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CHARLES F. HOBSON*

St. George Tucker led a productive life in law that began on his native island of Bermuda before the American Revolution and came to a close more than five decades later in his adopted state of Virginia.1 After an unhappy experience reading law with his uncle, Bermuda's attorney general, Tucker eventually made his way to Williamsburg, Virginia, in 1772 and entered The College of William and Mary, where for six months he took general academic courses in the schools of natural and moral philosophy.2 He then left the college and resumed the study of law with George Wythe, a practitioner and teacher of great reputation in the colony.3 Tucker gained admission to the bar of the county courts in 1774 and of the General Court in 1775, but the American War of Independence effectively postponed his law career for seven years.4 After the war, he commenced practicing in the county courts in the Petersburg vicinity and by the mid-1780s was attending the commonwealth's superior courts in Richmond.5 At this time he rapidly acquired a "considerable reputation, respected by all the court and bar,"6 which led to his election in 1788 as a judge of the General Court.7

* Editor, The Papers of John Marshall, and Resident Scholar, William and Mary School of Law.


2. CULLEN, TUCKER AND LAW, supra note 1, at 6-9.

3. Id. at 9.

4. Id. at 14-16, 22-24.

5. Id. at 24, 55.

6. Daniel Call, Biographical Sketch of the Judges of the Court of Appeals, 8 Va. (4 Call) at vii, xxvii (1833).

7. CULLEN, TUCKER AND LAW, supra note 1, at 63.
Tucker's judicial appointment coincided with a major reorganization of the commonwealth's courts, which, among other changes, divided the General Court's jurisdiction among eighteen (later nineteen) district courts dispersed throughout the commonwealth. From 1789 to 1803 Tucker attended the spring and fall terms of the district courts and also the twice yearly sessions of the General Court, at which the district judges sat en banc to consider certain cases. In 1804, he was promoted to the Virginia Court of Appeals, where he sat for seven years before resigning in 1811. After a brief retirement from law, Tucker accepted President Madison's appointment as judge of the U.S. District Court in 1813, in which capacity he also sat with Chief Justice John Marshall on the U.S. Circuit Court for Virginia. He tendered his resignation as a federal judge in 1825, two years before his death.

The years from 1789 to 1803 were the most active and prolific of Tucker's law career. In addition to holding court regularly in distant parts of the commonwealth, Tucker had a leading part on a commission to complete the revisal of its laws (a project begun a decade earlier under Thomas Jefferson's direction), which resulted in the publication of the commonwealth's first code in 1794. In the spring of 1790, he succeeded George Wythe as Professor of Law and Police at The College of William and Mary. During intervals between court terms, Tucker conducted his law course, which he organized around William Blackstone's *Commentaries on the Laws of England*. In his lectures, Professor Tucker took great care to point out the departures from English law that had taken place in Virginia and the United States, making it necessary to modify if not discard Blackstone at many points. He eventually incorporated the substance of his lectures in a series of notes and appendices to his own edition of Blackstone, published in 1803 as *Blackstone's Commentaries: With Notes of Reference, to the Constitution and*

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8. *Id.* at 72-73.
9. *Cullen, St. George Tucker, supra note 1*, at 685.
10. *Id.*
11. *Id.*
12. *See CULLEN, TUCKER AND LAW, supra note 1*, at 95-110.
13. *Id.* at 116-17; *Cullen, St. George Tucker, supra note 1*, at 661.
15. *See Cullen, St. George Tucker, supra note 1*, at 662-63.
Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. Each of the five volumes of this edition had appendices "containing short tracts upon such subjects as appeared necessary to form a connected view of the laws of Virginia as a member of the federal union." Tucker's Blackstone soon became the leading American law text of the day, enjoying wide circulation in Virginia and throughout the nation. His work was not only the first major treatise on American law but also the first commentary on the U.S. Constitution—indeed, it stood unsurpassed in these respects until the appearance of the great works of James Kent and Joseph Story in the 1820s and 1830s. Although it has long since ceased to be an essential text for aspiring law practitioners, Tucker's Blackstone continues to be held in the highest regard by legal and constitutional historians as an indispensable source for understanding American law and the Constitution in their formative era. The work has an abiding value and continues to be reprinted, most recently in 1996.

Tucker's renown in American law rests on the secure foundation of his edition of Blackstone. This Essay considers a less familiar but scarcely less imposing literary monument Tucker bequeathed to posterity: the vast corpus of law papers he generated as a working lawyer and judge from the 1780s to the 1820s. Tucker operated at every level of Virginia's court system, from county court lawyer to judge of the Court of Appeals, and spent the last dozen years of his career as a federal judge. His legal manuscripts include notes of arguments, opinions, correspondence, memoranda, pleadings, dockets, and numerous other papers relating to the cases he argued and heard in the various courts. The bulk of these papers survived the vicissitudes of time to find a permanent resting place as part of the magnificent Tucker-Coleman Papers in the Special Collections


17. Id. The edition contains an introduction by Paul Finkleman and David Cobin. The Lonang Institute has published an online version of the work. See Blackstone's Commentaries: With Notes of Reference (1803), http://www.lonang.com/exlibris/tucker/ (last visited Feb. 12, 2006).
of the Earl Gregg Swem Library at The College of William and Mary.

I. TUCKER’S MANUSCRIPT CASE REPORTS

The heart of Tucker’s law papers consists of three bound manuscript volumes of case reports, which he entitled Notes of Certain Cases in the General Court, District Courts, and Court of Appeals in Virginia, from the Year 1786 to 1811. In his “introduction” Tucker wrote: “These notes being many of them taken in Court have no other pretensions to accuracy, than so far as they contain my own opinion as delivered in the various Cases that have occurred in the Courts of which I was a Judge.” He went on to observe that he took his notes in small notebooks of about “half a Quire of paper.” Tucker’s notes eventually filled thirty-three notebooks totaling some sixteen hundred pages. He had them bound together in volumes, he said, in order to preserve them for his own use and that of his family. These three volumes contain reports of nearly eleven hundred cases. About six hundred of these were cases in the General Court and district courts heard between October 1786 and November 1803. Tucker recorded these reports in the first nine notebooks, and a part of the tenth, which compose most of the first volume. From the spring of 1804 until his resignation in April 1811, Tucker reported about five hundred cases in the Court of Appeals. These reports fill twenty-four notebooks that compose the second and third volumes.

The manuscript volumes had a use and circulation beyond Tucker and his immediate family, which included sons Henry St. George and Nathaniel Beverley, both of whom achieved prominence as lawyers and professors of law. Most notably, Daniel Call, the reporter of six volumes of Virginia cases, borrowed Tucker’s notes in 1825 for the purpose of filling in the gaps of unreported Court of

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19. Id. at intro.
20. Id.
21. Id.
Appeals cases since that court’s inception. The manuscript served as the principal source for the cases reported in Call’s fourth, fifth, and sixth volumes, published in 1833.22 As a lawyer, Call cited Tucker’s reports in cases he argued years before he used them for his own reporting project. Two criminal cases heard in the General Court, one in 1786 and the other in 1798, were reproduced directly from Tucker’s notes, without attribution, in the first volume of *Virginia Cases*, published in 1815.23 As late as 1869, a lawyer arguing in Virginia’s Supreme Court cited the source of a case report as “1 Tuck. (manuscript) Notes of Cases 23.”24 The same lawyer cited “1 Tuck. MSS. 388” in an article in the *American Law Review*.25

At some time in the nineteenth century, the volumes passed out of the Tucker family, only to be returned in 1880. An inscription on the flyleaf of the first volume reads: “Bequeathed by the late William Green to his brother James W. Green and by him presented to the Hon. J. Randolph Tucker. Oct. 21st 1880.”26 William Green was the lawyer who cited Tucker’s manuscript reports. Son of a judge on the Virginia Court of Appeals, Green achieved renown as an appellate advocate and author of scholarly legal articles.27 The annotations scattered throughout the Tucker volumes have been identified as being in Green’s distinctive hand.28 How long the volumes were in Green’s possession before his death is not known. They were given to Green by Judge William T. Joynes,29 who served on the Virginia Supreme Court from 1866 to 1873. How and when Joynes obtained the volumes is a mystery that has not been solved. After their return to the Tucker family in 1880, the volumes

22. Call dedicated his fourth volume to Tucker in the form of a letter written in 1827, shortly before Tucker’s death. Letter from Daniel Call to St. George Tucker (May 1, 1827), in 8 Va. (4 Call) dedication p. (1833).
26. 1 Tucker, Case Notes, supra note 18.
29. See Tucker, supra note 1, at 792.
evidently passed from one branch to another before they were donated to The College of William and Mary in 1938 by Mr. and Mrs. George P. Coleman. George P. Coleman was a descendant of Nathaniel Beverley Tucker, and J. Randolph Tucker was a son of Henry St. George Tucker.

