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Virginia Law Reports

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Virginia Law Reports

by W. H. BRYSON*

Erwin Surrency, a professional law librarian, during a long career as such, was a pioneer in the field of American legal bibliography. His work is the foundation upon which later work has been and will be based. The present essay is an acknowledgment of this beacon for further bibliographical research into law books, and it is hoped that many others will follow in Erwin's footsteps and further elucidate this fascinating field of scholarship.

I

INTRODUCTION

So I decided that the time had come for a second edition of Sir John Randolph's¹ reports of cases in the General Court of Virginia. Randolph's reports cover the period from October 1729 to April 1735. The General Court of Virginia, which sat in Williamsburg, was a collegial court composed primarily of lay magistrates, who did not give extensive reasons for their judgments, and, therefore, these

* Blackstone Professor of Law, University of Richmond School of Law. I would like to thank Leah Stearns and Anna Berkes of the Thomas Jefferson Foundation for their kind and knowledgeable assistance and for permission to publish the title page of their copy of volume four of Munford's Reports (©Thomas Jefferson Foundation at Monticello), Jamison Davis of the Virginia Historical Society and Cecelia Brown, Loren Moulds, and Kristin Glover of the Law School Library of the University of Virginia for their many courtesies and for permission to publish the other three illustrations that accompany this essay, which are from books in their collection.

¹ For Sir John Randolph (1693-1737), see generally R. E. Nance, *Sir John Randolph*, in W. H. BRYSON, *THE VIRGINIA LAW REPORTERS BEFORE 1880*, at 68-70 (1977) [hereinafter BRYSON BEFORE 1880]; G. Morgan, *Randolph, Sir John*, 46 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 9-10 (2004); G. S. Cowden, *The Randolphs of Turkey Island* (unpublished Ph. D. dissertation, College of William and Mary, 1977) (on file at the Virginia Historical Society, Richmond, Va.).

reports are primarily of the arguments of counsel, which are quite elaborate and well reported. These are the oldest known American law reports; they were first edited in 1909 by Robert T. Barton.² Barton³ based his edition on a manuscript copy that is in the Virginia Historical Society.⁴ I made a new edition based on this manuscript. Barton also used another very incomplete copy in the Library of Congress. This, of course, I also had to consult for my edition.

The larger manuscript in the Virginia Historical Society I found there, exactly where Barton had left it. But when I went looking for the copy in the Library of Congress, life became more complicated than I had anticipated. There was no mention of it whatsoever in the on-line catalogue of the Library of Congress. Therefore, I went to the inquiries page on their web site and requested a call number, giving a detailed description of the manuscript as given by Barton, who saw it last, a little over a hundred years ago. In due course, I received a very courteous response saying that the manuscript could not be located in the general special collections section of the Library of Congress; however, my query was being sent to the curator of the Jefferson collection, where many Virginia items could be found. I was dubious as to this suggestion, as the desired manuscript had no known Jefferson connection and was not mentioned in E. M. Sowerby's monumental five volume catalogue of Jefferson's books.⁵

In due course, the curator of this department responded, again negatively, but saying that my request was being forwarded on to the special collections librarian in the law library of the Library of Congress. Shortly afterwards, I got a response from Dr. Nathan Dorn of that branch of the Library of Congress saying that yes, indeed, he knew what I was looking for and I could come to Washington whenever was convenient to me to consult them. "Them?" I thought to

² VIRGINIA COLONIAL DECISIONS: THE REPORTS BY SIR JOHN RANDOLPH AND BY EDWARD BARADALL OF DECISIONS OF THE GENERAL COURT OF VIRGINIA, 1728-1741 (R. T. Barton ed. 1909, reprint 2005) [hereinafter VCD].

³ Robert Thomas Barton (1842-1917) was a scholarly lawyer from Winchester, Virginia. W. K. Winfree, *Barton, Robert Thomas*, 1 DICTIONARY OF VIRGINIA BIOGRAPHY 376 (1998).

⁴ Virginia Historical Society, Mss4 V81935a1, at 114-221.

⁵ E. M. SOWERBY, CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON (1952, reprint 1983).

myself. When I got to the second floor of the Madison Building in Washington, D.C., I was shown the incomplete copy of Randolph's reports that Barton had used⁶ and also a copy which was more complete, as it turned out, than the copy in the Virginia Historical Society. This second manuscript had, up to May 2012, been known but to God and to Dr. Dorn, having never been catalogued or described in print anywhere. This lucky find resulted in my being able to add three cases to my second edition of this collection of law reports.

