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THE PREROGATIVE OF THE SOVEREIGN IN VIRGINIA:
ROYAL LAW IN A REPUBLIC

by

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[B]y the rejection of the sovereignty of the Crown of England ... the whole *lex prerogativa* ... so far as it respected the kingly office and government, it was either modified, abridged, or annulled ... [in Virginia]¹.

[T]he doctrine of sovereign immunity is 'alive and well' in Virginia².

The history of the prerogative of the sovereign, the *lex prerogativa*, in Anglo-American jurisprudence is long and complicated. It has exercised the minds of jurists and political philosophers for many centuries, and there has not been universal agreement as to its nature and scope. The purpose of this essay, as prompted by the two quotations just given, is to describe the prerogative law and trace its development from medieval England to modern Virginia.

The prerogative of the sovereign in Anglo-American legal thought gives legal superiority to the sovereign over the legal rights of private individual members of the body politic. The law gives rights to the sovereign which prevail over and supersede the rights of subject and citizen. It is one part of the broad power of the government to govern. It is part of the authority of the government, and, thus, is found in republican as well as in monarchical political regimes. The governed must submit to the government or there will not be government, but there will be anarchy, which is an evil thing³.

Some of the kings of England believed that they were above the law and could make and change the law as they pleased⁴. However, the view that ultimately prevailed was that the rights of the Crown and of the king personally are a part of the common law of England. 'The king must not be under man but under God

* For a summary see below, p. 384.

1. 'Of the Unwritten, or Common Law of England', St.G. Tucker (ed.), *Blackstone's Commentaries*, Philadelphia 1803, vol. 1, app. E, p. 405.

2. *Messina v. Burden* (1984), 228 Va. 301, 307 (*per* Thomas, J.).

3. Whether or when a government can become more evil than anarchy are issues that are beyond the scope of this essay.

4. W. Blackstone, *Commentaries on the Law of England*, Oxford 1765, vol. 1, p. 231 (hereafter cited as Blackstone) (quoting with disapproval the words of King James I); D.E.C. Yale, *Hobbes and Hale on law, legislation and the sovereign*, Cambridge Law Journal, 31 (1972), p. 121, esp. p. 123, 134, 138 (quoting with scholarly detachment the words of Thomas Hobbes).

and under the law, because the law makes the king. ...⁵ Sir Matthew Hale wrote 'as to the directive power of the law, the king is bound by it'⁶.

The current view is that the royal or sovereign prerogative is a part of the common law, and since it is a part of the common law, it is subject to change by the legislative process and subject to interpretation, definition, and enforcement by the judicial process⁷.

The English common law is the foundation of the law of Virginia. Virginia was settled in 1607 by a London-based corporation, and the settlers were Englishmen. It was logical that they should have brought with them their own laws and legal institutions. Moreover, it was required by the instructions to the Virginia Company, which planted the colony at Jamestown, that litigation was to be settled 'as near to the common laws of England and the equity thereof as may be'⁸. In 1632 when commissioners were appointed to hold new monthly courts (later renamed county courts), their commissions required them to execute the office of justice of the peace and to act 'as near as may be after the laws of the realm of England and the statutes thereof made'⁹. The Remonstrance of July 1642 asserted that the laws and customs of England were being followed in the Virginia courts¹⁰. Note also that when Virginia accepted the authority of Parliament in 1651, it was explicitly stated that the submission was not 'a conquest upon the country, and that they [the Virginians] shall have and enjoy such freedoms and privileges as belong to the free born people of England'¹¹. When the statutes of Virginia were recodified in 1662, the common law of England was acknowledged to be in force¹². When independence from Great Britain was declared in 1776, a statute was enacted which stated that the general common law of England remained in force¹³, and this provision has been continued in substance by every Virginia code since¹⁴.

5. *Bracton on the Laws and Customs of England*, S.E. Thorne, trans., Cambridge, Mass. 1968, vol. 2, p. 33 (hereafter cited as Bracton); quoted in Blackstone, vol. 1, p. 232; J. Chitty, Jr., *Treatise on the law of the prerogatives of the Crown*, London 1820, p. 5 (hereafter cited as Chitty).

6. M. Hale, *The Prerogatives of the King*, D.E.C. Yale (ed.), Selden Soc., 92 (1976), p. 14 (hereafter cited as Hale).

7. When reading a comment on the prerogative, one must consider whether the writer is commenting upon the prerogative of the government in general, the sovereignty, or upon the specific executive prerogative of the monarch. The division of power and the place of the monarch in England has been constantly shifting as the king was recognized as a political person separate from his physical person and as constitutional developments proceeded through the centuries.

8. Articles, Instructions and Orders (Nov. 20, 1606), W.W. Hening, *The Statutes of Large of Virginia*, New York 1823, vol. 1, p. 68 (hereafter cited as Hening's Statutes); note also the second Virginia Charter (1609), art. 23, Hening's Statutes, vol. 1, p. 96, and the Ordinance, Commission, and Instructions of 1621, Hening's Statutes, vol. 1, p. 112-14.

9. Act of Feb. 1631/32, c. 33, Hening's Statutes, vol. 1, p. 169; note also Hening's Statutes, vol. 1, p. 186, 187. Also the general court and the governor, who presided there, were ordered to do justice according to the law of England; see the acts of Apr. 1652, Mar. 1657/58, Mar. 1659/60 in Hening's Statutes, vol. 1, p. 372, 504, 530.

10. Hening's Statutes, vol. 1, p. 237.

11. Hening's Statutes, vol. 1, p. 263.

12. Act of March 1662, preamble, Hening's Statutes, vol. 2, p. 43.

13. Act of May 1776, c. 5, § 6, Hening's Statutes, vol. 9, p. 127.

14. Virginia Revised Code, 1819, vol. 1, p. 135, c. 38; Va. Code, 1849, p. 98, c. 16,

In addition to legislative requirements giving force to the English common law in colonial Virginia, it was logical and reasonable that it should be used by the Englishmen who settled Virginia. When the English arrived, there was no pre-existing system of law applicable to them. The Indians, after defeat in war and / or sale of their territorial claims, slowly moved westward leaving the colony 'vacant'¹⁵. This legal vacuum was filled by the familiar English law, which the settlers brought with them from England¹⁶. 'In the case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there...'¹⁷. '[I]f there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England. ...'¹⁸.