For years, Tucker's volumes lay dormant in the Earl Gregg Swem Library, uncatalogued and virtually unknown to researchers. Not until the late 1960s were they, in effect, rediscovered, thanks to the probing investigations of a young graduate student, Charles T. Cullen, who was then writing a dissertation on Tucker. From his research, Cullen knew that Tucker had compiled case reports and that they had been bound together in manuscript volumes. His efforts to uncover them, including repeated inquiries to the Special Collections staff, only brought frustration. He even went to Lexington, Virginia, on the likely supposition that J. Randolph Tucker, a law professor at Washington and Lee, had given them to the university. Finally, back at Swem Library, staff member Margaret Cook asked Cullen to look at some dusty volumes she had come across among the uncatalogued papers. Cullen immediately recognized them and experienced the rare and sublime pleasure of knowing that a scholarly treasure, once despaired of as lost, had been found.

In taking notes of cases, St. George Tucker was by no means unusual among his contemporaries at the bar, at least those who practiced in the superior courts. Indeed, at a time when Virginia cases remained unreported and unpublished, lawyers and judges were their own reporters, jotting down the facts of the case, summarizing the arguments of counsel, and, most importantly, preserving a memorandum (or perhaps obtaining a copy) of the court's opinion. As Bushrod Washington noted in the preface to the first published volume of Virginia Court of Appeals cases, the reports were simply an extension of the notes kept for his personal

30. Cullen's 1971 Ph.D. dissertation was later published. See CULLEN, TUCKER AND LAW, supra note 1.

31. The author thanks Dr. Cullen for his recollections. A typescript of Tucker's manuscript volumes prepared under Cullen's direction was indispensable in preparing this Essay. Margaret Cook, recently retired as curator of manuscripts and rare books at the Earl Gregg Swem Library at The College of William and Mary, also provided valuable assistance.
use, "without any view to a publication." Until the reports began to be published, bar and bench cooperated with each other in circulating their notes, memoranda, and opinions. We know from citations in cases heard in the late eighteenth and early nineteenth centuries that lawyers relied on manuscript reports, including reports of cases in the colonial General Court. Most of these manuscripts have long since been lost or destroyed. No trace remains of what must have been a voluminous set of notes kept by John Marshall. The few surviving manuscript law reports of Virginia cases from this period, exclusive of Tucker's, have recently been published by W. Hamilton Bryson. The extraordinary feature of Tucker's reports, apart from the fact that they have survived, is the depth of detail in the reporting and the lengthy span of time embraced by the reports. In these respects, they far surpass those uncovered by Professor Bryson.

Along with the bound manuscript volumes of case reports, a vast quantity of loose papers relating to the cases is preserved in the Tucker collection. Much of this material has remained largely unstudied because the brief catalog descriptions fail to alert researchers to the treasure trove that lies within. For example, the catalog lists Tucker's docket books but provides no details about their contents. Ordinarily, court dockets, which provide a schedule of cases to be heard at a given term of a court, might not be of much interest. Tucker, however, used the blank sheets of his docket books to report cases, take notes of arguments, and draft opinions. The notes he made in his dockets were the raw material from which he fashioned the report he later entered in his notebook. The finished report often condensed or omitted what he had originally written

32. 1 Bushrod Washington, Reports of Cases Argued and Determined in the Court of Appeals of Virginia, at intro. (Richmond, Nicolson 1798). The earliest published Virginia reports were George Wythe's volume of cases in the High Court of Chancery (1798), followed by Washington's two volumes (1798, 1799) and Call's first three volumes of Court of Appeals cases (1801, 1802, 1805).

33. We know that Marshall compiled reports because Call borrowed fifteen of Marshall's cases and published them in the appendix to his third volume and published one other case in his fourth volume. Although Call did not identify Marshall by name as the source of these reports, Tucker cited "Marshall's reports 3: Call 556" in a note to one of his General Court cases. See 5 The Papers of John Marshall 454-55, 473-74 (Charles F. Hobson et al. eds., 1987) [hereinafter Marshall Papers].

34. See Miscellaneous Virginia Law Reports, supra note 23.
down. Although he took extensive notes of the lawyers' arguments in his dockets, Tucker typically entered only brief summaries of the arguments in his casebook if he noted them all. Occasionally, the casebook reports refer to the arguments "among my papers." A number of reports originally written on the dockets never made it into the casebook, including at least ten heard at the October 1788 term of the General Court. 35

For the years covering his service on the Court of Appeals, Tucker's casebook reports consist mainly of his opinions, most of which were later published in the reports of Daniel Call, William W. Hening, and Robert Munford. For each of his terms on that court there is also a set of loose papers, now carefully preserved in thirteen folders. Again, the terse catalog entries barely hint at the documentary richness of the collection. Just as he had done when sitting on the General Court, Tucker used his dockets to take notes of arguments in the Court of Appeals. He also used them to draft opinions, including some that were never recorded in his casebook or in the published reports. Indeed, preliminary investigation of Tucker's loose papers indicates that they contain interesting matter relating to Court of Appeals cases that has never been published.

Tucker did not, as was once thought, 36 cease note taking after resigning from the Court of Appeals in 1811. As a federal judge from 1813 to 1824, he compiled three additional notebooks of cases heard in the U.S. District Court and the U.S. Circuit Court. Unlike his Virginia Court of Appeals reports, Tucker's federal court reports have remained largely unexamined. Supplementing these reports, too, is a collection of loose papers—notes of arguments, memoranda, pleadings, petitions, and correspondence—that pertain to the cases. Preceding the reports is a memorandum book in which Tucker entered digests of the various laws concerning the federal district courts and alphabetically organized information on various topics connected with admiralty and prize law. In sum, Tucker's papers provide ample documentation of the workings of the lower federal

35. General Court docket (1788), in Box 66, Tucker-Coleman Papers (located at the Earl Gregg Swem Library at The College of William and Mary).

courts during his decade on the bench, a period in which those courts heard a number of important cases, many growing out of the War of 1812.

The balance of this Essay will deal with the first phase of Tucker's state judicial career—the years he sat on the General Court and rode circuit attending the district courts. Tucker's reports of cases in these courts are mostly unpublished. They open a rare window on what was happening at the trial and intermediate appellate levels, imparting a sense and flavor to the courts as they operated in the various districts, both near and remote from the capital at Richmond. Greatly enhancing their historical value is the illumination they cast on Virginia's post-Revolutionary efforts to establish a workable system of state superior courts operating alongside the older county court system dating from the colonial period.

II. COURT REFORM IN POST-REVOLUTIONARY VIRGINIA

Tucker's case reports begin at the time Virginia's first state court establishment, instituted during the Revolution, was undergoing reform. Until 1776, judicial administration in Virginia consisted of inferior county courts and one superior court, the General Court, all of which had legislative and executive functions as well. As courts of law, they decided a variety of causes—common law, equity, exchequer, and spiritual—that in England would have been heard in distinct courts for those purposes. The "gentlemen" justices who composed these courts—the great landowners and prominent men of affairs—were ill equipped to perform their diverse judicial duties, few of them possessing more than a veneer of legal learning. Even as late as the mid-nineteenth century, according to one commentator, there was "not one in fifty" county court judges who "pretended to any knowledge of the law." As for the colonial General Court, no
“legal attainments were required” for appointment to this body, which was first and foremost an executive council. Not surprisingly, legal proceedings were often irregular, with little attention paid to niceties of procedure, forms of action, pleading, or any technicalities that did not seem to go to the merits of a cause. Particularly neglected in Virginia was the science of pleading, the process of refining various claims and defenses into specific “issues” for decision by court or jury. Technical learning of this sort never took root because it was not essential to success at the bar. An advocate had to state his case with clear and simple reasoning that could be comprehended by lay judges who “distrust[ed] every argument which could not be understood without an effort.” Subtle points and fine distinctions were of little avail, and the prudent lawyer avoided them so as “not to discredit his case.”