If this manuscript of law reports was lurking unknown to modern legal historians for so long, then, perhaps, there are others. The following list describes Virginia manuscript law reports that are known to have been made but that have disappeared in the course of time.⁷

II LOST REPORTS

The original now lost copy of Sir John Randolph's reports contained more cases than any of the three known copies, which are mentioned above. We know this because Edward Barradall's reports of cases in the General Court of Virginia⁸ refer to several cases in Randolph's reports, giving case numbers. They are *McCarty v. Fitzhugh*, No. 42, which is Case No. 42 of the second edition, at 2 VCD B35; *Doe, ex dem. Myhil v. Myhil*, No. 52, at 2 VCD B166; *Legan, ex dem. Chew v. Stevens*, No. 53, at 2 VCD B174; *Morris v. Chamberlayne*, No. 56, at 2 VCD B161; and *Legan v. Newton*, No. 57, at 2 VCD B180. Thus, the copy of Sir John Randolph's reports that was known to Edward Barradall had at least fifty-seven cases, but only forty-four cases are in the surviving manuscripts.

Randolph's original manuscript was seen by Thomas Jefferson (1743-1826) when it was in the possession of John Randolph, Jr.,

⁶ This manuscript is listed in 224 CATALOGUE OF BOOKS IN THE LAW DEPARTMENT OF THE LIBRARY OF CONGRESS 79 (Dec. 1849).

⁷ Much of what follows is taken from MISCELLANEOUS VIRGINIA LAW REPORTS 1784-1809 BEING THE REPORTS OF CHARLES LEE, JOHN BROWN, DAVID WATSON, AND DAVID YANCEY (W. H. Bryson ed. 1992) [hereinafter BRYSON REPORTS] and *Reports of Cases, in VIRGINIA LAW BOOKS* (W.H. Bryson ed. 2000) [hereinafter BRYSON BOOKS].

⁸ 2 VCD, *supra* note 2; for Edward Barradall (1704-1743), see B. Tartar, *Barradall, Edward*, 1 DICTIONARY OF VIRGINIA BIOGRAPHY 351-53 (1998); R. E. Nance, *Edward Barradall, in BRYSON BEFORE 1880, supra* note 1, at 71-74.

the son of Sir John Randolph.⁹ Randolph the younger was the last attorney general of colonial Virginia, and, while he held this office, lent Jefferson this manuscript as well as the manuscript reports of Edward Barradall and those of William Hopkins. One may speculate that these three now lost manuscripts descended to Edmund Randolph (1753-1813),¹⁰ the son of John Randolph, Jr.

William Hopkins (d. 1734), who practiced law in the General Court of Virginia in the 1730s at the same time as Sir John Randolph and Edward Barradall, 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 John Randolph, Jr. 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.¹¹

John Randolph, Jr. (d. 1784)¹² made a set of law reports of cases in the General Court of Virginia in the 1760s and 1770s; there were two volumes. Several cases from them were cited in arguments before the Virginia Court of Appeals by Randolph's son, Edmund Randolph, who no doubt inherited them from his father. Unfortunately his manuscript books have been lost. However, there are later citations to these books. *Steger v. Moseley* (1773), "October, 1773, M.S. Rep. by J. Randolph, 2 vol. page 232," was cited in argument by Edmund Randolph¹³ and by Judges Spencer Roane and Edmund

⁹ T. JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730 TO 1740 AND FROM 1766 TO 1772, at preface (1829, reprint 1981).

¹⁰ Edmund Randolph had a son, Peyton Randolph (1779-1828), who was a very successful lawyer in Richmond and a law reporter. These manuscripts may have come to him. For Peyton Randolph, see R. G. Tavenner, *Peyton Randolph*, in BRYSON BEFORE 1880, *supra* note 1, at 47-48.

¹¹ 1 VCD 1, 12, 184; JEFFERSON, *supra* note 9; C. Robinson, *Of Lawyers in Virginia between 1704 and 1737*, 1 VA. L.J. 191, 193 (1877).

¹² John Randolph, Jr., was the last colonial Attorney General of Virginia; after he died in England in 1784 his body was returned to Virginia for burial in the crypt of the chapel of the College of William and Mary. Although he was a loyalist, his brother Peyton Randolph (1721-1775), also a lawyer, was the first President of the Continental Congress and his son Edmund Randolph (1753-1813) was the first Attorney General of the United States.

¹³ See generally J. J. REARDON, EDMUND RANDOLPH (1974).

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 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.¹⁴ Thus, the last known use of this manuscript was when Edmund cited from them in 1809.