Sir Matthew Hale and Sir William Blackstone both wrote on the validity of the English law in the English colonies, but used generalizations which were far too broad to describe correctly the law of Virginia. Both appear to be describing colonies that had been previously settled by other European powers, such as the Spanish, the French, and the Dutch, and then acquired by Great Britain. Hale in his *Prerogatives of the King* correctly described the Virginia situation when he wrote, '[T]he English planters carry along with them those English liberties that are incident to their persons'¹⁹. The rest of his comments were inapplicable to Virginia.

On the other hand, Blackstone published his *Commentaries on the Laws of England* in 1765. He wrote: 'Our American plantations are principally of this latter sort [*i.e.*, 'conquered or ceded countries, that have already laws of their own' as opposed to 'uninhabited' countries] being obtained in the last century by right of conquest and driving out the natives ... or by treaties. And therefore the common law of England, as such, has no allowance or authority there'²⁰.

Upon reading this passage in 1774, Col. Landon Carter noted in his private diary:

By this doctrine the colonists are in a legal view considered by the parent state as infidel or a conquered people; and are only subject to the Parliament and not as her children with her consent establishing societies. Further he [Blackstone] adds they are not only subject to the control of Parliament but the king may alter and impose what laws on them he pleases. What does he mean here by the word principally? Can he

§ 1; Va. Code, 1887, § 2; Va. Code, 1919, § 2; Va. Code Ann., Repl. Vol. 1995, § 1-10; see generally *Michie's Jurisprudence of Virginia and West Virginia*, 'Common Law', Charlottesville 1996, vol. 3B; P.A. Bruce, *Institutional history of Virginia*, New York 1910, vol. 1, p. 463-477; A.P. Scott, *Criminal law in Colonial Virginia*, Chicago 1930, p. 3-38; W.H. Bryson, *Virginia Civil Procedure*, 3d ed., Charlottesville 1997, p. 46-58.

15. In fact, many Indians remained and joined the English system of law and government.

16. The first charter of 1606 declared that the settlers were to have 'all liberties, franchises, and immunities' of Englishmen: Hening's Statutes, vol. 1, p. 64.

17. *Blankard v. Galdy* (K.B. 1693), 2 Salkeld 411, 91 English Reports (hereafter cited as E.R.) 356, Holt K.B. 341, 90 E.R. 1089 (re Jamaica) (dictum).

18. Anonymous (Ch. 1722), 2 Peere Williams 75, 24 E.R. 646.

19. Hale (*supra*, n. 6), p. 43, 44.

20. Blackstone, vol. 1, p. 105.

allude to the humanity and justice of the first settlers of some colonies who purchased the lands of the natives? If he does, it must be an ill directed humanity or a very useless exercise of their virtue to posterity; for if by accident they had settled an uninhabited country the invaluable rights of the common law would have attended them; but when they dared to attempt a settlement by humanity and justice, they forfeited all right to the common law to the latest ages. In support of this law, which every man of common sense must shudder at, he cites cases²¹, every one of which make a distinction between settlements composed of English subjects and those composed of conquered people. Therefore, according to his reasoning the conquerors are the conquered, and the drivers out of the natives are the very natives themselves; and those who owned by fair purchases are the very infidels driven out and no longer possessing. This is the species of law in many instances which has given that monster a reputation in the courts of law. Is he not then either an ass or a villain?²²

St. George Tucker and his son, Henry St.G. Tucker, both took the opportunity to disagree publicly (and politely) with Blackstone on this same point²³.

Blackstone's error in regards to the colony of Virginia stemmed from his confusion of Virginia history with that of the West Indies. Virginia was not a 'conquered' or 'ceded' colony but was a 'settled' one. If it could be considered to be conquered or purchased from the Indians, still they did not impose any laws on the newly arrived English. The Indians moved west, and the English moved in as 'settlers' of a vacant land and brought the English common law with them. (As to colonies taken away from other European nations, the Spanish law or whatever remained in force and continued to apply to the Spaniards and Indians already living there under that law until changed by the new English government). Although the English authorities were not always clear on this point and some disagreed with others, the Virginia legal authorities, statutory, case law, and secondary, were and are unanimous on the point that the common law of England was in force in Virginia from the time of the first settlement in 1607 and Virginians are entitled to all the rights, privileges, and liberties of Englishmen²⁴.

21. *Blankard v. Galdy* (K.B. 1693), 2 Salkeld 411, 91 E.R. 356 (Jamaica); the second case cited by Blackstone supports him rather than Carter in that Chief Justice Holt said 'for the laws of England do not extend to Virginia, being a conquered country their law is what the king pleases'; *Smith v. Brown*, 2 Salkeld 666, 91 E.R. 566, 567; *Anonymous* (Ch. 1722), 2 Peere Williams 75, 24 E.R. 646; *Calvin's Case* (Ex. Cham. 1608), 7 Coke Rep. 1, 17, 77 E.R. 377, 397, 398 (Scotland; the case of the *postnati*; the exact distinction discussed by Blackstone and Carter is not made in this case); *Calvin's Case* was discussed in the argument of *Dutton v. Howell* (H.L. 1693), Shower Parl. Cases 24, 31, 1 E.R. 17, 21 (Barbados). *Calvin's Case* determined that a Scot born after the king of Scotland became king of England was a subject of the king of England and entitled to the civil rights of Englishmen, e.g., to own land in England, but *Calvin's Case* does not discuss the settlement of a vacant land.

22. J.P. Greene (ed.), *Diary of Colonel Landon Carter*, Charlottesville 1965, vol. 2, p. 910.

23. 'Of the Unwritten, or Common Law of England' (*supra*, n. 1), p. 381–84, 432; H. St.G. Tucker, *Commentaries on the Laws of Virginia*, Winchester, Va. 1836, vol. 1, p. 6–8.

