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# *English Common Law in Virginia\**

W. HAMILTON BRYSON\*\*

By statute<sup>1</sup> the common law of England is the basis of the common law of modern Virginia. This reception statute refers to the customary, unwritten law of the kingdom of England, but only that part which was general and common to all parts of England. That the English common law is the foundation of the law of Virginia is a matter not merely of a modern statute but also of history and reason.

Virginia was settled in 1607 by a London-based private corporation, and the settlers were Englishmen. These adventurers set out for the new world with visions of becoming wealthy quickly. It was logical that they should have taken 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.'<sup>2</sup> In 1632 when commissioners were appointed to hold the monthly courts (later renamed the county courts) for Warwick, Warrosquyoke (now Isle of Wight), Elizabeth City, and Accomack, 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.'<sup>3</sup> When the statutes of Virginia were recodified in 1662, the common law of England was acknowledged to be in force.<sup>4</sup> When independence from Great Britain was declared in 1776, a statute was enacted which stated that the general common law of England remained in force,<sup>5</sup> and this provision has been continued in substance by every Virginia code since.<sup>6</sup>

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. The native Indians were seen to be living in a state of barbarism; furthermore, the Indians after defeat in war and sale of their territorial claims slowly moved westward leaving the colony vacant. This legal vacuum was filled by the familiar English law, which the settlers brought with them from England.<sup>7</sup>

Sir Matthew Hale and Sir William Blackstone both wrote on the validity

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of the English law in the English colonies, but both used generalizations which were far too broad correctly to describe 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.'<sup>8</sup> The rest of his comments were inapplicable to Virginia.<sup>9</sup> (This book, however, was not published until 1976.)

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.<sup>10</sup>

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 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 cases,<sup>11</sup> 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?<sup>12</sup>

St. George Tucker and his son, Henry St. G. Tucker, both took the opportunity to disagree publicly (and politely) with Blackstone on this same point.<sup>13</sup>

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 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 were entitled to all the rights, privileges, and liberties of Englishmen.<sup>14</sup>

Having established that the common law was brought from England to Virginia in 1607, it now remains to consider the scope and extent of the law introduced into the colony. The term common law, as used in the sense of the law common to all of England, included by 1607 equity jurisprudence and procedure. By this time equity was unquestionably a part of the municipal law of England, and it would have been egregiously defective otherwise. Equity along with the rest of the common law came to Virginia with the settlers.<sup>15</sup>

St. George Tucker argued that the royal prerogative, or prerogative law, was inimical to republican Virginia, and thus if it ever was the law in colonial Virginia, it ceased to be upon independence.<sup>16</sup> However, it is submitted that the royal prerogative was and is a part of the common law (and thus the king was under and subject to the law and not above it or independent of the law). Some parts of prerogative law may have been abolished by the Virginia Constitution and Bill of Rights in 1776, but the remaining parts became transferred from the crown to the commonwealth as a whole.<sup>17</sup> Note, for example, that the commonwealth never pays court costs,<sup>18</sup> nor can laches be imputed to the commonwealth.<sup>19</sup>

Since it was the law that was common to all of England that the settlers brought with them, no local laws or customs of any particular English borough, county, or manor were ever in force in Virginia. This is a matter of common sense; since the settlers did not come from any single locality in England, there would have been no agreement as to which local custom to use. Moreover, the local laws and customs, which were in derogation of the common law, were peculiar or specific to one particular locality in

England; they were not transferable to any other place, either in England or in Virginia.<sup>20</sup> Local law dealt primarily with the rights of the various tenants of a manor to use parts of that manor in particular ways and with the rights and methods of transferring and inheriting interests in the land in that manor. This was also true of the rights of the freemen of particular boroughs. The tenure of land in a particular English locality that was in derogation of the common law had nothing to do with the tenure of land in Virginia or in any particular part of Virginia.

Furthermore, there can be no valid local customs in Virginia in derogation of the common law, because such a custom cannot be alleged to be 'immemorial,' that is to have existed before the time of legal memory. This is because Virginia was first settled in 1607, which was well after the accession of King Richard I. A recent custom cannot change the common law.<sup>21</sup>

Note that the concept of local laws in derogation of the common law is quite different from the idea of title by prescription.<sup>22</sup> It is also different from the idea that the commercial customs of merchants can be proved as a matter of evidence to show the intent of the parties to a contract, which is the way commercial law becomes a part of the common law.<sup>23</sup>

It was believed in colonial Massachusetts that, since land was granted in free and common socage as of the manor of East Greenwich in Kent, gavelkind, the local law of inheritance in Kent, was applicable to Massachusetts. However, the colonial Virginians did not fall into this error, but correctly followed the common law of primogeniture.<sup>24</sup> In Virginia, as in all the English colonies in North America, land was granted in free and common socage as of the manor of East Greenwich, but this was done so that the English law of socage tenure applied rather than the law of military tenure with its burdensome knights' service.<sup>25</sup> The land was in Virginia not in Kent, and the local law of Kent was not applicable.