John Brown (1750-1810), the clerk of the Court of Appeals of Virginia,¹⁵ also made law reports, some of which have been recently printed.¹⁶ However, at least two collections have been lost, a second volume, probably a short one, of cases in the Court of Appeals and another one of cases in the General Court of Virginia. On the front cover of the extant manuscript of cases in the Court of Appeals is written "No. 1" and "See page 18th, 2 Book, for entries of some notes of decisions prior to 1791—omitted to be entered first, the rough notes being mislaid." This second volume of Court of Appeals cases 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 is volume one. There is no known reference to it, but one may guess that Conway Robinson (1805-1884) and William Green (1806-1880) saw it; Robinson and Green were both very successful practicing lawyers of a scholarly bent. Also, they were both very interested in Virginia legal history.

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, probably a small one, was used by Conway Robinson in preparing a book which was published in 1832. Robinson cited from John Brown's lost volume of reports of cases in the

¹⁴ 13 Va. (3 Hen. & M.) 322 at 335-37, 362, 374-75, 384 (1809).

¹⁵ For John Brown, see W. H. Bryson, *Brown, John*, 3 AMERICAN NATIONAL BIOGRAPHY 689 (1999). Brown was in Paris from 1797 to 1798 on the XYZ Affair as the Secretary to John Marshall. 3 *The Papers of John Marshall* 101, 187, 509 (C. T. Cullen ed. 1979).

¹⁶ BRYSON REPORTS, *supra* note 7, at 25-65.

General Court the following cases: *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).¹⁷ Robinson mentioned this book to Robert T. Barton in a letter dated December 20, 1875.¹⁸

John Marshall (1755-1835) also reported cases when he was in practice in Richmond. Although Marshall's manuscript reports have been lost, fifteen of his cases dating from 1790 were printed in Call's *Reports*, volume 3, pages 506-99; Marshall's report of *Turberville v. Self*, 8 Va. (4 Call) 580, 590 (1795), was also used by Daniel Call (1765-1840).¹⁹ This lost manuscript was last seen by Call,²⁰ his brother-in-law, who copied a case into volume four of his own *Reports*, which was published in 1833.

These lost manuscript books report cases from the eighteenth century and from the first decade of the next. There are not many law reports from this time in American legal history, and their discovery and publication would be a useful and welcome addition to legal literature. To know that they were made is the first step in their discovery and dissemination.

III PRINTED REPORTS

Not only are manuscripts of Virginia law reports in need of further attention, but so also are the printed law reports. The bibliographical attention bestowed on the works of literature could be emulated by lovers of law books with perhaps surprising results. No one has yet lavished such attention on the printed Virginia law books, but some interesting knowledge of legal publishing can perhaps be discovered by a careful bibliographical study of these books. Two examples come to mind, both the results of pure serendipity.

¹⁷ 1 C. ROBINSON, *PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA* 390, 592, 535-536, 657, 551, 616 (1832).

¹⁸ R. T. BARTON, *PRACTICE IN THE COURTS OF LAW IN CIVIL CASES* vi (1st ed. 1877).

¹⁹ 5 *THE PAPERS OF JOHN MARSHALL* 473-74 (C. F. Hobson ed. 1987); J. W. WALLACE, *THE REPORTERS* 590 n.3 (4th ed. 1882).

²⁰ For Daniel Call, see E. L. Shepard, *Call, Daniel*, 2 *DICTIONARY OF VIRGINIA BIOGRAPHY* 513-15 (2001).

Several years ago, John R. Barden discovered an unknown edition of the fourth volume of William Munford's Virginia reports. This discovery was made while Dr. Barden was cataloging the library at Thomas Jefferson's home, Monticello, near Charlottesville. Fortunately, Barden was trained as a librarian as well as a legal historian, and he recognized that what he found at Monticello was different from all the other copies of this book that he had seen. The first edition can be described as an octavo in fours, [2], [iii]-xi, [1], [1]-592 pp. The Index begins on p. [549]. Barden describes the second edition as follows:

Octavo in fours; [2], [iii]-xiii, [3], [1]-624 pp. Title page (with copyright notice on verso), table of cases reported, table of cases cited (American), table of cases cited (British), text (cases decided from March 1813 through March 1815), index. Even though the title page information has not changed, this is clearly a reprint of the original edition. The pagination of the front matter and the index varies, and the errata have been incorporated into the text.

The second edition has been entirely reset, though retaining the original pagination of the cases. Note the different typefaces used on the title page, especially for the words "William Munford," where the serifs for the letters A, M, and N are quite different.