24. In addition to the works cited above, see T. Jefferson, *Notes on the State of Virginia*, W. Peden (ed.), New York 1972, p. 132; *Miller v. Commonwealth* (1932), 159 Va. 924, 166 S.E. 557, 559; *Anderson v. Commonwealth* (1826), 26 Va. (5 Randolph) 627, 633; *Dykes & Co. v. Woodhouse* (1825), 24 Va. (3 Randolph) 287, 291; *Stout v. Jackson* (1823), 23 Va. (2 Randolph) 132, 146; *United States v. Mundel* (4th Cir. 1795), 10 Va. (6 Call) 245, 260–264 (*per Iredell, J.*).

During the seventeenth century, the bench and bar of Virginia were in general poorly trained in the law, and their administration of the law was rudimentary and unsophisticated. But from the first settlement in 1607 until independence in 1776, and afterwards, there was a continuous improvement in the level of legal education and legal practice. As the bench and bar became better educated, the practice of law came more and more to resemble the practice in England. Most of the English law books were present in eighteenth century Virginia²⁵, and the Virginia judges developed Virginia law according to English precedents and ideas. The legal profession in Virginia looked to England for inspiration throughout the nineteenth century, until it was rendered no longer necessary by the accumulation of a large body of Virginia decisions that was in print and readily available²⁶.

However, in 1803, St. George Tucker wrote:

[W]e may premise, that by the rejection of the sovereignty of the Crown of England, not only all the laws of that country by which the dependence of the colonies was secured, but the whole *lex prerogativa* (or *jura coronae* before mentioned) so far as respected the person of the sovereign and his prerogatives as an individual, was utterly abolished: and, that so far as respected the kingly office, and government, it was either modified, abridged, or annulled, according to the several constitutions and laws of the states, respectively: consequently, that every rule of the common law, and every statute of England, founded on the nature of regal government, in derogation of the natural and unalienable rights of mankind; or, inconsistent with the nature and principles of democratic governments, were absolutely abrogated, repealed, and annulled, by the establishment of such a form of government in the states, respectively. This is a natural and necessary consequence of the revolution, and the correspondent changes in the nature of the governments, unless we could suppose that the laws of England, like those of the Almighty Ruler of the universe, carry with them an intrinsic moral obligation upon all mankind. A supposition too gross and absurd to require refutation²⁷.

Thus St. George Tucker argued that the royal prerogative, or prerogative law, was inimical to republican Virginia, and, if it ever was the law in colonial Virginia, it ceased to be upon independence in 1776²⁸.

Judge Tucker went too far. It is submitted to the contrary that the royal prerogative was and is a part of the common law of England and that the common law of England is the fundamental law of Virginia. Thus the prerogative law of England is in force in Virginia, as a general rule.

Some of the prerogative of the Crown disappeared *ipso facto* when the monarchy was replaced by a republic in Virginia. For example, there can be no prerogative privileges in a queen consort²⁹ if there is no king. Moreover, as there were never any royal forests, chases, or parks in Virginia³⁰, these prescriptive rights

25. W.H. Bryson, *Census of Law Books in Colonial Virginia*, Charlottesville 1978.

26. For a modern example of the influence of the English common law, see *Carter v. Hinkle* (1949), 189 Va. 1, 10–12, 52 S.E.2d 135.

27. 'Of the Unwritten, or Common Law of England' (*supra*, n. 1), p. 405–406.

28. 'Of the Unwritten, or Common Law of England' (*supra*, n. 1), p. 405–406; *cf.* *United States Fid. etc. Co. v. Carter* (1933), 161 Va. 381, 403, 170 S.E. 764, 769; *Stokes v. Upper Appomattox Co.* (1831), 30 Va. (3 Leigh) 318, 338.

29. *Chitty* (*supra*, n. 5), p. 401–403.

30. *Hale* (*supra*, n. 6), p. 229–240; *Chitty*, p. 133–141.

could not ever arise. They can exist only by the eminent domain power of the state or by private contract³¹.

Some parts have been relinquished by delegation to the national government, such as the power to make treaties with and receive ambassadors from foreign nations and the power to declare war³².

Some parts of the prerogative law have been abolished by the Virginia Constitution and Declaration of Rights in 1776 and other parts have been modified by statute. For example, no public office can be held by any type of hereditary tenure³³. The sovereign³⁴ cannot dictate the religious beliefs of citizens³⁵. The law of royal mines, the prerogative right to gold and silver in the ground³⁶, was abolished by statute in 1779³⁷.

However, the remaining parts became transferred from the Crown of England to the Commonwealth as a whole³⁸. The first Constitution of Virginia specifically prohibited the governor from exercising 'any power or prerogative by virtue of any law, statute, or custom of England'³⁹ and transferred to the Commonwealth⁴⁰ all 'escheats, penalties, and forfeitures' payable to the king⁴¹. At common law, judicial writs ran in the name of the king since he was by prerogative law the sole administrator of justice⁴²; now, in Virginia, writs run in the name of the Commonwealth of Virginia⁴³.

Many parts of the prerogative of the sovereign remain in force simply as being a part of the common law of England that is the foundation of the law of Virginia.

The Commonwealth claims sovereign immunity from suit unless it is expressly waived. By the English common law, the sovereign cannot be sued. This principle, sovereign immunity, applies to suits against the state brought indirectly against its

31. See below, p. 380.

32. Blackstone, vol. 1, p. 245–254; Chitty, p. 40–44; Articles of Confederation, 1781, art. VI; United States Constitution, 1789, art. I, § 10.

33. Virginia Declaration of Rights, 1776, art. 4, Hening's Statutes, vol. 9, p. 110; Virginia Constitution, 1971, art. I, § 4.

34. The king or queen of Great Britain is the head of the church of England. Blackstone, vol. 1, p. 269–270; Chitty, p. 50–66.

35. Virginia Declaration of Rights, 1776, art. 16, Hening's Statutes, vol. 9, p. 111–110; Va. Const., 1971, art. I, § 16.

36. *Regina v. Earl of Northumberland* (Ex. Cham. 1567), 1 Plowden 310, 75 E.R. 472; *Attorney General v. Price* (Ex. 1691), Lincoln's Inn MS. Misc. 558, fol. 112; Blackstone, vol. 1, p. 284; Chitty (*supra*, n. 5), p. 145–146.

