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BOOK REVIEWS

REPORTING ON A REPORTER

VIRGINIA CIRCUIT COURT OPINIONS. Edited by W. Hamilton Bryson. Richmond, Va.: The Dietz Press, Inc., 1985. \$38.65 per volume.

*Reviewed by T. S. Ellis, III**

Jesse Root. Nathaniel Chipman. George Caines. Ephraim Kirby. Most lawyers will not recognize these names. More familiar, perhaps, are Alexander Dallas, Henry Wheaton, and Richard Peters. In fact, all belong to the same distinguished group: compilers and reporters of America's early judicial decisions.¹ With the publication of Volumes One and Two of the Virginia Circuit Court Opinions (hereinafter "*Opinions*"), Professor Hamilton Bryson bids fair to join this distinguished group.²

Accurate, readily available reports of judicial decisions are vital to an effective common law system. The genius of this system is its ability to achieve and sustain a happy marriage between a fidelity

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1. Jesse Root (1736-1822) was a Connecticut lawyer who, in 1798, became Chief Justice of that state's Supreme Court of Errors and published his *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS FROM JULY, 1769 TO JUNE, 1793*.

Nathaniel Chipman (1752-1843) was the first lawyer to serve as a justice of Vermont's Supreme Court and in 1793 published his *REPORTS & DISSERTATIONS*, consisting chiefly of reports of cases before that court.

George Caines (1771-1825) was New York's first official reporter and was responsible for the publication of several compilations of reports, including *NEW YORK TERM REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THAT STATE (1800-1806)*.

Ephraim Kirby (1757-1804) published the first complete volume of law reports in the United States. See *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1785 TO MAY, 1788 WITH SOME DETERMINATIONS (1798)*.

Messrs. Dallas, Wheaton and Peters are more familiar to lawyers because their names, along with those of Cranch, Howard and Black, are inscribed on the spines of the *United States Supreme Court Reports* for the period 1790 to 1874. William T. Otto's name appears on the spines of volumes 91 U.S. to 107 U.S., covering the period from the October term 1874 through the October term 1882. Thereafter the Supreme Court reports ceased to bear the names of the reporters.

2. Hamilton Bryson is a Professor of Law at the University of Richmond, T.C. Williams School of Law. Volume Three is expected to be published by the end of 1985.

to the past, through the doctrine of *stare decisis*, and a dynamism necessary to accommodate the present and anticipate the future. Reports of judicial opinions are the life-blood of this genius. Legal scholars and practitioners have long recognized that publishing judicial opinions plays an important role in promoting uniformity, preventing arbitrariness, improving judicial decisions and guiding future conduct; all of which, taken together, improve the quality of justice. These goals (hereinafter "the reporter's goals") could not be achieved without reports of judicial decisions; indeed, without them there could be no common law.³ This review, therefore, considers the extent to which Professor Bryson's *Opinions* furthers the reporter's goals. Let us begin by describing the contents of *Opinions*.

Opinions currently consists of two volumes. They contain 234 circuit court opinions—114 in Volume One and 120 in Volume Two. Thirty-two different courts are represented, but the geographical distribution is skewed. Inescapably perhaps, over seventy percent of the opinions are from courts in the Richmond area.⁴ This geographical imbalance, we are told, is due to proximity or

3. For an early discussion of the importance of reporting judicial decisions in achieving the reporter's goals, see Paine, *Reports of Cases Argued and Determined in the Circuit Court of the United States, for the Second Circuit, Comprising the Districts of New York, Connecticut and Vermont*, 27 N. AM. REV. 167, 179-81 (1828); Ricker, *Reports of Cases Argued and Determined in the Superior Judicial Court of Massachusetts*, 20 N. AM. REV. 180, 180-91 (1825).

William Cranch, an early U.S. Supreme Court reporter, used the prefaces to his reports to acknowledge the importance of reporting decisions. My favorite appears in his first volume. There, after noting that law reports eliminated uncertainty and promoted uniformity, Mr. Cranch shined a bright light on the role of law reports in limiting judicial power:

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed

5 U.S. (1 Cranch) at iii-iv (1801).

4. The geographical distribution is as follows:

“physical convenience . . . to the reporter.”⁵ It is also doubtless true that the types of cases likely to prompt written opinions—ones that are large, complex or address novel issues—find their way more often into the circuit courts of larger cities.⁶ Nonetheless, Professor Bryson is correct to seek greater geographic diversity, for judges of exceptional ability and cases of substantial interest and complexity can be found throughout Virginia.