As to why there were two editions of this book in the same year in the same place is a matter of speculation at this stage of investigation. It is my theory that the first printing was completely sold out very quickly, and a second printing was called for. The reason for this popularity is easy to guess. This volume of Virginia reports contains the response of the Court of Appeals of Virginia to John Marshall's opinion in *Fairfax's Devisee v. Hunter's Lessee*, in which the Supreme Court of the United States reversed the Court of Appeals of Virginia and remanded the case for further proceedings.²¹ As is well known, Judge Spencer Roane (1762-1822) of Virginia responded with a defiance of the federal court, and his opinion was first printed in volume four of Munford's reports. Munford knew very well the importance of this opinion, and he published it at page one, out of chronological order. This is recognized by Munford in a

²¹ *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munford) 218 (1810), *rev'd sub nom. Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), *on remand sub nom. Hunter v. Martin*, 18 Va. (4 Munford) 1 (1813), *rev'd sub nom. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheaton) 304 (1816); note also *Marshall v. Conrad*, 9 Va. (5 Call) 364 (1805).

footnote at the beginning of the case. This litigation, of course, established the supremacy of the federal judiciary over the state courts, and it is one of the leading cases in American constitutional history. Thus, the book was a best-seller and had to be reprinted shortly after its first appearance in 1817.²²

The other curiosity of printed Virginia law reports is a second edition of Thomas Jefferson's *Reports of Cases Determined in the General Court of Virginia*, which was first published in 1829 by Jefferson's grandson and executor, Thomas Jefferson Randolph (1792-1875). In preparing my second edition of Sir John Randolph's General Court Cases, of which four cases were copied by Jefferson, I came across a copy with exactly the same wording and date as the title page of the first edition but with quite different type used. Also, in the later edition, there is a period instead of a colon after the word "Charlottesville" and the comma after the word "Carr" is omitted. This second edition is a faithful reproduction of the first, the pagination being exactly the same. However, the typeface is more modern, and the paper is different. There is a copy of the reproduction in the University of Virginia Law Library. This book has a book-seller's label from J. W. Randolph and Co. at the top left-hand corner of the front paste-down. Joseph Williamson Randolph (1815-1893) had a very prosperous business in Richmond as a book publisher, book seller, and book binder. He was also an avid bibliophile, and he may well have published this book. The argument against this proposed attribution is that J. W. Randolph published under his own imprint new editions of other Virginia law reports, i.e., those by George Wythe, by William Brockenbrough and Hugh Holmes, and by William Waller Hening and William Munford.²³ The newly identified edition was donated to the University of Virginia School of Law by Charles S. Hutzler (1912-1996), a Richmond lawyer.

The original manuscript of Jefferson's reports is in the Library of Congress. This manuscript contains four cases from the General Court of Virginia that were not included in the published *Reports*.

²² For further discussion of this matter, see F. T. Miller, *John Marshall Versus Spencer Roane: A Reevaluation of Martin v. Hunter's Lessee*, 96 VA. MAG. HIST. & BIO. 297 (1988).

²³ J. W. Randolph was a direct descendant of William Randolph (d. 1711). See generally R. F. Strohm, *J. W. Randolph*, in BRYSON BOOKS, *supra* note 7, at 547-56.

They are *Hunt v. Tucker's Ex'rs*; *The King v. Dugard*; *Wormeley v. Wormeley*; and *Blair v. Blair*.²⁴ The report of *Blair v. Blair* (1773) has been published with a scholarly introduction by Frank L. Dewey (1906-1995).²⁵ A new edition of Jefferson's reports including them all would be a welcome addition to the legal literature of the nation.

For that matter, modern scholarly editions of the other early Virginia law reports also would be useful. The historical context of the Virginia law reports of Bushrod Washington (1762-1829) and the others could shine further light on this very interesting period of American history.

IV CONCLUSION

A book is a receptacle of ideas. While it is only a physical thing, it contains intellectual things, and, thus, it is to be carefully preserved. When the book is lost, the ideas it preserves are lost with it. It is the responsibility of librarians to collect, organize, and preserve books, as Erwin Surrency did so well. But all too many librarians today are more concerned to throw away the books in their collections. This essay demonstrates the deep regret of legal scholars that has resulted from the failure to preserve some books of Virginia law reports, some very interesting books, that were part of the foundation of American legal history.

²⁴ F. L. DEWEY, THOMAS JEFFERSON, LAWYER 136-37 (1986).

²⁵ F. L. Dewey, *Thomas Jefferson and a Williamsburg Scandal: The Case of Blair v. Blair*, 89 VA. MAG. HIST. & BIO. 44 (1981).