The Virginia Constitution of 1776 laid the foundation of the first state court system by providing for the appointment of judges of appeals, common law, chancery, and admiralty. The General Assembly fleshed out the details in a series of enactments establishing the Court of Admiralty, the High Court of Chancery, the General Court, and the Court of Appeals. These superior courts were engrafted upon the existing system of inferior county and corporation courts; essentially, the new courts (excepting the admiralty court) replaced the colonial General Court, which had exercised both original and appellate jurisdiction and heard both common law and equity causes. The impetus for court reform began prior to the Revolution, and continued for more than a decade after Independence. Reformers desired a more efficient and professional system of justice appropriate to a republican

40. See id. at 55.
41. See id. at 54-55.
42. See id. at 54.
43. See id. at 54-55.
44. Id. at 55.
45. Id. at 54-55.
46. 5 MARSHALL PAPERS, supra note 33, at xxviii. A more detailed and general discussion of Virginia’s post-Revolutionary court system is provided id. at xxviii-xxxiii.
47. Id. at xxviii.
48. Id.
49. Id.
commonwealth. A staple of post-Revolutionary Virginia politics, court reform encountered difficulties because of resistance from interested parties and because improving the judicial organization conflicted with the ideal of republican frugality in public expenditure.

The new General Court succeeded to the common law jurisdiction of its colonial counterpart, having original jurisdiction where the debt or claim exceeded ten pounds, and appellate jurisdiction over the county and corporation courts. It was also a court of oyer and terminer for the trials of crimes and misdemeanors committed by free persons. As originally constituted, the General Court was composed of five judges, who were elected by joint ballot of both houses of the legislature and held office during good behavior. Until 1789, the General Court was by far the busiest of the commonwealth's superior courts. Tucker's practice during the two years he attended the superior courts was mostly confined to this court. He also made regular appearances in the Court of Admiralty, which had three judges and continued to sit in Williamsburg after the capital moved to Richmond in 1780. Although his reputation as a lawyer was rising, Tucker was not in practice long enough to acquire many clients in the High Court of Chancery or the Court of Appeals.

The Virginia legislature inadvertently created a situation that led to the collapse of the commonwealth's first judicial establishment by staffing the Court of Appeals with all of the superior court judges, not as a separate court. Members of the Court of Appeals held their commissions as judges of their respective courts rather than as judges of the Court of Appeals. This anomaly served as a

50. Id.
51. Id.
52. Id.
53. Id.
54. CULLEN, TUCKER AND LAW, supra note 1, at 68.
55. Id. at 55-70.
56. Id. at 56; 5 MARSHALL PAPERS, supra note 33, at xxix.
57. CULLEN, TUCKER AND LAW, supra note 1, at 72-75, 77-99.
58. The Court of Appeals was composed of the superior court judges in order of rank: the three chancellors, the five general court judges, and the three admiralty judges. 5 MARSHALL PAPERS, supra note 33, at xxx.
59. Id.
pretext for them to later claim that they “contracted no new obligations by becoming judges of the court of appeals,” that their services on that tribunal were “voluntary,” performed “with a view to relieve the state from the necessity of sustaining additional burthens in times of difficulty.” The crisis boiled over early in 1788 with the passage of the District Court Act. Pressure had been building since before the Revolution to improve the administration of justice at the local level. For many years, the county courts were inadequate, driving parties to the General Court in increasing numbers, if they could afford the trip to the capital. Tucker noted in 1787 that “it was computed that the suits then depending therein could not be tried in less than five years, and they still continued to accumulate.”

One proposed remedy was assize, or circuit courts, to try issues of fact made up in the General Court, to which the verdict would be returned and judgment entered. Proposed legislation was enacted on the third attempt in 1784, but it never took effect because of resistance from those who believed the plan was too complicated and inconvenient. Naturally, strong resistance came from the county court judges and lawyers. John Marshall, then in the legislature, commented:

Those Magistrates who are tenacious of authority will not assent to any thing which may diminish their ideal dignity & put into the hands of others a power which they will not exercise themselves. Such of the County Court lawyers too as are suspicious that they do not possess abilities or knowledge sufficient to enable them to stand before judges of law are

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60. Id. (quoting Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 138 n.*, 139-40 (1788)).
61. Id. at xxx-xxxii.
62. Id. at xxxi.
63. Id.
64. Id. (quoting St. George Tucker, Summary View of the Judicial Courts of the Commonwealth, and of the United States, in Virginia, in 3 TUCKER, BLACKSTONE’S COMMENTARIES, supra note 16, ed. app. at 11 [hereinafter Tucker, View of the Judicial Courts]).
65. Id.
66. Id.
opposed from motives of interest to any plan which may put the
distribution of justice into the hands of judges. 67

The Court of Appeals judges were also opposed to the assize plan
because they did not wish to ride circuit; because the Act was
suspended and ultimately repealed, the judges said nothing
"officially ... respecting it."

The District Court Act of January 1788 appeared to offer a more
eligible plan because it gave the district courts the power to decide
both law and fact. 69 They would have the full power of the General
Court in their respective districts. 70 The commonwealth was divided
into districts, to be attended by all the present superior court judges
and by four additional General Court judges appointed under the
Act. 71 Tucker was elected to one of the new judgeships created at
this time. 72 By requiring all the superior court judges—who
gether constituted the Court of Appeals—to attend the district
courts, the General Assembly reflected its unwillingness to incur
the expense of additional judges. 73 The legislature's frugality,
however, now drew forth an official protest from the judges of the
Court of Appeals. 74 In explaining their refusal to implement the Act,
they complained that it assigned new duties, beyond their commis-
sions, without a commensurate increase in pay, which undermined
the Virginia constitution's principle of an independent judiciary. 75

The upshot of this protest from the bench was the repeal of the
District Court Act and a complete overhaul of the commonwealth's
judicial structure, accomplished by three laws enacted in December
1788: a revised District Court Act establishing eighteen district
courts to be attended by ten General Court judges; an act creating
a separate Court of Appeals with five judges; and an act reducing

67. Id. (quoting Letter from John Marshall to Charles Simms (June 16, 1784), in 1
MARSHALL PAPERS, supra note 33, at 124).
68. Id. (quoting Cases of the Judges of the Court of Appeals, 8 Va. (4 Call) 135, 139
(1788)).
69. Id.
70. Id.
71. Id.
72. CULLEN, TUCKER AND LAW, supra note 1, at 63.
73. 5 MARSHALL PAPERS, supra note 33, at xxxi.
74. Id. at xxxi-xxxii.
75. Id. at xxxii.
the High Court of Chancery to one judge.76 This reorganization
necessitated just one additional judge to those appointed under the
preceding District Court Act; it was made possible by the transfer
to the General Court of three judges from the Court of Admiralty,
which soon ceased business because its jurisdiction was assumed
by newly established federal courts.77 These reforms established
the fundamental structure of Virginia’s court system, which with
successive modifications endured to the Civil War.78 The most
important change was decentralizing the common law jurisdiction
of the General Court into eighteen districts.79 As a concession to the
sensibilities of the county court establishment, the jurisdictional
amount for an original suit in the district courts was also raised to
thirty pounds (one hundred dollars).80 The district court judges were
commissioned as judges of the General Court, and a court of that
name continued to sit twice a year, mostly as a fiscal court, a court
to hear suits and motions against public debtors and collectors, and
to receive probate of wills.81 Cases in the district courts that raised
new or difficult questions of law could also be adjourned to the
General Court for decision.82 Writing in 1803, Tucker pronounced
himself generally satisfied with Virginia’s court system, which stood
“upon as respectable a footing ... as in any state in the Union, and
perhaps in any other country.”83 Clogged dockets continued to be a
problem, but these actually reflected the virtues of the system: “[i]n
Virginia the cheapness of the law is perhaps one great cause of the
multitude of suits, and the delays which attend their decision.”84