Professor Bryson has been somewhat more successful in achieving an appropriate measure of substantive diversity. Included in the two volumes are decisions on contracts, personal injury, medical malpractice, procedure, worker’s compensation, discovery, real property and more. The criteria he used in selecting opinions were essentially as follows:

- (1) opinions that furnish authority where none now exists;
- (2) opinions on discovery and civil procedure points;
- (3) opinions on the Commercial Code; and

Volume 1:	<u>No.</u> <u>Opinions</u>		<u>No.</u> <u>Opinions</u>
Fairfax County	4	Hanover County	1
Princess Anne County	1	Prince William County	1
City of Richmond	68	Pittsylvania County	1
Henrico County	16	Rockingham County	1
Pulaski County	2	Warren County	1
City of Roanoke	9	Shenandoah County	2
Accomack County	1	Montgomery County	1
Campbell County	1	City of Virginia Beach	2
Henry County	1	City of Charlottesville	1
Volume 2:	<u>No.</u> <u>Opinions</u>		<u>No.</u> <u>Opinions</u>
City of Roanoke	5	Campbell County	3
City of Richmond	61	Warren County	2
Henrico County	24	Wise County	1
Nelson County	2	City of Winchester	4
Bedford County	3	City of South Norfolk	1
City of Lynchburg	3	Rappahannock County	1
City of Alexandria	2	Clarke County	1
City of Virginia Beach	1	Frederick County	1
Russell County	2	Arlington County	1
Amherst County	1	Shenandoah County	1

5. 1 Va. Cir. preface (1985).

6. But noticeably absent from either volume is any appreciable number of opinions from urban areas other than Richmond, such as Norfolk, Alexandria, Arlington and Fairfax, or indeed even Chesterfield County.

(4) opinions that provide more recent authority on points covered only in nineteenth century Virginia Supreme Court cases.⁷

Professor Bryson tells us that within these four categories he sought opinions that emphasize legal rather than factual analysis, yet contain sufficient facts to be comprehensible without resorting to other sources.

It is worth dwelling a bit on Professor Bryson's four criteria as they are at the heart of a reporter's task. The merit of the selection criteria and the extent to which they are observed determine whether, and in what measure, *Opinions* furthers the reporter's goals, listed previously, of promoting uniformity, preventing arbitrariness, providing guidance for future conduct and improving the quality of judicial decisions.

The first of the selection criteria is undeniably correct and almost certainly the most important. The law's expanse is too vast and human conduct too infinitely diverse to permit the Virginia Supreme Court and the intermediate appellate court to elucidate all areas of the law. Lacunae exist. They always will. Circuit courts, however, not infrequently decide issues within these lacunae. Publication of these decisions helps minimize uncertainty in the law, provides some guidance for the future and serves other judges as a check and a beacon.⁸ Uniformity in the application of law is also promoted. A published circuit court opinion on a novel point is available for the next circuit judge to follow or depart from in an opinion, preferably written, which gives cogent reasons for doing so. Thus it is apparent, as the early reporters recognized, that reporting decisions on points not previously settled is at the center of a reporter's task; it is, without exaggeration, his principal *raison d'etre*.

Not surprisingly, careful scrutiny of the second and third selection criteria reveals that these are actually subsets or specific applications of the first criterion. Professor Bryson correctly recog-

7. 1 Va. Cir. preface (1985).

8. For a particularly picturesque metaphor on this point, we are indebted to a British commentator who wrote that judges in a common law system proceed "from case to case, like the ancient Mediterranean marines, hugging the coast from point to point and avoiding the dangers of the open sea of system and science." Wright, *The Study of Law*, 54 LAW Q. REV. 185, 186 (1938). Dr. Johnson, typically more direct, wrote that "the more precedents there are, the less occasion there is for law; that is to say, the less occasion there is for investigating principles." J. BOSWELL, 1 THE LIFE OF SAMUEL JOHNSON 615 (Everyman's ed. 1906).

nizes that some areas of procedure and discovery rarely rise to the appellate level.⁹ In this respect, then, his *Opinions* serve, consistent with the first criterion, much like a Virginia version of the *Federal Rules Decisions* or *Federal Supplement* reporters.¹⁰

The focus on Commercial Code opinions fits within the first criterion for a slightly different reason. While there are no special obstacles in the way of appealing Commercial Code cases, the Code is an extensive statute, a vast legal landscape, of relatively recent vintage. The legal lacunae, at least in Virginia, are large and numerous. Put another way, the Commercial Code is fertile ground for finding circuit court opinions on points not yet addressed by the supreme court. Thus, Professor Bryson's focus on the Commercial Code is simply a specific application of his first criterion. Other similarly appropriate specific applications come to mind: opinions dealing with the Virginia Tort Claims Act,¹¹ the Equitable Distribution of Marital Property Act,¹² the statute concerning the effect of releases and covenants not to sue,¹³ and the Virginia Stock Corporation Act.¹⁴ Professor Bryson, faithful to his first selection criterion, will doubtless cast his net in these directions as he prepares future volumes.¹⁵

Use of the first selection criterion (and its subsets) has another,

9. See 1 Va. Cir. preface (1985). Professor Bryson also labels errors in discovery and procedure as "harmless." Practitioners wounded in battle by such errors might take issue with this label. But all would agree that many issues in these areas are never appealed for a variety of reasons (e.g., appeal of discovery production order might require counsel to risk contempt of court) and all would further agree that reporting decisions on these issues will, in due course, help reduce errors.

