Overseers of the Poor, 23 Va. (2 Rand.) 313 at 316 (1824). Note this reporter was Peyton Randolph, son of Edmund Randolph; see R. G. Taverner,
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Braxton v. Winslow (1791). Although Call's manuscript version of this case was later published in 1833, 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. In his argument in Martin v. Stover, 6 Va. (2 Call) 514 at 518 (1801), Call cites the case of Calvert v. Bowdoin (1791) from a "M.S. Rep. in this Court." Call goes on to copy it as a footnote to the principal case. Call and Wickham in their arguments in Ross v. Overton, 7 Va. (3 Call) 309 at 312, 313, 316 (1802), cited manuscript reports of Deane v. Cunliffe (1797) and Brown v. Ross.

This book presents to the general public the reports of Charles Lee, John Brown, David Watson, and David Yancey. The search continues for the lost reports.

The two lost volumes of William Hopkins from the 1730s were last used by Thomas Jefferson around 1775. These two books were probably acquired by Sir John Randolph and passed to his son John, who owned them when Jefferson consulted them. The younger John died in 1784, and they probably then passed to his son Edmund Randolph.

The younger John Randolph compiled two volumes of reports in the 1760s and 1770s. They were last used when his son Edmund cited from them in 1809.

John Brown made a second volume of notes of cases in the Court of Appeals that was a continuation of the volume that is printed here. This second volume may well have covered cases from 1799 until his death in 1810; he was clerk of the Court of Appeals from 1785 to 1810. It was probably a small book, as volume one was. There is no known reference to it, but one may guess that Conway Robinson and William Green

12 Braxton v. Winslow, 8 Va. (4 Call) 308 (1791).
13 See above.
14 I.e. Court of Appeals.
saw it. Brown also compiled notes of cases in the General Court from 1788 to 1794; he was clerk of this court from 1781 to 1794. Considering the nature of his surviving reports, it is likely that he ceased to report cases from the General Court when he ceased to be its clerk. This lost volume was used by Conway Robinson in preparing a book which was published in 1832.

John Marshall reported cases from the time that he was in practice in Virginia, 1781 to 1800. This lost manuscript was last seen by Daniel Call, his brother-in-law, who copied a case into volume four of his own *Reports*, which was published in 1833.

The Courts

The court structure of Virginia immediately following Independence in 1776 was a slight modification of the former colonial system. The first level of courts included the county courts and the borough (or corporation or hustings) courts staffed respectively by the justices of the peace and the mayor, recorder, and aldermen. Above these courts were the General Court, the High Court of Chancery, and the Court of Admiralty; these courts had both appellate and original jurisdiction. The highest court in Virginia was the Court of Appeals, which was created to take the place of the Privy Council in London. The judges of the General Court, the High Court of Chancery, and the Court of Admiralty also sat together as the Court of Appeals.36

In 1788, the appellate courts were reorganized. The Court of Admiralty was abolished when its jurisdiction was transferred to the new federal courts upon the ratification of the Constitution of the United States. The Court of Appeals was reorganized so that its judges did not sit in any other court, and its jurisdiction over criminal appeals was taken away. The General Court thus became the court of last resort in

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criminal matters. A new level of courts was erected between the county and borough courts and the General Court; these were called district courts, and they were staffed by two judges of the General Court, who went out from Richmond on circuit. Appeals lay from the county and borough courts to the district courts and from them to the General Court in Richmond.37