76. Id. (citing 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF
VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 733, 764, 766
(William Waller Hening ed., reprint 1969) (1822) [hereinafter STATUTES AT LARGE]).
77. Id.
78. Id.
79. See id.
80. Id.
81. WILLIAM BROCKENBROUGH, BRIEF SKETCH OF THE COURT OF THIS COMMONWEALTH
(1815), reprinted in VIRGINIA REPORTS ANNOTATED 101-03 (1902) (Judge Brockenbrough’s
introduction to volume two of Virginia Reporter of General Court cases (2 Va. Cas.)).
82. Id. at 102.
83. 5 MARSHALL PAPERS, supra note 33, at xxxii (omission in original) (quoting Tucker,
View of the Judicial Courts, supra note 64, ed. app. at 5).
84. Id. (quoting Tucker, View of the Judicial Courts, supra note 64, ed. app. at 5).
III. TUCKER’S CIRCUIT TRAVELS

As provided in the revised District Court Act of December 1788, the commonwealth was divided into eighteen districts embracing all the counties of Virginia, which then included present-day West Virginia. The judges were to attend the districts twice yearly, with two judges to constitute a district court. The districts were organized into five circuits, four containing four districts and one containing the other two, which were assigned to the judges by yearly allotment. Tucker traveled each of the five circuits at least once during his tenure.

To plot the course of these circuits on a map is to gain a sense of the dedication and sacrifice of Tucker and his fellow itinerants in bringing justice to the citizens of the far-flung commonwealth. From his home in Williamsburg in the southeastern corner of the commonwealth, Tucker followed one circuit that began at Staunton in the Valley of Virginia, proceeded eastward more or less in a straight line across the Blue Ridge to Charlottesville, and then on to Fredericksburg before veering northward to Dumfries. Tucker traveled this circuit eight times. He also made eight trips on the circuit that commenced at Winchester in the lower (northern) Shenandoah Valley, proceeded westward over the first ridge of the Alleghenies to Moorefield in Hardy County (West Virginia), and ended in Morgantown in the far northwest county of Monongalia on the Pennsylvania border. The circuit that included Tucker’s home district embraced most of the Tidewater counties north of the James River, starting in the Northern Neck county of Northumberland. From there it proceeded southward to King and Queen on the middle peninsula and to Williamsburg, then turned east across the Chesapeake Bay to Accomac on the Eastern Shore. Tucker was assigned this relatively choice circuit for nine terms. Another convenient circuit went from Richmond south to Petersburg and Brunswick and then east to Suffolk, covering the counties in the Richmond vicinity and south of the James River to the North Carolina border. This circuit was allotted to Tucker only

85. CULLEN, TUCKER AND LAW, supra note 1, at 72, 197-98.
86. See id. at 72, 80.
87. Id. at 197-98. Subsequently, the number of districts increased to nineteen. Id. at 82.
88. See id. at 195.
three times, however. The most extensive circuit began at Prince Edward Courthouse in the southside Piedmont and went as far southwest as Abingdon in Washington County, near the North Carolina (later Tennessee) border more than three hundred miles from Richmond. Tucker luckily did not have to travel the full route on either of his two assignments to this circuit, going only as far as Sweet Springs in Monroe County (West Virginia).

As a circuit-riding state judge, Tucker enjoyed remarkably good health given the hardship of constant travel. On seven occasions, sickness caused him to miss a district court or two, but never an entire circuit. Over the course of fourteen years, Tucker sat with eleven different judges. Spencer Roane was his most frequent companion before Roane was promoted to the Court of Appeals in 1794. Paul Carrington, Jr., who succeeded Roane on the General Court, also traveled frequently with Tucker beginning in the mid-1790s. Other judges who attended at least three circuits with Tucker were Joseph Jones, Joseph Prentis, and Robert White. Tucker's association with White, who was from Winchester, began during his first Winchester circuit in 1790, when White was still at the bar. After he joined the General Court in 1793, White sat with Tucker on two Winchester circuits and one Staunton circuit. In 1802, Tucker sent his son Henry St. George to study law in Winchester, an indication of his great respect for White.

IV. AN OVERVIEW OF TUCKER'S REPORTS IN THE DISTRICT COURTS AND GENERAL COURT

From the time he began riding circuit in the spring of 1789 until his last circuit in the fall of 1803, Tucker reported more than four hundred cases. Preliminary investigation has turned up some two dozen instances in which he recorded his disagreement with his brother judge or judges. Tucker's superior legal knowledge and his tendency to adhere to the technical rules of law may account in part for his occasional clashes on the bench. According to Call, Tucker "was considered as decidedly the most learned judge" of the General

89. Tucker also served with James Henry, William Nelson, Richard Parker, Henry Tazewell, John Tyler, and Edmond Winston.
90. See Tucker, supra note 1, at 797. Henry St. George Tucker settled permanently in Winchester.
Court after Henry Tazewell left to join the Court of Appeals in 1793.\(^{91}\) Call went on to observe that Tucker's opinions were "generally learned and sound; but sometimes a little tinctured with technicality, arising I believe from his having been entered in a special pleader's office in Bermuda, in order to learn that intricate science; which gave a bias to his mind, that he never, entirely, got rid of."\(^{92}\)

Tucker's preference for standing by the strict requirements of law is well illustrated by a murder case in 1793. Although Judge Roane believed an indictment was sufficient,\(^{93}\) Tucker objected to it as faulty for not sufficiently alleging the length and depth of the wounds to show that they were mortal and for not alleging which hand held the knife.\(^{94}\) In like manner, at a General Court session in the same year, a question arose whether the grand jury presentments of the preceding session on which indictments were to be prepared should be sent to the presently sitting grand jury.\(^{95}\) A precedent was cited showing that the General Court in 1782 had tried and convicted a criminal upon an indictment prepared upon a grand jury presentment but not submitted to the grand jury.\(^{96}\) Three of the four sitting judges thought this precedent was sufficient to justify filing an indictment without referring it to the grand jury.\(^{97}\) Tucker alone dissented, contending "that without such submission it was not an Indictment[,] an indictment being totidem verbis the words of the grand jury—and no proceeding not having their sanction can be called an Indictment."\(^{98}\)

Tucker's penchant for observing legal niceties extended to civil cases, as well. On a motion against a sheriff for not returning an execution, it was objected that the notice given to the sheriff did not

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\(^{91}\) Call, *supra* note 6, at xxviii; CULLEN, TUCKER AND LAW, *supra* note 1, at 193.

\(^{92}\) Call, *supra* note 6, at xxviii.

\(^{93}\) Commonwealth v. Yowles (May 9, 1793), *in 1 Tucker, Case Notes, supra note 18*, nbk. 2, at 78.

\(^{94}\) *Id.*

\(^{95}\) Unnamed Case (June 10, 1793), *in 1 Tucker, Case Notes, supra note 18*, nbk. 2, at 82.

\(^{96}\) *Id.*

\(^{97}\) *Id.*

\(^{98}\) *Id.*
recite the execution accurately. Judge Carrington was disposed to give judgment for the plaintiff, believing the variance immaterial. Tucker thought it was fatal. Similarly, on a motion for judgment on a forthcoming bond in a different case, the sheriff's recital of the sum due exceeded by about £130 the sum stated in the execution. Tucker said the “law requires that in reciting the [Execution] the sum due thereon, should be truly recited.” If the difference was material and the error against the defendant, “he may well avail himself of it.” Judge Prentis disagreed, “thinking it sufficient that the party’s names were truly recited & judging unnecessary & improper for the Court to enter into any calculations in order to ascertain the sum due on the [Execution].” He mentioned a Court of Appeals case in support, but Tucker cited another Court of Appeals precedent, which he said “accords with my opinion in this Case.”