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

—◆—
VOLUME IV.
—◆—

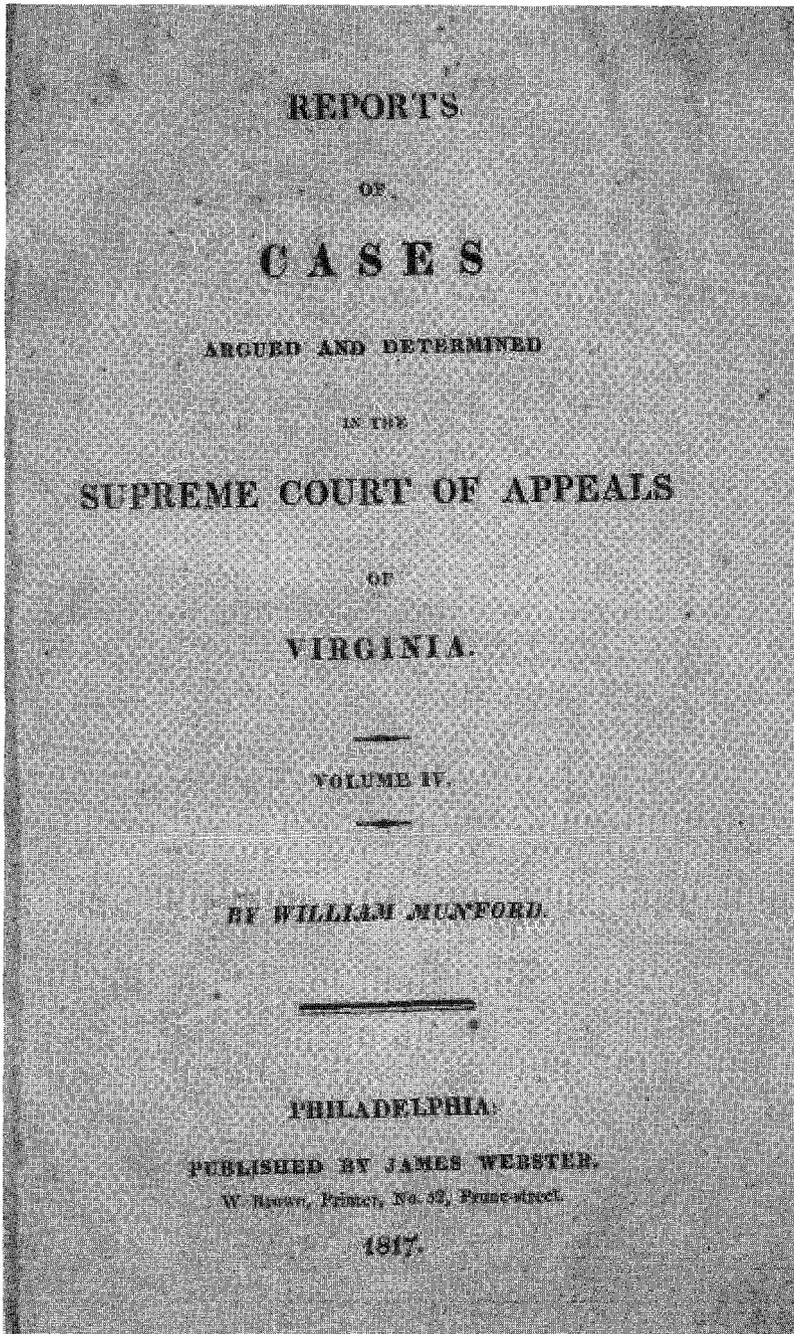
BY WILLIAM MUNFORD.

PHILADELPHIA:

PUBLISHED BY JAMES WEBSTER.

W. Brown, Printer, No. 52, Prune-street.

1817.



REPORTS OF CASES
DETERMINED IN THE
GENERAL COURT
OF
VIRGINIA.

FROM 1730, TO 1740;

AND

FROM 1760, TO 1772.

By THOMAS JEFFERSON.

CHARLOTTESVILLE.
PUBLISHED BY F. GARR AND CO.
1829.

REPORTS OF CASES

DETERMINED IN THE

GENERAL COURT

OF

VIRGINIA.

FROM 1710, TO 1740;

AND

FROM 1768, TO 1779.

By THOMAS JEFFERSON.

CHARLOTTESVILLE:
PUBLISHED BY F. CARE, AND CO.

1828.

***A Family Connection
of Some Virginia Lawyers***

William Randolph (d. 1711)