10. It is perhaps worth recalling here an often-overlooked fact: not all federal district and circuit court opinions are published. This practice of publishing selected opinions has provoked controversy, much of it predictably focused on the selection criteria. See Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977).

11. VA. CODE ANN. §§ 8.01-195.1 to -195.8 (Repl. Vol. 1984 & Supp. 1985).

12. *Id.* § 20-107.3 (Repl. Vol. 1983 & Supp. 1985).

13. *Id.* § 8.01-35.1 (Repl. Vol. 1984 & Supp. 1985).

14. *Id.* tit. 13.1, chs. 9-11 (Interim Supp. 1985).

15. Given the aim of the first selection criterion, Professor Bryson might also cast his net in the direction of family law. Judges of the juvenile and domestic relations courts have an expansive and important original jurisdiction, many aspects of which have never received supreme court review. Thus, not infrequently they must wrestle with novel and difficult legal issues. While they do not routinely write opinions, they occasionally do so. Some of these may merit inclusion in the *Opinions*, as indeed some are occasionally cited by the Virginia Supreme Court. See, e.g., *Stephens v. Stephens*, 229 Va. ___, ___, 1 VLR 1517, 1520 (1985).

more subtle benefit that merits mention. Federal courts in diversity suits must, in the absence of controlling state precedent, speculate as to what result the highest state court would reach.¹⁶ While circuit court opinions are not controlling in these circumstances, federal courts sensitive to the demands of federalism properly regard them as persuasive.¹⁷ By collecting and reporting circuit court opinions on issues not covered by the supreme court, Professor Bryson gives federalism a valuable assist.¹⁸

So much then for the first three selection criteria. They deserve primary emphasis in this context. What then of the final criterion—the selection of recent opinions on issues covered only by nineteenth century Virginia Supreme Court authority? It is a valid criterion for if such circuit court opinions exist, they serve notice that the rule or principle, though old, still has vitality. But this selection criterion, as Professor Bryson apparently recognizes, is of only secondary importance. Furthermore, when utilized it should be joined with its mate—circuit court opinions which reluctantly follow, but are critical of, aged authority. Publication of these opinions would alert the supreme court to a potential need for re-examination of an issue, thereby also allowing circuit courts to play an appropriately significant role in the dynamics of common law development.

Professor Bryson's selection criteria are, if followed, well suited to further the reporter's goals. By and large, I think he has suc-

16. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

17. See, e.g., *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985) (approval of district court's reliance in diversity case on Virginia circuit court opinions); *Harris v. Lukhard*, 733 F.2d 1075 (4th Cir. 1984) (in absence of controlling authority, federal court in diversity case should afford weight to state lower court's interpretation of statute); see also 19 C. WRIGHT, A. MILLER & F. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4507 (1982).

18. Of course, Virginia circuit judges may also miss the mark when they are required to speculate, and this possibility suggests a way in which Professor Bryson can enhance the utility of future volumes of *Opinions*. Since there is no *Shepards* for these circuit court opinions, Professor Bryson should undertake to note in future volumes which, if any, of the previously published opinions have been explicitly or implicitly overruled, modified or criticized.

Another important service Professor Bryson could render to readers of future volumes is the identification and perhaps discussion of conflicting opinions. Compare, e.g., *McIntyre v. McIntyre*, 1 Va. Cir. 175 (Cir. Ct. of Henrico County 1975) (fifth amendment refusal to answer deposition question seeking adultery admission treated as admission) with *Gantt v. Gantt*, 1 Va. Cir. 266 (Cir. Ct. of City of Richmond 1982) (fifth amendment refusal to answer interrogatory seeking admission of adultery deemed a denial).

ceeded. It is no easy task. Virginia's judges and lawyers would materially aid Professor Bryson's important work if, as he requests,¹⁹ they send him opinions. And they should send him *all* opinions from throughout the Commonwealth, allowing *him* to make the sometimes subtle publication selection.²⁰ In making these selection decisions, too stringent an application of the selection criteria should be avoided. Close cases should be decided in favor of publication. Indeed, I would urge his including some opinions not within the selection criteria if they are particularly well-reasoned, well written or otherwise exemplary. This, one hopes, would have the salutary effect of encouraging circuit judges to issue written opinions more often.²¹ Written opinions certainly promote justice and the almost equally important appearance of justice.²² A judge who submits his or her decisional process to the discipline and rigor of a writing illuminates for himself, as importantly as for others, the sometimes obscure intellectual path to decision. A written opinion is tangible, accountable evidence to litigants and the public that the judge has engaged, or not engaged, the issues. Professor Bryson's effort, if it encourages written opinions, will have served the significant goal of judicial accountability.²³

In summary, Professor Bryson has commenced a potentially important venture. Only time, future volumes, and the reaction of the bench and bar can determine whether he will succeed. Let us hope he does, for then we shall all benefit.