Fully half of Tucker’s recorded judicial disagreements were with Judge John Tyler, all but one of which occurred on a single circuit in the spring of 1798. Tyler was not enamored with legal learning—he “disliked law books, and particularly those of England”—a circumstance that no doubt increased the likelihood of conflict with the scholarly Tucker. On the first day of the Fredericksburg term in May 1798, Tucker reported three cases, and in all three Tyler opposed him. Having already encountered Tyler’s contrariety at the Staunton court, Tucker sounded a note of exasperation by the time he recorded his third Fredericksburg case. An action to recover a debt had twice been continued at the instance of the

99. Alexander v. Jones (Sept. 18, 1797), in 1 Tucker, Case Notes, supra note 18, nbk. 6, at 38.


103. Id. 104. Id. 105. Id.

106. Call, supra note 6, at xxiii.

107. Coleman v. Day (May 1, 1798); Windor v. Thornton (May 1, 1798); Haywood’s Adm’rs v. Brooke’s Adm’rs (May 1, 1798), in 1 Tucker, Case Notes, supra note 18, nbk. 7, at 4-5.
defendants. Of the three plaintiffs, executors of the creditor, two were Virginians and had died; the third resided out of state. At the time the jury came to be sworn, defendants' counsel moved for security for costs. Tucker's entry reads:

Tyler Judge seemed to think it reasonable that the [plaintiff] should give Security—Tucker tost veribus [with all his might] contra. The [defendant] at the moment that the Cause is ready for trial endeavours to shun the trial of the issue and to avail himself by a [hitch?] of ... the [plaintiff's] situation—he ought to have given notice sixty days. I will not aid him to do Injustice by granting a Continuance, merely to give him an unjust advantage. If he goes to trial, & a Verdict be for him, he will not be put to one penny's additional Costs. If we grant his motion[,] he defeat the [plaintiff] of a Just demand.

In the following days, Tucker recorded five more instances of opposition from Tyler at Fredericksburg, followed by another early in the Dumfries term. On the third day of that court, Tucker noted, perhaps with relief, that "Mr. Tyler left the Court."

While affording a glimpse of the interactions among the judges, Tucker also brought the lawyers within his notice, usually in connection with various motions made during the course of the trial. Typically, such motions asked the court to admit or exclude evidence or to instruct or not instruct the jury in one way, or another. It was common practice for the lawyer who lost a motion to file a bill of exceptions to the court's ruling. In this way the court's action became part of the official record and thus subject to appeal. A lawyer might file a bill of exceptions just to get the matter on record, whether or not he seriously intended to appeal the case. A notorious user, or abuser, of this device was John "Jock" Warden,

108. Haywood's Adm'rs v. Brooke's Adm'rs (May 1, 1798), supra note 107, nbk.7, at 5.
109. Id.
110. Id.
111. Id.
112. David Greenlaw's Case (May 2, 1798); Woodford's Ex'rs v. Banks (May 5, 1798); Clayton v. Latham (May 5, 1798); Mercer v. Hedgman (May 14, 1798); Ex parte Thilman (May 16, 1798); Waggoner v. Stuart (May 19, 1798), in 1 Tucker, Case Notes, supra note 18, nbk. 7, at 5-16.
113. Notation on May 20, 1798, in 1 Tucker, Case Notes, supra note 18, nbk. 7, at 16.
a canny veteran of the Virginia bar whose legal acumen more than compensated for his homely appearance. Tucker registered his irritation at King and Queen in September 1797, when on successive days Warden filed bills of exceptions after being overruled. Tucker's entry in the second of these cases reads: "The Court overruled the Objection and Warden, as usual, tendered an Exception." In another case at that term, Warden demurred to a plea and was overruled. In the margin Tucker noted: "Memo: Warden for the first time agreed that this Opinion though against him was right!!"

Tucker rarely went through a term without entering at least one case, if only a few lines. On a few occasions he was obliged to record "no case of importance" or "no point of law worth noting occurred." The great majority of the reports were of original cases brought in the district courts, and most of these were civil cases, which were more likely than criminal cases to raise issues of law. A smaller group of reported cases consisted of appeals from the county courts. Tucker also reported cases heard at the June and November sittings of the General Court, the most important of which were those that had been adjourned from the districts for novelty and difficulty.

Although reformers were unable to do much to improve the county courts, the establishment of the district courts cut significantly into the business of the former, attracting numerous clients who formerly had to resort to the local court. Still, the jurisdictional minimum of one hundred dollars in the district courts ensured that the counties would continue to hear the multitude of suits involving small claims.
courts by amateur magistrates, and the lawyers presenting cases before them were often inexperienced neophytes or practitioners of the second rank who could not compete at the superior court bar.\textsuperscript{121} Appeals from these courts were thus a regular occurrence, though evidently much less frequent than under the former establishment. County court appeals ordinarily proceeded by a writ of supersedeas commanding the sheriff to stop execution of the judgment below and to give notice of a rehearing in the superior court.\textsuperscript{122} In Virginia, supersedeas was in most cases a substitute for the writ of error and could be issued to reverse county court judgments where the amount in dispute was at least thirty-three dollars.\textsuperscript{123} Tucker usually indicated at the beginning of his report that the case was an appeal and named the county whence it came. A cursory review indicates that he reversed most of the county court judgments he considered, with faulty pleading being a prominent ground for reversal.

In one such case, Tucker noted that the declaration was defective, that the defendant failed to demur and instead gave an informal plea, and that the plaintiff's replication was “as bad as the plea.”\textsuperscript{124} He went on to observe that the court had given judgment for the defendant, which it “certainly ... could not.”\textsuperscript{125} Yet they could not adjudge “for the [plaintiff] upon this Decl[aration].”\textsuperscript{126} He ultimately decided that because the court gave a judgment “substantially right in law,” he could “not say it ought to be reversed.”\textsuperscript{127} In other cases, the county court permitted defective pleadings in indebitatus assumpsit, a common action for the recovery of debts arising from everyday transactions such as goods sold and delivered, work done, money lent, and money due by account. Before reversing one such case, Tucker commented: “This record is so full of Error throughout that it would be tedious to analyze it. The [plaintiff] has clearly

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\textsuperscript{121}. See supra notes 38-45 and accompanying text.
\textsuperscript{122}. 1 CONWAY ROBINSON, THE PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA 660 (Richmond, Shepard 1832).
\textsuperscript{123}. 1 REVISED CODE OF THE LAWS OF VIRGINIA, supra note 101, at 239; 1 ROBINSON, supra note 122, at 660.
\textsuperscript{124}. Finch's Ex'r v. Tyler, Ex'r of Munford (Oct. 9, 1794), in 1 Tucker, Case Notes, supra note 18, nbk. 4, at 18.
\textsuperscript{125}. Id. at 19.
\textsuperscript{126}. Id.
\textsuperscript{127}. Id.
misconceived his Action, for the Services performed as an overseer for which he ought to have brought Covenant.\textsuperscript{128} He went on to recite other errors in the declaration and also in the defendant's plea, while pointing out that the jury had found "a Verdict upon the third Count, on which there is neither plea nor issue."\textsuperscript{129}

The large number and variety of original cases Tucker deemed worthy of reporting resist classification except in broad general terms. The great majority of his civil cases involved the recovery of a debt or a dispute over property. One debt case is particularly useful in showing how Tucker shaped it in a way to settle a pressing legal question of the day: whether a defendant in an action brought by a British creditor for a debt incurred before the War of Independence was entitled to discount interest during the war years. Although the plea of "British debt" no longer sufficed to deny or delay suits for such debts in Virginia courts, juries routinely subtracted eight years' interest in rendering their verdicts—over the loud protests of British plaintiffs.\textsuperscript{130} In federal court, juries deducted interest despite explicit instructions from the judge that interest must be regarded as part of the debt.\textsuperscript{131} Because this disallowance was done as part of a general verdict, the question could not be appealed to the U.S. Supreme Court.\textsuperscript{132} All that a judge could do was order a new trial—which would produce the same result.\textsuperscript{133}

At King and Queen District Court in April 1795, the defendant's lawyer moved to enter a plea of "British debt."\textsuperscript{134} Tucker said the plea could "neither operate in Bar, nor in Abatement," but as to the question of war interest intended to be raised by the plea, "he thought it high time the point should be settled."\textsuperscript{135} He then added:

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\textsuperscript{128} Basset v. Binns (Apr. 1800), in 1 Tucker, Case Notes, \textit{supra} note 18, nbk. 8, at 14.
\textsuperscript{129} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 195.
\textsuperscript{133} 5 MARSHALL PAPERS, \textit{supra} note 33, at 371 (citing sources).
\textsuperscript{134} \textit{See} McCall v. Turner (Apr. 20, 1795), in 1 Tucker, Case Notes, \textit{supra} note 18, nbk. 4, at 45.
\textsuperscript{135} \textit{Id.}
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The difficulty was in what shape to bring it on.—If [plaintiff] were really absent during the War, & no Agent or Attorney within the State, this for ought he knew might be proper Evidence for the Consideration of a Jury; but he knew of no method of bringing on the Question by pleading.\textsuperscript{136}

In order to get a decision so that justice would “no longer [be] delayed by Doubts on the subject,” Tucker recommended that the defendant give the plaintiff written notice of his intention to move the court to offer evidence to the jury to prove the plaintiff was absent during the war and had no agent to whom the debt could be paid.\textsuperscript{137} At the ensuing trial, upon the motion to introduce evidence, Tucker said, “Without giving any Opinion whether the Evidence be proper or not, I agree that it may be offered to the Jury, in order that this long contested point may be settled.”\textsuperscript{138} The plaintiff’s lawyer, none other than John Warden, tendered a bill of exceptions, making this ruling part of the record for a possible appeal.\textsuperscript{139} When the jury deducted eight years’ interest, Warden appealed.\textsuperscript{140} The Virginia Court of Appeals upheld Tucker’s ruling and the jury’s verdict in 1797.\textsuperscript{141}

Land title disputes figure prominently in Tucker’s reports, as signified by the many entries of “ejectment” cases. The action of ejectment was an elaborate fiction, designed for the purpose of asserting title to real property. In form, ejectment was a personal action in trespass brought by an ousted leaseholder for the recovery of his lease and the damages suffered by the loss.\textsuperscript{142} Its true function was to enable a freeholder to recover real property by trying the merits of his title against those of another claimant. Over time, ejectment had become the common means of trying title to real estate, virtually supplanting the ancient and often cumbersome real actions.\textsuperscript{143} One of Tucker’s cases raised the question of “whether one parcener can maintain an Ejectment against another

\textsuperscript{136} Id.  
\textsuperscript{137} Id.  
\textsuperscript{138} Id.  
\textsuperscript{139} Id.  
\textsuperscript{140} Id.  
\textsuperscript{141} M’Call v. Turner, 5 Va. (1 Call) 133, 139-47 (1797).  
\textsuperscript{142} J.H. Baker, An Introduction to English Legal History 301-03 (4th ed. 2002).  
\textsuperscript{143} Id.
for an undivided part of the Inheritance." 144 Neither the lawyers nor Tucker had ever found such a case, 145 prompting the judge to enter into an extended disquisition on the nature of ejectment. Citing Blackstone, he admitted that the law was express that coparceners could not maintain an action of trespass against each other. 146 He conceded as well that ejectment was "in point of form, an action of Trespass." 147 But the authorities were equally clear that ejectment was a fiction devised to obtain justice by compelling the parties to go to trial on the merits unencumbered by elaborate pleadings. 148 Ejectment had become the nearly universal method of trying title to lands, founded on the same principle "as the Ancient Writs of Assize, and hath succeeded to those real actions, as more convenient for attaining the Ends of Justice." 149 If ejectment was in substance the equivalent of the ancient real actions, then one only had to consult Coke on Littleton "to discover that although parceners cannot maintain an action of Trespass, ... they may have a writ of assize against each other." 150 He accordingly ruled that ejectment was the proper action in this case. 151

Tucker's most noteworthy land case was an ejectment brought by David Hunter, claiming under a patent from the commonwealth, against Denny Martin Fairfax, who, as heir to Lord Fairfax, asserted the validity of his title to the Northern Neck of Virginia. 152 Tucker upheld the Fairfax title in a long and elaborate opinion given at Winchester in April 1794. 153 Hunter appealed this case to the Court of Appeals, where it languished a number of years before being argued in April 1809. Tucker was then sitting on that court but disqualified himself because "my Son Henry has now become a party interested in it"—an allusion to Henry St. George Tucker's

144. Dunkenson & Wife v. Moore (Sept. 4, 1802), in 1 Tucker, Case Notes, supra note 18, nbk. 9, at 8.
145. See id. at 8-9.
146. See id. at 9.
147. Id.
148. See id.
149. Id. (citing Blackstone).
150. Id. at 11.
151. Id. at 12.
153. Id.
1806 marriage to David Hunter’s daughter.154 The next year the Court of Appeals reversed Tucker’s Winchester judgment.155 The case then went by writ of error to the U.S. Supreme Court, which in 1813 reversed the state appellate court.156 After the Virginia Court of Appeals refused to accept the Supreme Court’s mandate, the Supreme Court again heard the case, this time in 1816, as Martin v. Hunter’s Lessee, and again ruled in favor of the Fairfax title in the course of affirming in strong nationalist terms the Supreme Court’s appellate jurisdiction over the state courts.157 By this time, the constitutional issue greatly overshadowed the original land dispute.158 Ironically, if Tucker had not been forced to recuse himself in 1809, the state court might well have affirmed the 1794 judgment, making unnecessary an appeal to the Supreme Court.

The counterpart to ejectment for land was “detinue for a slave.”159 Detinue was the common law remedy for recovery of a specific personal property and damages for the property’s detention.160 It had fallen into disuse in England, having been superseded by “trover and conversion.”161 In trover, however, the plaintiff recovered the value of the property, not the thing itself.162 To recover the specific thing, only detinue would lie, and it was therefore a common action for regaining possession of slaves.163 At King and Queen in September 1792, however, the plaintiff in Tucker’s court, instead of bringing detinue, sued out a writ of “formedon in the descender,” one of the ancient real actions, to recover “eleven slaves, annexed to certain Lands in tail.”164 The defendant’s lawyer, who perhaps had never encountered such a writ, pled “non detinet,” the general issue in detinue.165 The plaintiff demurred, placing the
question in the hands of the court. Tucker clearly relished the opportunity to conduct a thorough investigation of the subject as set forth in the works of Blackstone and Coke explicating the statute of 1285, de Donis, which gave the action. "This action being a perfect novelty in our Courts," he said, "we must consider the nature, origin, & application of it." Much of his ensuing analysis was directed at refuting the plaintiff's contention "that wherever anything may be entailed[,] a writ of formedon will lie." After showing that this proposition was not "well founded," Tucker next met the argument based on the "strong analogy between Villeins regardant and intailed, or annexed Slaves, in this Country." He concluded that the writ of formedon would lie to recover a villein only if "brought for the Manor to which he was regardant." It was not the proper writ to recover a villein alone, who had been taken away from his manorial lord. Tucker painstakingly viewed the case in every possible light, "endeavouring to satisfy every Mind of the principles upon which my Determination is founded." He found for the defendant, holding that if the defendant's plea did not adequately answer the declaration, the fault lay with the plaintiff in misconceiving his action. Some of Tucker's disquisition prompted by this case reappeared in an appendix to his edition of Blackstone.

In addition to actions to recover slave property, Tucker also reported cases in which slaves themselves asserted a claim—to recover their status as free persons. Such suits for freedom were common in Virginia, most often by persons claiming descent from a free Indian woman. In form, these suits were personal torts, usually trespass for assault and battery and false imprisonment, but were universally understood to be fictitious actions analogous

166. Id.
167. Id.
168. Id. at 65-67.
169. Id. at 67-68.
170. Id. at 68.
171. Id. at 69.
172. Id. at 72.
173. Id. at 73.
Several of Tucker's reports of freedom suits raised an interesting question of evidence concerning the authenticity of a manuscript copy of colonial law enacted in the late seventeenth century. Until the revisal of 1733, Virginia laws existed mostly in manuscript, except for a couple of printed editions, including that compiled by John Purvis and published in 1684. In the case of "George, a Negroe," tried at Accomac District Court in May 1795, Tucker reported that the plaintiff's lawyer "produced a Copy of Purvis, at the End of which was a Manuscript Copy of the Act of 1691, c. 9, the title of which appears in the Ed[ition] of 1733, pa: 94.—authorizing a free trade with Indians, and requested the Courts instruction to the Jury thereupon." The significance of the 1691 Act was that it indicated the General Assembly's intention to disclaim its right to make slaves of Indians, as had been done by a law of 1682.