To state the rule that the common law of England is the foundation of Virginia law is simple and indeed simplistic. It is submitted that the common law of England in 1607 was brought to Virginia by the first settlers, but the common law was not and is not static. Thus the evolving common law, after 1607, was developed by the Virginia courts rather than by the English judges. However, the evolution of the common law and the doctrine of stare decisis is and has always been the subject of dispute.

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 Virginia,<sup>26</sup> and the Virginia judges developed Virginia law according to English precedents and ideas. The legal profession in Virginia looked to England for inspiration well into the nineteenth century, until it was rendered no longer necessary by the accumulation of a large body of Virginia decisions in print and readily available.<sup>27</sup>

The English common law, of course, was subject to revision and change by Virginia legislation; also various English common law doctrines, which were unsuited to Virginia conditions and policies, have been modified by the Virginia courts. A good example of the latter type of development is the law of waste. Virginia being a wooded country in the nineteenth century differed greatly from England, a cleared country, and therefore the life tenant in Virginia in cutting timber did not commit any legal waste. If the life tenant were not allowed to clear the land of trees, it would be worthless to him. Furthermore, the cutting down of woods was not a loss but a positive benefit for the remainderman also.<sup>28</sup>

Since in Virginia there was no tenure by knight's service, there were no rights of wardship. Since there were no manors or local jurisdictions in derogation of the general common law, there were no courts by prescription, copyhold lands, or conveyances by surrender. Since there was no bishop, there were no ecclesiastical courts; wills and administrations were handled by the county courts.

English cases decided after 1607 were taken to be persuasive rather than binding authority; there are relatively few reports of decisions before 1607 and many of these were, by the eighteenth century, antiquated by later English developments or inapplicable to the social conditions of Virginia and thus of little use or authority. It is thus necessary for the Virginia bench to deal with most English authority in a flexible manner. Chancellor Creed Taylor in 1809 stated that 'it was the *common law* we adopted, and not *English decisions*'.<sup>29</sup>

The force of the common law as declared by Virginia decisions is, however, a more difficult problem. Where the common law is clear on a point, for the courts to rule otherwise is for the judges to change the law and to usurp the legislative function of the General Assembly. It is the duty of the courts to administer the law, not to legislate.<sup>30</sup> 'The province of the court is to interpret the law, not enact it.'<sup>31</sup> Referring directly to the current Virginia common law reception statute, Justice Spratley said, 'Law-making by the courts in the face of this language would be an unconstitutional assumption of legislative power.'<sup>32</sup>

On the other hand, a study of the history of almost any branch of the common law reveals that the common law is a dynamic, a changing, a growing thing.<sup>33</sup> 'The common law ... is a flexible body of principles which are designed to meet, and are susceptible of adaptation to, new institutions, conditions, usages, and practices, as the progress of society

may require.<sup>34</sup> In *Harris v. Commonwealth*, the court said, 'It is true that the principles of the common law are elastic, and that one of its peculiar merits is that it adapts itself to the rights of parties under changed circumstances ...'<sup>35</sup> Referring to the common law, Judge Brooke wrote in 1831, 'Its peculiar beauty is that it adapts itself to the rights of parties under every change of circumstances.'<sup>36</sup>

The difficult distinction that must be drawn between judicial legislating and the court's developing the unwritten common law leads to a more fundamental problem. What should the court do when a good general rule of the common law leads to injustice in a single particular case? Should a good system be weakened or destroyed in favor of justice in the particular case? It was ruled in 1823 by the excellent Judge Green that

The quiet and well being of society require that the rights and responsibilities of individuals should in all cases, when it is practicable, without the hazard of extensive injustice, be ascertained by fixed and certain rules, so that they may adjust their differences, without a resort in each particular case to the judicial tribunals. It is no objection to such general rules that in some few instances they will operate injustice. If their general effect is to do right between the parties, it is better that individuals should suffer occasionally an injury than the whole community an inconvenience [*i.e. an injury or harm*]. This principle is strongly asserted and insisted on by the common law.<sup>37</sup>

