THE

Canadian Freeholder:

DIALOGUE II.

THE

Canadian Freeholder:

IN

THREE DIALOGUES

BETWEEN AN

ENGLISHMAN and a FRENCHMAN,

SETTLED IN CANADA.

SHEWING

The Sentiments of the Bulk of the Freeholders of Canada concerning the late Quebeck-Act; with ſome Remarks on the Boſton-Charter Act; and an Attempt to ſhew the great Expediency of immediately repealing both thoſe Acts of Parliament, and of making ſome other uſeful Regulations and Conceſſions to his Majeſty's American Subjects, as a Ground for a Reconciliation with the United Colonies in America.

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PREFACE.

THIS second Dialogue of *The Canadian Freeholder* contains an examination of the reasons and authorities alledged by Lord Mansfield, the lord chief justice of the Court of King's Bench, in support of the following doctrine, which he laid down in the month of November, 1774, in delivering the judgement of the court in the case of Campbell and Hall, to wit, *That, upon the conquest of any country by the British arms, and a subsequent cession of it by its former sovereign to the Crown of Great-Britain, the king becomes the sole legislator of such country, and has a right to make laws for, and impose taxes on, the inhabi-*

inhabitants of it by his ſingle authority, or without the concurrence of the parliament; unleſs the ſaid authority ſhall have been previouſly limited, or reſtrained, by an act of parliament antecedent to ſuch conqueſt and ceſſion." This is the main ſubject of this dialogue: but there are ſome other matters, relating principally to the government of the American colonies, occaſionally introduced in it. The more particular contents of it may be deſcribed as follows.

The 11 firſt pages are taken up in ſtating the two different opinions which lawyers have entertained upon this ſubject, and the doctrine laid down by Lord Mansfield in delivering the aforeſaid judgement of the Court of King's Bench.

The 12th and 13th pages contain a ſtate of the three grounds, or reaſons, aſſigned by Lord Mansfield in ſupport of the ſaid doctrine; to wit, 1ſt, The king's right to make war and

and peace; 2dly, The practice which has taken place with respect to countries conquered by the Crown of England; and 3dly, The opinions of judges and other lawyers of eminence upon the subject.

Pages 13, 14, 15, 16, 17, 18, 19, 20, are employed in examining the first of the said three reasons, which is stated in Lord Mansfield's own words in page 15.

Page 21, &c.---40, are employed in shewing the importance of this question to all the subjects of the Crown of Great-Britain, and the mischievous consequences to the liberty of Great-Britain itself that might follow from Lord Mansfield's doctrine.

Pages 41, 42, 43, and 44, contain an argument that has been used by some private lawyers in support of Lord Mansfield's opinion. This argument is answered, and the subject further examined upon the footing of reason and the general principles of law,

law, in the following pages down to page 63; which concludes that firſt part of the diſcuſſion of this queſtion.

In page 64 Lord Mansfield's ſecond head of argument, from hiſtorical precedents of countries conquered by the Crown of Great-Britain, is taken into conſideration.

In pages 65 and 66 Lord Manſfield's aſſertions concerning Ireland are ſtated. And they are examined in the following pages down to page 75.

Page 75, &c.---79, contain ſome remarks concerning the legiſlative authority over the inhabitants of the iſland of Grenada in the Weſt-Indies, grounded on the Stat. 6 Geo. I. concerning Ireland, and on the 6 Geo. III. concerning the ſupreme legiſlative authority of the parliament of Great-Britain over all the Britiſh dominions in America, which was a declaratory ſtatute.

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In pages 79 and 80 Lord Mansfield's aſſertions concerning Wales are ſtated. And they are examined in the following pages down to page 150; which contain ſome curious particulars concerning the antient ſtate of Wales before its final reduction by king Edw. I. in the year 1284, ſupported by the teſtimony of the venerable hiſtorian, Matthew Paris, and other reſpectable authorities.

In page 151 the other places mentioned by Lord Mansfield as inſtances of the exerciſe of the king's ſole legiſlative power over conquered countries, are taken into conſideration; which are, Berwick upon Tweed, the town of Calais in France, the dutchy of Guienne, or Gaſcony, in the ſame kingdom, the province of New-York in North-America, and the town of Gibraltar and iſland of Minorca, which were formerly a part of the Spaniſh monarchy.