[Tucker] left it to the Jury to decide whether this was a Copy of the Act in question, the Copy being evidently very ancient, the title corresponding, and the records of those days wholly destroyed by the British Army in 1781, but would not instruct them either to regard the same as Law, or to disregard it.

The jury could not agree in George's case, but two years later, in a case brought on behalf of a woman named Airy, Tucker instructed the jury that the manuscript copy of the Act in Purvis was authentic and further that "the burthen of proof upon this issue lay upon the Defendant." Again, the jury could not agree, and no verdict was rendered. Finally, in May 1800, Tucker instructed the

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175. See, e.g., Coleman v. Dick & Pat, 1 Va. (1 Wash.) 233, 239 (1793) (Pendleton, J.).
176. 3 Statutes at Large, supra note 76, at 9 n.*.
178. George, a Negroe v. Walker (May 14, 1795), in 1 Tucker, Case Notes, supra note 18, nbk. 5, at 7.
179. See An Act for a Free Trade with Indians (Apr. 1691), in 3 Statutes at Large, supra note 76, at 69; An Act to Repeal a Former Law Making Indians and Others Free (Nov. 1682), in 2 Statutes at Large, supra note 76, at 490-92.
180. George, a Negroe v. Walker (May 14, 1795), supra note 178, nbk. 5, at 7.
181. Id.
182. Airy v. Kelham (Oct. 17, 1797), in 1 Tucker, Case Notes, supra note 18, nbk. 6, at 44.
183. Id.
jury that if they found that the plaintiff's ancestor was an Indian brought into Virginia before November 10, 1682, or after April 16, 1691 (the dates of enactment of the two relevant laws), they should find for the plaintiff. The law in this respect remained unsettled for some years afterward, the prevailing opinion being that Indian slavery did not cease until 1705. The revisal of that year reenacted the 1691 law but without any indication of its date. In the 1808 case of Pallas v. Hill, the Virginia Court of Appeals recognized the authenticity of the manuscript of the 1691 Act as stating the law of the land from that date. Tucker, then a judge on the court, commented that William W. Hening, the great compiler of Virginia's statutes, had obtained a copy of the 1691 law from the same book Tucker had seen at Accomac in 1795.

In this general survey of Tucker's reports, a brief notice of his criminal cases is appropriate. In addition to murder, the crime most frequently mentioned, Tucker reported cases of manslaughter, burglary, forgery, assault, horse stealing, perjury, and illegal gambling. Several of his cases called attention to an unresolved question of criminal procedure: whether a prisoner in custody of the district court must be sent to an examining court before he could be tried in the superior court. While the grand jury at Monongalia was sitting in 1796, a guard delivered a loaded pistol to a prisoner accused of murder. At the direction of the district court, the commonwealth's attorney prepared an indictment against the

184. Annis, an Indian Woman v. Stringer (May 19, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at 29.
185. Id. The next day, Tucker, noting the "facts and testimony in [the Annis] case being precisely the same as [the Airy] case, ... delivered the same charge to the Jury." Airy, an Indian Woman v. Kelham (May 20, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at 29. The jury returned a verdict for the plaintiff. Id.
186. 3 STATUTES AT LARGE, supra note 76, at 69 n.*.
187. Id.
189. Id. at 158. Tucker also mentioned the Accomac adjudications in his opinion in Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 138 (1806). Accord Tucker, State of Slavery, supra note 174, ed. app. at 47 n.§ (expressing the opinion that no Indians brought into Virginia after 1691 could be retained in slavery in Virginia).
190. See John Oddewald's Case (Sept. 22, 1796), in 1 Tucker, Case Notes, supra note 18, nbk. 6, at 6.
guard, who was subsequently tried and acquitted. Tucker noted that he and Judge White agreed that an "examining court was not of necessity, in all Cases, but only in such where the accusation is first made before a Justice of the Peace, or founded upon a Coroner's Inquest, in which Case the law is express." The next year Tucker and White tried another accused criminal who had not been brought before an examining court. Hearing that some of the other judges "differed in opinion from them," Tucker and White then adjourned a case from Staunton to the General Court, which in November 1800 by "a large majority" (Tyler alone dissenting) agreed that a person indicted and arrested under the direction of the district court could be tried there without the intervention of an examining court.

In two of his murder cases Tucker preserved a record of his charge to the jury. One of these was an indictment "for the wilful, deliberate & premeditated Murder of one Sarah Boston, by throwing her on a Bed, beating her with his fists, kicking her, & choking her with his hands, in consequence of which she died on the fourth day after." Murder was evidently a rare occurrence on the Eastern Shore, for Tucker noted that this was the first such case to come before the Accomac District Court. He accordingly conceived it to be his duty to enter upon a thorough exposition of the law, carefully defining and distinguishing the various kinds and degrees of homicide and explaining the meaning of such terms as "malice aforethought" and "implied" malice. The jury in this case acquitted Boston's accused murderer. Tucker repeated this charge in another murder case six months later in Fredericksburg, adding some observations about cases not explicitly mentioned in

191. Id.
192. Id.
193. See Jesse Martin's Case (May 16, 1797), in 1 Tucker, Case Notes, supra note 18, nbk. 6, at 25.
194. Thomas Blakely's Case (Nov. 15, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at 25.
195. Id.
196. Willis McCottrack als. McCotter's Case (May 15, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at 16.
197. See id.
198. Id. at 18-19.
199. See id. at 20.
the statute but that might be within the legislature’s intention “in
distinguishing the different Degrees of Murder.” He left no record
of the jury’s verdict on that occasion.

This overview concludes with two cases that elicited noteworthy
opinions from Tucker affirming the judiciary’s right to pronounce
a law void as contrary to the constitution. Sitting with Roane at
Dumfries in May 1793, Tucker left the bench, refusing to hear a
motion for an injunction to stay a judgment of the district court.
A law of 1792 authorized the district courts to issue injunctions and
to hear cases on injunctions in the same way that such suits were
heard in the High Court of Chancery. On this occasion, Tucker
briefly gave his reasons for not hearing the motion, notably that the
effect of the law would “be to annihilate the Constitutional Court
of Chancery” and that the Virginia Constitution required that
chancery judges must be “elected, & commissioned, as such.”
After the motion was renewed following Tucker’s departure, Roane
adjourned the case to the General Court “for novelty & difficulty.”

Tucker’s action precipitated the celebrated case of Kamper v.
Hawkins, the leading precedent in Virginia for what became known
as “judicial review.” At the November 1793 session of the General
Court, the five sitting judges—Tucker, Tyler, Henry, Roane, and
Nelson—delivered opinions, all of them agreeing that the court was
duty bound to regard the constitution in pronouncing the law.
Tucker, building on his amicus brief in the 1782 “Case of the
Prisoners,” gave an elaborate defense of judicial review as it came
to be formulated in the early republic. He stressed the great
importance of a written constitution whose principles could “be
ascertained from the living letter, not from obscure reasoning or

200. John Carter’s Case (Oct. 2, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at
34.
201. Id.
202. Anonymous Case [Kamper v. Hawkins] (May 23, 1793), in 1 Tucker, Case Notes,
supra note 18, nbk. 2, at 81.
203. Id.
204. Id.
205. Id.
206. See, e.g., Sharpe v. Robertson, 46 Va. (5 Gratt.) 518, 547-48 (1849); Goddin v. Crump,
35 Va. (8 Leigh) 120, 133 (1837).
He described a constitution as "a rule to all the departments of the government, to the judiciary as well as to the legislature," a phrase echoed by Chief Justice Marshall in *Marbury v. Madison.* A point of more than passing interest is that Marshall, as a lawyer, argued *Kamper v. Hawkins.* This fact has escaped notice because neither Tucker’s casebook report nor the published report included arguments or even mentioned the names of the participating lawyers. Tucker, however, jotted down a brief summary of arguments—naming Marshall and John Warden—in one of his General Court dockets.