19. See 1 Va. Cir. preface (1985).

20. For a persuasive statement that the decision to publish should be unfettered and independent of the bench, see *Garfield v. Palmieri*, 193 F. Supp. 137, 143 (S.D.N.Y. 1961). The potential for publication discourages judges from producing opinions which are poorly written or incorrectly reasoned.

21. An important constraint on a circuit judge's opinion-writing activity is the absence, in some cases, of a full-time secretary and, in all cases, the absence of any law clerks. The Judicial Council of Virginia and the Tides Inn Conference of the Virginia Bar Association have endorsed state funding for both secretaries and law clerks. Those in sympathy with the goals of Professor Bryson's *Opinions* must hope this recommendation finds favor.

22. The importance of appearances is too often underestimated. Lord Devlin, the British jurist, put it well when he noted: "[T]he judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all." P. DEVLIN, *THE JUDGE* 3 (1981).

23. *Opinions* and other reporters can aid in this process by focusing critical attention on appropriate circuit court opinions. Perhaps the Virginia Supreme Court, too, might more often find appropriate occasions to do the same. In many circumstances, a written opinion from the circuit court materially aids appellate review. See *Taylor v. McKeithen*, 407 U.S. 191 (1972) (fifth circuit decision without opinion vacated and remanded because of uninformative record).

HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA. By George P. Smith, Jr. Charlottesville, Va.: The Michie Company, 1985. 574 pages, \$60.00.

*Reviewed by Dennis I. Belcher**

An estate planning and estate administration practice involves many substantive areas of law. In addition to having to be familiar with the rules concerning wills, the estate planner and estate administrator must be familiar with the law governing federal income taxation, estate and gift taxation, real property, corporations, and fiduciary litigation. Although there are many treatises covering the federal income, estate and gift tax rules applicable to estate planning and estate administration, this area of the law is dependent in great part upon Virginia law.

In Virginia, there has been no comprehensive, up-to-date treatise that is authoritative in the area of wills and estate administration. Lamb's *Virginia Probate Practice* was published almost twenty years ago and is generally considered an excellent form book. The recent publication by Messrs. Dorset and Brown, the *Virginia Probate Handbook* is also an excellent form book, but is written in general terms and is not intended to be helpful where detailed research is required. The most authoritative treatise in the area of Virginia wills and estate administration has been *Harrison on Wills and Administration*. Unfortunately, the last edition was written in 1960, and much has changed in the last twenty-five years. Fortunately for Virginia practitioners, the first volume of *Harrison* has now been updated.

The first edition of *Harrison on Wills and Administration* was written by the Honorable T.W. Harrison, a circuit court judge in Virginia for many years. The author of the second edition is George P. Smith, Jr., who proved to be a worthy substitute to Judge Harrison. The first and second editions of *Harrison* contained three volumes. This third edition will be expanded to four volumes.

Volume One consists of fifteen chapters and covers intestate suc-

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cession, dower and curtesy, the substantive areas of wills, and the first steps in probate proceedings. Volume Two consists of Chapters 16-25 and covers will construction, creditors' rights, and the rights and duties of a personal representative. Volume Three consists of Chapters 26-32 and covers accounting and distribution and other related estate administration matters. Volume Four will contain forms, a table of cases, a table of constitutions and statutes, and the index.

Overall, Volume One maintains the integrity of the earlier editions of *Harrison on Wills and Administration*. The strengths of *Harrison* are continued in this third edition of Volume One. It is comprehensive, easy to read, accurate, and authoritative. Numerous cases are cited that can be located in no other one treatise. This reviewer also found that recent changes in the law appeared to have been covered.

Although few in number, this reviewer did find some weaknesses in Volume One. It would be helpful if each volume had its own separate index. Also, it does not appear that there have been significant deletions of discussion of old law. Discussion of old law is helpful in understanding the area of wills, but the readability of the treatise would have been better served by old law being included in footnotes.

Overall, this reviewer found the third edition of Volume One of *Harrison on Wills and Administration* to be a continuation of the authoritative nature of the earlier editions. This reviewer is confident the author will be complimented and thanked by Virginia practitioners for many years to come.

In his preface, the author repeated a quotation of Judge Brockenbrough Lamb in Judge Lamb's preface to *Virginia Probate Practice*: "And if there is any reason at all for writing, this can only be the hope that somebody may read what is written." This reviewer is confident that what Mr. Smith has written will be read and will be very helpful to the reader.