37. Act of May 1779, chap. 13, § 6, Hening's Statutes, vol. 10, p. 64–65.

38. Virginia Declaration of Rights, 1776, art. 2, Hening's Statutes, vol. 9, p. 109; Va. Const., 1971, art. I, § 2; *Commonwealth v. Webster* (1852), 49 Va. (8 Grattan) 702, 705 (per Lomax, J.) ('The Commonwealth has always occupied the place of the Crown, with its prerogatives as to all the legal remedies, not expressly taken away by statute'); *Galleo v. Attorney General* (1832), 30 Va. (3 Leigh) 450, 482 (the prerogative of *parens patriae* devolved upon the legislature rather than the judiciary); see generally *Michie's Jurisprudence*, 'State', Charlottesville 1994, vol. 17, §§ 24–25.

39. Va. Const., 1776, art. 9, Hening's Statutes, vol. 9, p. 115.

40. Va. Const., 1776, art. 20, Hening's Statutes, vol. 9, p. 118.

41. Note Blackstone, vol. 2, p. 408.

42. Blackstone, vol. 1, p. 257.

43. Va. Const., 1776, art. 18, Hening's Statutes, vol. 9, p. 118.

officers or agents as well as to suits brought directly against the Commonwealth⁴⁴. The doctrine of sovereign immunity is based on the ancient common law principle that the king could not be brought into and sued in his own court⁴⁵. No one can be the judge of his own cause. It was also often stated that no writ lies against the king. The harshness of this doctrine in practice has always been recognized, and from the middle ages onwards, it has been substantially mitigated by the idea that the king is presumed to do no wrong and he desires that his servants not do wrong⁴⁶. Therefore the courts granted petitions of right ('petitions' not 'writs') whereby a private person could be granted relief by the royal courts as a matter of royal grace (not as a matter of right) in disputes with the sovereign involving proprietary rights. In the eighteenth century, the scope of petitions of right was expanded to include contractual rights also⁴⁷. In 1779, the common law was codified to provide for a traverse of office, a monstrans de droit, or a petition of right to challenge an escheat of property to the Commonwealth⁴⁸. And in 1778, the General Assembly created a statutory petition for pecuniary claims which was similar to the common law petition of right⁴⁹.

Although occasionally questioned⁵⁰, the doctrine of sovereign immunity is 'alive and well in Virginia'. It 'serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation'⁵¹. However, the state can voluntarily allow itself to be sued, and there are statutes granting the right to sue the Commonwealth for contractual debts and claims due and for torts committed by its agents⁵².

44. *E.g.*, *Davis v. Marr* (1959), 200 Va. 479, 485, 106 S.E.2d 722; *Sayers v. Bullar* (1942), 180 Va. 222, 225, 22 S.E.2d 9; *Board of Public Works v. Gannt* (1882), 76 Va. 455; *Rasnick v. Pittston Co.* (1986), 5 Va. Cir. 336; see generally *Michie's Jurisprudence*, 'State', vol. 17, §§ 25–26; *Michie's Jurisprudence*, 'Counties', vol. 5A, §§ 84–92; *Michie's Jurisprudence*, 'Public Officers', vol. 15, §§ 49–52.

45. Bracton, vol. 2, p. 33; *Id.*, vol. 4, p. 197.

46. Blackstone, vol. 1, p. 238–39; Chitty, p. 5.

47. W.S. Holdsworth, *The History of remedies against the Crown*, Law Quarterly Review, 38 (1922), p. 141–164, 280–96; Chitty (*supra*, n. 5), p. 339–373.

48. Act of May 1779, chap. 45, Hening's Statutes, vol. 10, p. 116; see, *e.g.*, *French v. Commonwealth* (1834), 32 Va. (5 Leigh) 512.

49. Act of Oct. 1778, chap. 17, § 5, Hening's Statutes, vol. 9, p. 540; *Attorney General v. Turpin* (1809), 13 Va. (3 Hening & Munford) 548; *Commonwealth v. Beaumarchais*, 7 Va. (3 Call) 122, 170–171 (1801) (*semble*); *Higginbotham v. Commonwealth* (1874), 66 Va. (25 Grattan) 627, 637–741; J.B. Minor, *Institutes*, 4 (1893), p. 591–595. It is interesting to note that this statute was the first of its kind in America and, as of 1837, was still the only one: *Above the Law*, Southern Literary Messenger, 3 (1837), p. 689–690.

50. *E.g.*, J.A. Eichner, *A Century of tort immunities in Virginia*, University of Richmond Law Review, 4 (1970), p. 238–281; E.W. Taylor, *A Re-examination of sovereign tort immunity in Virginia*, University of Richmond Law Review, 15 (1981), p. 247–282.

51. *Messina v. Burden* (1984), 228 Va. 301, 308, 321 S.E.2d 657; note also *Virginia Board of Medicine v. VPTA* (1991), 13 Va. App. 458, 464, 413 S.E.2d 59, 63.

52. Va. Code Ann. §§ 8.01-192 through 8.01-195, 8.01-605, 8.01-224; § 15.1-508 (counties may be sued); §§ 2.1-223.1, 11-70, 11-71; Va. Code Ann. §§ 8.01-195.1 through

As the sovereign cannot be summoned into court against its will, it cannot be bound by arbitration through a contract made by one of its agents⁵³. However, by statute municipal corporations, county school boards⁵⁴, and counties can agree to binding arbitration of any controversy⁵⁵. A criminal matter cannot be the subject of arbitration⁵⁶. Criminal justice is a matter of public concern and cannot be compromised, or 'compounded', by an out of court settlement between the victim and the criminal, though they may settle any private tort claim. The same principle forbids compromise of a criminal sanction by means of arbitration.

Estoppel *in pais* cannot be asserted against the Commonwealth⁵⁷. Similarly, the defense of laches cannot be pleaded against the Commonwealth; the sovereign cannot be guilty of laches⁵⁸.

One of the most fundamental parts of prerogative law is the principle that statutes do not apply to the sovereign unless they explicitly express that intention⁵⁹.