*Kamper v. Hawkins* is a well-known case, having been subsequently published, no doubt with great assistance from Tucker’s manuscript report. Not generally known, however, is Tucker’s unpublished opinion in another adjourned case heard by the General Court in November 1800. The original case was an action of debt on a bond at the Prince Edward District Court. The defendant objected at the trial to permitting the bond to be evidence for the jury to consider because it was not written on stamped paper pursuant to an act of Congress. Tucker framed the court’s inquiry in these words:

This Question is of the utmost importance; on the one hand we are to enquire, whether there be any, & what Limits to the powers of the federal Legislature; and on the other, whether there be any, & what rights, reserved to the several States, by the federal Constitution? Secondly, whether this Court is a proper tribunal before which such enquiry can constitutionally be made;—thirdly, and lastly, in Case of an affirmative Decision on the former points, whether the Act of Congress imposing a

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208. *Id.* at 78.
209. *Id.* at 79.
210. 5 U.S. (1 Cranch) 137, 177 (1803). For Tucker’s role in the “Case of the Prisoners” (*Commonwealth v. Caton*), see CULLEN, TUCKER AND LAW, supra note 1, at 36.
211. General Court docket (June 1793), in Box 66, Tucker-Coleman Papers (located at the Earl Gregg Swem Library at The College of William and Mary).
212. The case was first published in 1794 as a pamphlet entitled REPORT OF A CASE DECIDED ON SATURDAY, THE 16TH OF NOVEMBER, 1793, IN THE GENERAL COURT OF VIRGINIA; WHEREIN PETER KAMPER, WAS PLAINTIFF, AGAINST MARY HAWKINS, DEFENDANT (Philadelphia, M’Kenzie 1794).
213. Woodson v. Randolph (Nov. 14, 1800), in 1 Tucker, Case Notes, supra note 18, nbk. 8, at 37.
214. *Id.*
Duty on stamps, so far as it declares that no Bond which shall be written on unstampt paper, shall be given in Evidence in any Court, does exceed the Limits of federal legislative power, and trench upon the rights reserved by the Constitution to the several states. 215

He went on to give a strict reading to the powers of Congress, an expansive reading of the powers reserved to the states, a reaffirmation of his Kamper opinion in support of the state court's right to inquire into the limits of federal authority, and concluded with a ruling that Congress exceeded its constitutional authority in requiring bonds to be on stamped paper. 216 This time, however, Tucker had only Judge Tyler (his erstwhile nemesis) with him. Judges Prentis, Nelson, White, and Carrington were of the opinion that the Act was within Congress's power to lay and collect taxes and to make all laws necessary and proper for executing its enumerated powers. 217

CONCLUSION

The foregoing survey has been conducted to give some idea of the nature and contents of St. George Tucker's legal manuscripts and to suggest that they constitute a documentary treasure of immense value. A meticulous record keeper and inveterate notetaker, Tucker created a personal legal archive that is virtually unsurpassed as a source for documenting the "Americanization" of the common law as it unfolded in the republican Commonwealth of Virginia in the decades following the American Revolution. He was both a working judge and a legal scholar, alert to new and interest-

215. Id.
216. Id. at 37-49.
217. Id. at 49. The brief published report of this case includes only the court's official judgment. Woodson v. Randolph, 3 Va. (1 Va. Cas.) 128, 128-29 (Va. Gen. Ct. 1800). Tucker's early draft of his opinion can be found in his General Court docket for November 1800. This draft is endorsed "Loose Thoughts upon the Stamp-Act." St. George Tucker, General Court docket (Nov. 1800), in Box 66, Tucker-Coleman Papers (located at the Earl Gregg Swem Library at The College of William and Mary); see also Kurt T. Lash, "Tucker's Rule": St. George Tucker and the Limited Construction of Federal Power, 47 WM. & MARY L. REV. 1343, 1371 n.155 (2006) (noting the significance of this case as the "first extended discussion and justification of the power of judicial review by any judge, state or federal, prior to Marbury").
ing questions of law that presented themselves in the various courts on which he sat, even in the most mundane cases.

Tucker's law papers should be published in an annotated scholarly edition, with appropriate apparatus, such as tables of cases and statutes, a glossary of legal terminology, a biographical dictionary, and a general introductory essay on the law in post-Revolutionary Virginia. At minimum, such an edition should include the three manuscript volumes of reports in Virginia courts from 1786 to 1811. Tucker obviously intended these reports to be preserved as a single integrated document, and they should be published as such. A project for this purpose was begun nearly thirty years ago, but the editor embarked on a career path that prevented him from pursuing it further. Such an enterprise ought to be revived and expanded to include the additional notebooks of reports of cases in the U.S. District Court and U.S. Circuit Court from 1813 to 1824. Moreover, the loose papers should be thoroughly searched for materials relating to the reported cases, most importantly notes of attorneys' arguments and drafts of opinions that Tucker did not record in his casebook. While serving primarily as a source for annotating the case reports, some of the loose papers—for example, drafts of unreported opinions—might merit publication in their own right.

Such an edition would make accessible an extensive collection of hitherto unpublished reports in the state and federal courts of Virginia. Even where his casebook duplicates much that is in the published reports of Court of Appeals cases (because it was a principal source for those reports), Tucker's reports and loose term papers provide a valuable supplement to Call, Hening, and Munford. A few examples from the May 1804 term serve to illustrate the point. In a case in which the court reversed a High Court of Chancery decree on a technicality, Call reported Judge Lyon's one-sentence opinion directing the chancery court to make proper parties. Tucker added some clarification in his casebook report, explaining that "no opinion was delivered in court upon the merits; the Judges appeared not to be agreed in their opinions

218. At the time he commenced work on the project, Dr. Cullen was in Williamsburg as editor of the papers of John Marshall. In 1979, he moved to Princeton to be the editor of the papers of Thomas Jefferson. He was president of the Newberry Library in Chicago from 1986 until his retirement in 2005.

respecting them." He himself did prepare an unreported opinion on the merits and preserved it with his papers. In another case, Tucker was the only judge who prepared a written opinion, which Call duly printed, omitting, however, Tucker’s marginal memorandum noting specific points of agreement and disagreement with his fellow judges. In other cases, too, Call omitted Tucker’s marginal notes keyed to various passages in his opinions. Indeed, indications are that some very interesting information in Tucker’s marginalia—including the dates of arguments and opinions, citations of cases not mentioned in the body of the opinion, and memoranda of other judges’ views—did not get into the published reports of Court of Appeals cases.

Professor James Oldham demonstrated how the manuscript notes of eighteenth-century English judges enhance the published English reports, for example by correcting errors, by clarifying “through unreported factual detail,” by revealing “unreported portions of judges’ opinions” and “undelivered opinions,” and by showing “cooperation, collegiality or friction among the judges.” Oldham later published an edition of the legal manuscripts of one of those English judges, the great Lord Mansfield. What The Mansfield Manuscripts did for Lord Mansfield and the history of English law in the eighteenth century, a publication of Tucker’s law papers might do, perhaps on a less monumental scale, for the Virginia judge and the history of American law in the early republic.

220. Carter’s Ex’r v. Currie (May 17, 1804), in 2 Tucker, Case Notes, supra note 18, nbk. 11, at 43.
221. St. George Tucker, Court of Appeals docket (May 1804), in Folder 8, Tucker-Coleman Papers (located at the Earl Gregg Swem Library at The College of William and Mary).
222. Compare Hawkins’s Ex’rs v. Minor Ex’r of Berkeley, 9 Va. (5 Call) 118, 120 (1804), with Hawkins’s Ex’rs v. Minor, Ex’r of Berkeley (May 10, 1804), in 2 Tucker, Case Notes, supra note 18, nbk. 11, at 6-7.
223. Compare Bronaugh & Co. v. Scott (May 18, 1804), in 2 Tucker, Case Notes, supra note 18, nbk. 11, at 19-21, Hooe v. Wilson (May 16, 1804), in 2 Tucker, Case Notes, supra note 18, nbk. 11, at 12, 16-18, and Johnson’s Ex’rs v. Pendleton (May 4, 1804), with Bronaugh & Co. v. Scott, 9 Va. (5 Call) 78 (1804), Hooe v. Wilson, 9 Va. (5 Call) 61 (1804), and Johnson v. Pendleton, 9 Va. (5 Call) 128 (1804).