Page 152 contains Lord Mansfield's words concerning the town of Berwick upon Tweed; which were very few. It alſo contains remarks upon them, which are continued in pages 153, 154.

Page 155 contains Lord Mansfield's words concerning the dutchy of Guienne, or Gaſcony, and the town of Calais. And pages 156, &c.----164, contain an examination of them.

In page 164 the political ſituation of the province of New-York is taken into conſideration. Lord Mansfield's aſſertions concerning it are cited in pages 166, 167. In pages 168, &c.---173, an account is given of the manner in which that province was claimed and conquered by king Charles the 2d, taken from Mr. Smith's hiſtory of it; by which it appears that the ſaid province was not conſidered by king Charles the 2d as *a conquered* country, but as *a planted* country, namely, as a part

part of the more antient Engliſh colony, or plantation, of New-England.

In page 173 an inquiry is begun concerning the legiſlative authority claimed by the Crown over colonies planted by Engliſhmen; and it is continued in the following pages down to page 200. It contains (amongſt other things that are curious and intereſting to ſuch perſons as are deſirous of knowing the political ſtate and hiſtory of the American colonies,) an account of the government of the province of New-York from the conqueſt of it in 1664 to the year 1691, taken from Mr. Smith's Hiſtory aforeſaid. This account is contained in pages 186, 187, &c.---196.

In page 200 an inference is drawn from the declaratory ſtatute of 6 Geo. III. 1766, to ſhew that the king alone does not now claim to be the ſole legiſlator of any of the American dominions of the Crown. And in pages 200 and 201 a like inference is

drawn from the late act for the government of the province of Quebeck.

In pages 201 and 202, an objection is made to the laſt inference: which objection is grounded on the king's proclamation of October, 1763, which is underſtood by ſome perſons to have contained an immediate reſignation, on the part of the Crown, of its legiſlative authority over the four new governments of Quebeck, Eaſt-Florida, Weſt-Florida, and Grenada, which were erected by it. This objection is examined in the following pages down to page 215.

In page 216 another objection is made to the ſame inference from the late Quebeck-act. This objection is grounded on the conduct of the Crown with reſpect to the province of Quebeck from the 10th of Auguſt, 1764, when the civil government of the ſaid province was eſtabliſhed by the publication of General Murray's commiſſion

ſion of civil governour, to the year 1774, in which the late Quebeck-act was paſſed. And it is examined and anſwered in the following pages, down to page 224.

Pages 224, &c.---240, contain ſome remarks on the nature of inſtructions to governours of provinces under the king's ſignet and ſign-manual, and on the difference between ſuch inſtructions and the commiſſions of governours under the great ſeal, and on a remarkable clauſe in thoſe commiſſions, which contains a reference to the inſtructions, and ſeems intended to adopt them, (as it were,) into the commiſſions, or give them an equal degree of authority with the commiſſions themſelves, without reciting them in the ſaid commiſſions.

Pages 241, &c.----268, contain a conjecture concerning the reaſons that may have been the occaſion of the inſertion of the ſaid clauſe of reference in the commiſſions of governours under the

the great ſeal; with ſome remarks on the proceedings of ſecretaries of ſtate in England, and on the danger of permitting the ſervants of the Crown ever to exert extraordinary powers, not agreeable to the known laws of the land, under pretences of publick danger or neceſſity.

Pages 269, &c.---277, contain ſome remarks on the ordinances paſſed by the governour and council of the province of Quebeck before the late Quebeck-act.

In page 277 the main argument concerning the king's legiſlative authority over conquered countries is reſumed. And in pages 278, 279, Lord Manſfield's words concerning the exerciſe of the ſaid authority in Gibraltar and the iſland of Minorca are recited.

In pages 279, 280, Lord Mansfield's aſſertions concerning Gibraltar are examined: and the ſame thing is done in pages 281, 282, &c.---288, with reſpect to his aſſertions concerning Minorca.

norca. And herewith ends the examination of Lord Mansfield's second head of argument in support of the king's sole legislative authority over conquered countries, which is derived from historical precedents, or examples.