The statutes of limitations do not bar any proceedings by or on behalf of the Commonwealth⁶⁰. On the other hand, they do apply to actions brought against the

8.01-195.8 allows tort claims up to \$100,000.00 or the maximum of any insurance policy covering the situation. These statutes are to be liberally construed: *Stuart v. Smith Courtney Co.* (1918), 123 Va. 231, 235, 96 S.E. 241. T.E. Albro, *The Virginia Tort Claims Act*, Virginia Bar News, vol. 3, no. 12 (June 1982), p. 23-27.

53. *Richard L. Deal & Assocs. v. Commonwealth* (1983), 224 Va. 618, 299 S.E.2d 346.

54. *McKennie v. Charlottesville & A. Ry.* (1909), 110 Va. 70, 65 S.E. 503; *Spotsylvania County School Board v. R.E. Lee & Son, Inc.* (1982), 5 Va. Cir. 48; *contra Spotsylvania County School Board v. Sherman Const. Corp.* (1989), 14 Va. Cir. 333, *rev'd on other grounds*, 243 Va. 202, 415 S.E.2d 120 (1992).

55. Va. Code Ann. § 15.1-508.

56. *Horton v. Benson* (C.P. 1675), 1 Freeman 204, 89 E.R. 145.

57. *E.g.*, *Attorney General v. Honiwood* (Ex. 1686), Lincoln's Inn MS. Misc. 557, fol. 126, pl. 2; *Halberstam v. Commonwealth* (1996), 251 Va. 248, 467 S.E.2d 783, 785; *Main v. Department of Highways* (1965), 206 Va. 143, 150, 142 S.E.2d 524, 529; *Emerson v. Zoning Appeals Board* (1998), 44 Va. Cir. 436, 440; *Locks v. Virginia Motor Vehicle Board* (1997), 43 Va. Cir. 511; *R.J. Crowley, Inc. v. Fairfax County School Board* (1996), 41 Va. Cir. 55, 57; *McIntosh v. Almaca, Inc.* (1989), 8 Va. App. 124, 125.

58. *E.g.*, *Anonymous* (K.B. 1529), 102 Selden Soc. 56, 93 Selden Soc. 36; *Norris's Case* (Ex. 1589), 2 Leonard 31, 74 E.R. 333; *Attorney General ex rel. Shaw v. Bowater* (Ex. 1696), Lincoln's Inn MS. Misc. 559, fol. 18 (laches of a tenant of the crown cannot prejudice the rights of the crown); *Tauber v. Commonwealth* (1998), 255 Va. 445, 456, 499 S.E.2d 839, *aff'g Commonwealth v. Tauber* (1997), 43 Va. Cir. 5, 10; *City of Manassas v. Prince William County Supv'rs* (1995), 250 Va. 126, 132, 458 S.E.2d 568, 571, *aff'g* 33 Va. Cir. 286 (1994); *Board of Supv'rs v. Norfolk & Western R. Co.* (1916), 119 Va. 763, 790, 91 S.E. 124; *Sink v. Commonwealth* (1992), 13 Va. App. 544, 413 S.E.2d 658; *Emerson v. Zoning Appeals Board* (1998), 44 Va. Cir. 436, 440; *Commonwealth v. Ellingsworth* (1990), 22 Va. Cir. 73.

59. *E.g.* Note (1498), 115 Selden Soc. 371; *Attorney General ex rel. Boucher v. Portington* (Ex. 1694), *Dodd's Reports* 137 (The Crown is not bound by the Statute of Frauds or the Statute of Limitations); *Regina v. Arnold* (Ex. 1710), *Dodd's Reports* 356 (Statute of Frauds); *Attorney General v. Newman* (Ex. 1815), 1 Price 438, 145 E.R. 1455; *Kemp v. Commonwealth* (1806), 11 Va. (1 Hening & Munford) 85; *Bradford v. Nature Conservancy* (1982), 224 Va. 181, 192, 294 S.E.2d 866.

60. Va. Code Ann. § 8.01-231; *e.g.* *City of Manassas v. Prince William County Supv'rs* (1995), 250 Va. 126, 132, 458 S.E.2d 568, 571; *Bouldin v. Commonwealth* (1987), 4 Va. App. 166, 355 S.E.2d 352; *University of Virginia v. Wise* (1997), 43 Va. Cir. 398.

state. This is a codification of the ancient common law, which is often expressed by the maxim '*nullum tempus occurrit regi*' (time does not run against the king)⁶¹. Sir Edward Coke gives the reason for this rule to be that the king is too busy managing the public affairs of the 'commonwealth' to keep a close watch on his own⁶². Another reason is that since the government must be conducted through agents, those agents may not be as diligent to protect the interests of the public as they should be and the public good should not suffer through their negligence. Moreover, the statutes of limitation do not expressly apply to the sovereign, except in a few narrow instances.

The Commonwealth does not pay interest charges in the absence of a statutory or contractual obligation⁶³. A refund of local taxes can be accompanied with interest only if interest is provided for by a local ordinance⁶⁴.

The Commonwealth does not pay court costs⁶⁵, unless there is a special statute permitting it⁶⁶. At common law and in equity in the old practice, the sovereign never pays court costs. In modern times, it still makes sense not to require the Commonwealth to pay costs because such payments must come out of the public treasury; such payments would thus be a financial imposition on the already overburdened taxpayer.

Property belonging to the state cannot be levied upon⁶⁷. Distress does not lie against land in the possession of the Crown⁶⁸. Writs of replevin do not lie against

61. *E.g.*, Sir Edward Coke's Case (Wards 1579), Godbolt 289, 298, 78 E.R. 169, 174, 2 Rolle Rep. 294, 81 E.R. 809; Norris's Case (Ex. 1589), 2 Leonard 31, 74 E.R. 333; Rotherham v. Nutt (Ex. 1589), 117 Selden Soc. 129; Rex v. Bishop of Hereford (C.P. 1527), 93 Selden Soc. 195; *In re Stonor* (1497), 115 Selden Soc. 363, 366; Attorney General *ex rel.* Grimby v. Eyre (1456), Yearbook Mich. 35 Hen. VI, fol. 26, pl. 33; Bracton, vol. 2, p. 167; E. Coke, *First Institute*, London 1628, fol. 41b, 180b; Commonwealth v. Spotsylvania Supv'rs (1983), 225 Va. 492, 303 S.E.2d 887; Norfolk & W. Ry. v. Supervisors of Carroll County (1909), 110 Va. 95, 103-104, 65 S.E. 531; Nimmo's Ex'r v. Commonwealth (1809), 14 Va. (4 Hening & Munford) 57; Middlesex County v. Hamilton (1992), 28 Va. Cir. 283.