Judge Kelly in 1921 balanced the competing policies as follows:

Courts cannot always have the satisfaction of feeling that decisions arrived at by them have reached the right of the individual case, because they must have due regard for the legal proverb that hard cases make bad law, but they must never lose sight of the fact that justice in the individual case should always be a primary consideration, and should be brought about if that result can be attained without sacrifice of sound and just general principles.<sup>38</sup>

#### NOTES

1. Va. Code Ann. § 1-10 (Repl. Vol. 1979).
2. 'Articles, Instructions and Orders' (Nov. 20, 1606), 1 W. W. Hening, *Statutes at Large ... of Virginia* 68 [hereinafter cited as Hening's *Statutes*]; note also the second Virginia Charter (1609), art. 23, 1 Hening's *Statutes* 96.
3. Act of Feb. 1631/32, c. 33, 1 Hening's *Statutes* 169; note also 1 *id.* 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 1 Hening's *Statutes* 372, 504, 530.
4. Act of March 1662, preamble, 2 Hening's *Statutes* 43.

5. Act of May 1776, c. 5, § 6, 9 Hening's *Statutes* 127.
6. Va. Rev. Code, vol. 1, p. 135, c. 38 (1819); Va. Code, p. 98, c. 16, § 1 (1849); Va. Code, § 2 (1887); Va. Code § 2 (1919); Va. Code Ann. § 1-10 (Repl. Vol. 1979).
7. The first charter of 1606 declared that the settlers were to have 'all liberties, franchises, and immunities' of Englishmen: 1 Hening's *Statutes* 64; note also St. G. Tucker, *Blackstone's Commentaries*, Philadelphia, 1803, vol. 1, app. E, pp. 381-4, 432; H. St. G. Tucker, *Commentaries on the Laws of Virginia*, Winchester, 1836, vol. 1, 6-8.
8. M. Hale, *The Prerogatives of the King*, 92 *Selden Soc.* 43, 44 (D.E.C. Yale ed. 1976).
9. *Id.*
10. W. Blackstone, *Commentaries on the Laws of England*, London, 1765, vol. 1, 105.
11. *Blankard v. Galdy*, 2 Salkeld 411, 91 Eng. Rep. 356 (K.B. 1693) (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 Eng. Rep. 566, 567 (K.B.); Anon., 2 Peere Williams 75, 24 Eng. Rep. 646 (Ch. 1722); Calvin's Case, 7 Coke Rep. 1, 17, 77 Eng. Rep. 377, 397, 398 (Ex. Cham. 1608) (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*, Shower Parl. Cas. 24, 31, 1 Eng. Rep. 17, 21 (H.L. 1693) (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. This case is analogous to that of an Englishman, a subject of the king of England, emigrating to Virginia and bringing English rights with him to his king's new dominion, but Calvin's Case does not discuss the settlement of a vacant land.
12. J. P. Greene, ed., *Diary of Colonel Landon Carter*, Charlottesville, 1965, vol. 2, 910.
13. See note 7.
14. In addition to the works cited in notes 7 and 12, see E. C. Surrency, 'Report on Court Procedures in the Colonies - 1700,' *Am. J. Legal Hist.*, 9 (1965) 69, 239; J. H. Smith, 'The English Common Law in Early America' in *The English Legal System* (1975); T. Jefferson, *Notes on the State of Virginia*, W. Peden ed., New York, 1972, 132; *Miller v. Commonwealth*, 159 Va. 924, 931, 166 S.E. 557, 559 (1932); *Anderson v. Commonwealth*, 26 Va. (5 Rand.) 627, 633 (1826) (per Brockenbrough); *Dykes and Co. v. Woodhouse*, 24 Va. (3 Rand.) 287, 291 (1825) (per Green); *Stout v. Jackson*, 23 Va. (2 Rand.) 132, 146 (1823); *United States v. Mundel*, 10 Va. (6 Call) 245, 260-264 (4th Cir. 1795) (per Iredell). 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.' 1 Hening's *Statutes* 263.
15. 'Articles, Instructions and Orders' (Nov. 20, 1606), 1 Hening's *Statutes* 68; Act of Nov. 1645, c. 10, 1 Hening's *Statutes* 303 (county courts).
16. St. G. Tucker, *Blackstone's Commentaries*, Philadelphia, 1803, vol. 1, app. E, pp. 405-6; cf. *U.S. Fidelity etc. Co. v. Carter*, 161 Va. 381, 403, 170 S.E. 764, 769 (1933); *Stokes v. Upper Appomattox Co.*, 30 Va. (3 Leigh) 318, 338 (1831).
17. *Commonwealth v. Webster*, 49 Va. (8 Gratt.) 702, 705 (1852); *Gallego v. Attorney General*, 30 Va. (3 Leigh) 450, 482 (1832).
18. *Commonwealth v. Colquhoun*, 12 Va. (2 Hen. & M.) 213, 245, note 1 (1808); this rule was codified by 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.
19. E.g. *Board of Sup'rs v. Norfolk & W.R. Co.*, 119 Va. 763, 790, 91 S.E. 124 (1916); 'nullum tempus occurrit regi': *Norfolk & W.R. Co. v. Board of Sup'rs*, 110 Va. 95, 103-4, 65 S.E. 531 (1909).
20. H. St. G. Tucker, *Commentaries on the Laws of Virginia*, Winchester, 1836, vol. 1, 23.
21. *Delaplane v. Crenshaw & Fisher*, 56 Va. (15 Gratt.) 457, 470-5 (1860); *Harris v. Carson*, 34 Va. (7 Leigh) 632, 638-9 (1836); H. St. G. Tucker, *Commentaries*, vol. 1, 24.
22. J. B. Minor, *Institutes*, Richmond, 1892, vol. 2, 564-6.
23. H. St. G. Tucker, *Commentaries*, vol. 1, 24; e.g. *Reese v. Bates*, 94 Va. 321, 325, 26 S.E. 865 (1897).