62. E. Coke, *First Institute* (*supra*, n. 61), p. 90, quoted in Blackstone, vol. 1, p. 240.

63. County of Fairfax v. Century Concrete Servs. (1997), 254 Va. 423, 492 S.E.2d 648 (construing Va. Code Ann. § 15.1-549); State Highway Comm'r v. Trustees of the Broadford etc. Church (1979), 220 Va. 402, 404, 258 S.E.2d 503; City of Lynchburg v. County of Amherst (1913), 115 Va. 600, 608, 80 S.E. 117, 120; Halco Eng'g, Inc. v. Commonwealth (1992), 27 Va. Cir. 111, 114-115; Cole v. Kyle (1997), 41 Va. Cir. 274.

64. Va. Code Ann. §§ 58.1-3987, 58.1-3991; Board of Supv'rs of Fairfax County v. FCS Bldg. Assocs. (1997), 254 Va. 464, 492 S.E.2d 634; City of Winchester v. American Woodmark Corp. (1995), 250 Va. 451, 459, 464 S.E.2d 148, 153.

65. Williams v. Attorney General (Ex. 1696), Dodd's Reports 165; Fitch v. Comm'rs of the Navy (Ex. 1697), Lincoln's Inn MS. Misc. 559, fol. 146; Attorney General v. Earl of Ashburnham (V.C. 1823), 1 Simons & Stuart 394, 397, 57 E.R. 157, 159; Rex v. Corum (Ex. 1792), 1 Anstruther 50, 145 E.R. 797; Rex v. Miles, 7 Term Reports 367, 101 E.R. 1024 (1797); Commonwealth v. Colquhoun (1808), 12 Va. (2 Hening & Munford) 213, 245, n. 1; *In re Williams* (1993), 31 Va. Cir. 133; this rule is codified by Va. Code Ann. § 17.1-629; Va. Code Ann. § 14.1-201 (Repl. Vol. 1978); Va. Code § 3537 (1919); Va. Code § 3556 (1887); Va. Code, c. 211, § 13, p. 783 (1849); Va. Acts 1847-48, c. 23, § 18, p. 158.

66. *E.g.* Va. Code Ann. § 9-6.14:21; R. v. Brunty (1995), 38 Va. Cir. 174.

67. Stuart v. Smith-Courtney Co. (1918), 123 Va. 231, 239, 96 S.E. 241.

68. Note, Jenkins 112, 145 E.R. 79. Note also Va. Code Ann. § 44-96 (military property).

the king⁶⁹. Public property is not subject to a mechanic's lien as a matter of governmental immunity, the state not being mentioned in the statute that created these liens⁷⁰. A suit for garnishment does not lie against the Commonwealth⁷¹, except where specifically allowed for the wages of government employees⁷². Even so, the salaries of the constitutional officers of Virginia cannot be garnished⁷³.

Eminent domain is the right of the government to take private property for public use upon the payment of its fair value which constitutes 'just compensation'. '[T]he eminent domain of the sovereign power extends to the taking [of] private property for public purposes ... but then to render the exercise of this power lawful, a fair compensation must always be made to the individual ...'⁷⁴. The theory of eminent domain is that, as the king was the paramount or ultimate overlord of all real property⁷⁵, it was his seigniorial right and part of his royal prerogative to retake land that he or his predecessor had granted provided just compensation was made to the holder. Grants and homage include warranties of seisin, which, if broken, will require the grantor to pay compensation (*escambium*) therefor⁷⁶. Since neither writs of *warrantia cartae* nor writs of right lay against the king, the right to just compensation was put into operation by an inquest upon a writ of *ad quod damnum*⁷⁷.

However, by the sixteenth century, the inheretability, alienability, and ownership of real property had become an absolute right. Furthermore, the separation of the government of the king from the person of the king was proceeding apace, and the right of the king, as lord paramount, to take a person's inheritance, i.e. land, was denied, although this right was allowed to be exercised by the government by legislative act⁷⁸. Thus, this right was still allowed to the sovereign⁷⁹.

69. *Attorney General v. Rolle* (Ex. 1628), British Library MS. Add. 35961, fol. 182v, pl. 8.

70. E.g., *Legg v. Wise County School Board* (1931), 157 Va. 295, 300, 160 S.E. 60; *Bowers v. Town of Martinsville* (1931), 156 Va. 497, 511, 159 S.E. 196.

71. *Jarvis v. Charlotte Diesel Driving School* (1998), 45 Va. Cir. 481; *Kater, Scott & Heller, P.C. v. Landside* (1994), 35 Va. Cir. 107.

72. Va. Code Ann. §§ 8.01-522 through 8.01-525.

73. *Hilton v. Amburgey* (1957), 198 Va. 727, 96 S.E.2d 151.

74. *Crenshaw v. Slate River Co.* (1828), 27 Va. (6 Randolph) 245, 264; see also *Attorney General v. Turpin* (1809), 13 Va. (3 Hening & Munford) 548; see generally *Michie's Jurisprudence*, 'Eminent Domain', vol. 7A; A.E.D. Howard, *Commentaries on the Constitution of Virginia*, Charlottesville 1974, vol. 1, p. 210-219; A.E.D. Howard, *The Road from Runnymede, Magna Carta and constitutionalism in America*, Charlottesville 1968, p. 332-340. The Americans, following Blackstone, grounded the requirement of paying just compensation on the 'Due Process' Clause of Magna Carta. E.g. J.W. Ely, Jr., 'That due satisfaction may be made', *The Fifth Amendment and the origins of the compensation principle*, *American Journal of Legal History*, 36 (1992), p. 1, 16.

75. F. Pollock and F.W. Maitland, *History of English law*, 2d ed. by S.F.C. Milsom, Cambridge 1968, vol. 1, p. 232-233.

76. Bracton, vol. 4, p. 195, 197; S.J. Bailey, *Warranties of land in the thirteenth century*, *Cambridge Law Journal*, 8 (1944-1945), p. 274-299; *id.*, vol. 9, p. 82-106; Pollock and Maitland, *History of English law*, vol. 1, p. 301, 306; A.W.B. Simpson, *History of the land law*, 2d ed., Oxford 1986, p. 15.

77. P. Nichols, *Law of eminent domain*, 2d ed., Albany, N.Y. 1917, vol. 1, p. 5-11.

78. *Willion v. Berkley* (C.P. 1562), 1 Plowden 223, 75 E.R. 339; in this case, which held that the king, when taking property in his private capacity, is bound by the terms of

The later philosophers, most notably John Locke and Samuel Pufendorf, saw the right of eminent domain as part of the nature of a government, similar to the right to tax for the greater benefit of the entire body politic. They found the duty to pay just compensation to the former owner of the condemned land to be required by fairness in order to equalize the financial burden. Taxes are paid proportionally; thus, similarly, if one citizen has a special loss, that loss should be shared proportionally through the payment of compensation to him out of the general public fisc⁸⁰.

Blackstone followed the natural law philosophers and did not include this right as a part of the prerogative of the sovereign and wrote that it could be done only by an act of Parliament.

The third absolute right inherent in every Englishman is that of property ... Upon this principle, the Great Charter has declared that no freeman shall be disseised or divested of his freehold or of his liberties or free customs but by the judgment of his peers or by the law of the land. ... So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community ... [T]he legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution and which nothing but the legislature can perform⁸¹.

Blackstone recognized the possibility that Parliament by an act might trample on the rights of private persons, but he expressed the hope that Parliament would not disregard the law and the natural rights of landowners by not giving just compensation for land forcibly taken from them. Although most of the early Virginia statutes required that compensation be paid for eminent domain condemnations⁸²,

the Statute De Donis, even though not specially mentioned therein, the court said 'nor will [the king's] prerogative be any warrant to him to do an injury to another ... his prerogative could not alter his estate nor make it greater than the donor gave it to him' at p. 246; note also argument of counsel at p. 359–362; E. Coke, *Second Institute*, London 1642, p. 35–36, said that the prerogative of purveyance did not extend to real property.

79. As the sovereign rights of the king were later passed to the Commonwealth of Virginia as a whole, i.e. not to the Governor of Virginia (*supra*, p. 376), this prerogative right passed from the king to the legislature of the kingdom.

80. W.B. Stoebuck, *A general theory of eminent domain*, Washington Law Review, 47 (1972), p. 553, 583–588. My view of the prerogative of the sovereign is broader than Stoebuck's in that I find that the king is under the law and not separate from it; thus, the reallocation of the political rights of the monarch to the legislature does not change the extent of the prerogative rights of the government vis-a-vis the governed. Thus the right of eminent domain appears to me to be a prerogative right. Stoebuck argues to the contrary. *Id.* at 562–565.

81. Blackstone, vol. 1, p. 134–135.

82. Ely notes that sometimes this requirement was not included in such a statute, but he gives no examples from Virginia where compensation was in fact not paid. J.W. Ely, Jr., 'That

to clarify this for once and for all, the Virginia Constitution of 1830 expressly included the requirement for the government to pay just compensation for the exercise of the eminent domain power⁸³.

The need for and use of this doctrine was relatively infrequent until the late nineteenth century because, before then, the state did not often meddle in the private affairs of its citizens. But now, the state appears sometimes to have lost all sense of private rights and all self-control in the regulation of commerce and social welfare. Thus, the sovereign prerogative of eminent domain has been expanded in the republican Commonwealth of Virginia in the twentieth century beyond the wildest nightmares of monarchical England in the eighteenth century.

According to common law, information in the possession of the government, state secrets, and official communications cannot be discovered⁸⁴. This rule has been greatly and beneficially limited by the Virginia Freedom of Information Act⁸⁵. It is to be noted also that Virginia Supreme Court Rule 4:8(a) contemplates service of interrogatories on 'public corporations' and 'governmental agencies'. The privilege of governmental secrecy has been generally abrogated by the Freedom of Information Act, but there are special exceptions which preserve the common law privilege. Information in the hands of the government relating to private persons and which have no specific political significance should not be discovered through the use of this Act. Some examples are matters dealing with criminal investigations⁸⁶, income tax returns⁸⁷, scholastic records⁸⁸, and personal records⁸⁹.

due satisfaction may be made' (*supra*, n. 74), p. 1, 10. If the requirement of just compensation is a common law requirement, then such a clause in a statute would not be required. Only if there were a denial of the right of the landowner would the omission be significant; the presence in the statutes of the duty to pay is merely a reminder to the condemnor of the common law duty.

83. Virginia Constitution, 1830, Art. III, § 11; Va. Const., 1971, Art. I, § 11. 'Virginia does not depend solely upon its inherent powers of sovereignty in the exercise of eminent domain. Rather, that power is expressly recognized in the Constitution of Virginia', *Spotsylvania County v. Mineral Springs Homeowners Ass'n* (2003), 62 Va. Cir. 319.

84. *Smith v. East India Co.* (Ch. 1841), 1 Phillips 50, 41 E.R. 550; *Webb v. Commonwealth* (1923), 137 Va. 833, 120 S.E. 155; *Peden v. Peden's Adm'r* (1917), 121 Va. 147, 92 S.E. 984; *Morris v. Creel* (1816), 4 Va. (2 Va. Cases) 49; J.B. Minor, *Institutes of common and statute law*, Richmond 1893, vol. 4, p. 873.

85. Va. Code Ann. §§ 2.1-340 to 2.1-346.1; e.g., *Associated Tax Serv. v. Fitzpatrick* (1988), 236 Va. 181, 372 S.E.2d 625; *Gibbs v. Roanoke County Board of Supv'rs* (1981), 3 Va. Cir. 24 (job classification and pay plan).