24. St. G. Tucker, *Blackstone's Commentaries*, vol. 1, app. E, pp. 402–3; the Massachusetts law could have come from gavelkind or from the law of Moses: R. B. Morris, *Studies in the History of American Law*, New York, 1974, 105–14; Virginia was granted in socage as of the manor of East Greenwich: 'Letters Patent to Sir Thomas Gates,' 1 Hening's *Statutes* 66 (10 Apr. 1606).
25. J. Hurstfield, 'The Greenwich Tenures of the Reign of Edward VI,' *L. Q. R.*, 65 (1949) 72–81.
26. W. H. Bryson, *Census of Law Books in Colonial Virginia*, Charlottesville, 1978.
27. For a modern example of the influence of the English common law, see *Carter v. Hinkle*, 189 Va. 1, 10–12, 52 S.E.2d 135 (1949).
28. *Findlay v. Smith*, 20 Va. (6 Munf.) 134, 142, 148–9 (1818); *Lightfoot v. Colgin*, 19 Va. (5 Munf.) 42, 68 (1813) (dictum); J. B. Minor, *Institutes*, Richmond, 1892, vol. 2, 620–1.
29. *Marks v. Morris*, 14 Va. (4 Hen. & M.) 463 (1809); note also the opinions expressed in *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 158, 161–4 (1806).
30. *Stout v. Jackson*, 23 Va. (2 Rand.) 132, 149 (1823); see also *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 293, 247 S.E.2d 400, 404 (1978); *Millhiser Mfg. Co. v. Gallego Mills Co.*, 101 Va. 579, 595, 603, 44 S.E. 760, 766, 769 (1903); *Surratt v. Thompson*, 212 Va. 191, 196, 183 S.E.2d 200, 203 (1971) (Harman, J. dissenting).
31. *Lewis v. Commonwealth*, 184 Va. 69, 73, 34 S.E.2d 389, 390 (1945).
32. *Brown v. Brown*, 183 Va. 353, 358, 32 S.E.2d 79, 81 (1944).
33. That the common law is dynamic not static, see e.g. *Korman v. Carpenter*, 216 Va. 86, 90, 216 S.E.2d 195, 197–198 (1975); *Surratt v. Thompson*, 212 Va. 191, 193, 183 S.E.2d 200, 202 (1971); *Foster v. Commonwealth*, 96 Va. 306, 310, 31 S.E. 503 (1898); *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 161–4 (1806).
34. *Midkiff v. Midkiff*, 201 Va. 829, 832, 113 S.E.2d 875, 877 (1960).
35. *Harris v. Commonwealth*, 113 Va. 746, 749, 73 S.E. 561, 562 (1912) (dictum).
36. *Stokes v. Upper Appomattox Co.*, 30 Va. (3 Leigh) 318, 338 (1831).
37. *Stout v. Jackson*, 23 Va. (2 Rand.) 132, 150 (1823).
38. *Clark v. Hugo*, 130 Va. 99, 112, 107 S.E. 730 (1921).