86. E.g. *Stevens v. Lemmie* (1996), 40 Va. Cir. 499; *Commonwealth v. Pollard* (1996), 40 Va. Cir. 354 (names of informants); *Wheeler v. Gabbay* (1994), 40 Va. Cir. 551 (criminal investigations); *Richmond Mercury Corp. v. Williams* (1975), 2 Va. Cir. 432 (fire department records leading to criminal prosecution).

87. E.g. *Commonwealth v. Krbec* (1984), 3 Va. Cir. 165 (state tax returns); *Green v. Sixty-Seventh Sales Co.* (1972), 1 Va. Cir. 115 (income tax returns); *Prulease, Inc. v. Henrico County* (1988), 11 Va. Cir. 248 (tax records). There is only a qualified privilege in tax returns: *Continental Fed. Sav. Bank v. Cooper* (1989), 17 Va. Cir. 355.

88. E.g. *Redinger v. Casteen* (1996), 39 Va. Cir. 176.

89. Va. Code Ann. §§ 2.1-342(B), 2.1-382(B), 2.1-384, 42.1-78, 8.01-581.17; 58.1-3, 58.1-4, 58.1-109; *Lee Gardens Arlington, L.P. v. Arlington County Board* (1995), 250 Va. 534, 463 S.E.2d 646 (real estate tax records); *Harding v. Harding* (1990), 21 Va. Cir. 130.

Because grants of the government are drafted by agents of the Crown or the state, who may not take sufficient care to protect the interests of the public or who may conspire with the grantee to defraud the public, they are construed narrowly⁹⁰. Where the government is deceived into making a grant, such grant or patent is void⁹¹. ‘The prerogative protects the king from the force of the lion and the fraud of the fox because no one can disseise him nor deceive [him], and, if the king be misinformed of his title or estate, the grant is void’⁹².

Furthermore, in several instances the royal prerogative has been extended to the general public. The assignability of choses in action, contractual obligations, is now valid for all assignees⁹³. Similarly, execution of judgments against the debtors of a judgment debtor by the prerogative writ of extent is now generally available to all judgment creditors by garnishment proceedings⁹⁴.

And thus we see that prerogative law can be useful and flourish in a democratic as well as a monarchical state. This is because prerogative law is not an aspect of monarchy but is an aspect of government. This brings us back to the question of whether the king is under the law and whether the republic is under the law and whether the government is. If the government is not under the law, then, whatever its form, it is or will soon become a tyranny.⁹⁵ Man-made law, positive law, must defer to the overarching fundamental law⁹⁶. Whether constitutional law is written or unwritten, it controls statute law, because the law of the government cannot supervene the fundamental law. A government can change municipal law but not the fundamental law. The law of a single person or of a majority of persons will be oppressive where it conflicts with the rule of the fundamental law. The government must be under the rule of law or the self interest of those in power will lead to the oppression of those not in power.

This brings us back to Saint George Tucker’s reaction to the *lex prerogativa*.

90. *E.g.* Knight’s Case (C.P. 1588), 5 Coke Rep. 54, 77 E.R. 137; Case of the Royal Pishary of the Banne (1610), Davis 55, 57, 80 E.R. 540, 543; Rex v. Bacon (Ex. 1627), British Library MS. Add. 35961, fol. 83v, pl. 16.

91. *E.g.* Barwick’s Case (Ex. 1597), 5 Coke Rep. 93, 77 E.R. 199, Moore K.B. 393, 72 E.R. 649; Lord Brooke v. Lord Goring (1630), Croke Car. 197, 79 E.R. 773; Attorney General v. Blage (Ex. 1630), 118 Selden Soc. 608; Legan v. Stevens (1736), 2 Virginia Colonial Decisions B166, Jefferson 30; Hambleton v. Wells (1791), 8 Va. (4 Call) 213, 216, 11 Va. (1 Henning & Munford) 307 note, Misc. Va. 30, see also St.G. Tucker (ed.), *Blackstone’s Commentaries*, vol. 4, p. 261, note 10 (the scope of this rule is debated here, but it is clear from the use of the word ‘deceived’ that the *lex prerogativa* is the foundation of the reason of the case); White v. Jones (1792), 8 Va. (4 Call) 253, 257, 1 Va. (1 Washington) 116, Wythe 111; Alexander v. Greenup (1810), 15 Va. (1 Munford) 134, 141.

92. *Welshe’s Case* (Ex. 1595), Moore K.B. 413, 416, 72 E.R. 664, 666 (argument of counsel).

93. Rex v. Hunton (1628), British Library MS. Add. 35961, fol. 177, 188; Tirrell v. Holmes (1633), 118 Selden Soc. 638; Regina v. Arnold (1710), Dodd’s Reports 356; Va. Code Ann. §§ 8.01-26, 8.2-210, 8.9-318(4); for an historical account, see W.H. Bryson, *Virginia civil procedure* (supra, n. 14), p. 170–173.

94. Va. Code Ann. §§ 8.01-511 *et seq.*; see also D. Rendleman, *Enforcement of judgments and liens in Virginia*, Charlottesville 1982, p. 106–107.

95. At what point the oppression of tyranny becomes worse than the anarchy and brutality of warfare is beyond the scope of this essay.

96. Positive law is a matter of power; natural law is a matter of right.

The dispute in the eighteenth century between the king and Parliament of Great Britain on the one hand and the Virginians and the other North American colonists on the other was whether the common law of England with its protections of life, liberty, and property applied to the colonists. Could either Parliament or king or both declare or alter the law or tax without the consent of the community, contrary to the law of England, which was carried across the Atlantic Ocean by the English settlers? To the Virginians, the theory of virtual representation in Parliament was not convincing. The jurisdiction of the British Parliament was not seen to extend beyond the geographical boundaries of Great Britain. They believed that their own legislature, the General Assembly, which was established in 1619, was the representative body of the people in Virginia within the unwritten common law of England. It is the conclusion of this writer that the common law of England, including the prerogative of the sovereign, came to America with the first English colonists and has been the law of Virginia since 1607.

Summary

The prerogative of the sovereign in Virginia: royal law in a republic

This essay describes and traces the historical development of governmental law from seventeenth-century England to twentieth-century Virginia.