The remaining part of Lord Mansfield's speech in delivering the judgement of the Court of King's Bench in the case of Campbell and Hall, is recited in pages 289, &c.---295; in which is contained his third head of argument in support of the said legislative authority of the crown, which is grounded on the opinion of judges and other lawyers of learning and eminence, and particularly on the opinion of the judges in Calvin's case in the reign of king James the 1st and on that of Sir Philip Yorke (who was afterwards Lord Chancellor and Earl of Hardwicke,) and Sir Clement Wearg in the year 1722 concerning the island of Jamaica, when they were in the offices

offices of attorney and ſollicitor general to king George the 1ſt.

Page 296, &c.--300 contain remarks on thoſe two authorities, ſhewing that the opinion of the judges in Calvin's caſe, inſtead of favouring the doctrine advanced by Lord Mansfield, was really contrary to it; and that the opinion of Sir Philip Yorke and Sir Clement Wearg, (which is acknowledged to have been agreeable to Lord Mansfield's doctrine,) was, according to Lord Mansfield's account of it, a very haſty opinion, upon which thoſe learned lawyers appear to have beſtowed very little attention, and that it muſt alſo be conſidered as having but a ſmall degree of authority in deciding a matter of this importance in favour of the Crown, on account of the byaſs which thoſe gentlemen muſt be ſuppoſed to have had upon their minds in favour of that ſide of the queſtion, from their poſſeſſion of the offices of attorney and ſollicitor general.

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In page 300 the authority of Calvin's caſe is further conſidered; and in the following pages 301, &c.--323, a very full account is given of that famous caſe, with a copious extract from it: which is followed by ſome remarks upon the ſaid caſe in pages 323, &c.---328.

Pages 328 and 329 contain a conjecture concerning the cauſe of Lord Mansfield's citing the opinion of the judges in Calvin's caſe as an opinion in ſupport of his doctrine of the king's ſole legiſlative authority over conquered countries, though in truth it makes againſt the ſaid doctrine.

Pages 330, &c.---342 contain an hiſtorical account of the diſputes in the beginning of king James the 1ſt's reign concerning the right of the *Poſt nati*, (or perſons born in Scotland after the acceſſion of king James to the crown of England,) to the privileges of natural-born ſubjects of the crown of England; which gave riſe to the aforeſaid caſe of Calvin.

Pages 343, &c.---347, contain an inquiry how far the aforeſaid opinion of Lord Mansfield concerning the power of the Crown over conquered countries, delivered in the ſaid judgement in the caſe of Campbell and Hall, ought to be conſidered as the opinion of the other judges of the Court of King's Bench.

Pages 347, &c.---366 contain a recapitulation of the principal concluſions eſtabliſhed in the foregoing pages in oppoſition to Lord Manſfield's argument in ſupport of the ſole legiſlative power of the Crown over conquered countries.

Pages 367, &c.---370 contain remarks on Lord Mansfield's peremptory manner of aſſerting the ſole legiſlative authority of the Crown over conquered countries.

Pages 370, 371 contain a remark on Lord Mansfield's firſt aſſertion on this ſubject, viz. "*That the king's legiſlative right over a conqueſt has never been denied in Weſtminſter Hall.*"

Pages

Pages 372 and 373 contain a remark on his second assertion, "*That the king's legislative right over a conquest was never questioned in parliament.*"

Pages 373, &c.----379, contain some remarks on his third assertion, "*That no book, no saying of a judge, no opinion of any counsel, publick or private, has been cited on the other side*;" together with an extract from a learned modern treatise on the Law of Nations written by an eminent author, of the name of *Vattel*, which is directly contrary to Lord Mansfield's doctrine of the king's being the sole legislator of conquered countries, and which was cited in one of the arguments of the said case of *Campbell* and *Hall* before Lord Mansfield, by the late ingenious *Mr. Allen*, one of the counsel of the plaintiff *Campbell*.

Pages 379, &c.---385, contain different accounts of an opinion given by that learned and upright lawyer, Sir William Jones, while he was at-

torney general to king Charles the 2d, and probably about the year 1677, againſt the ſole legiſlative authority of the Crown over the American plantations.

Pages 385 and 386 contain an account of an opinion of Mr. Lechmere, in the year 1717, while he was attorney-general to king George the 1ſt, that is nearly to the ſame effect with that of Sir William Jones. It is alſo remarked in page 386 that theſe two opinions of Sir William Jones and Mr. Lechmere may fairly be ſet in oppoſition to the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722.

In page 387 an inquiry is begun concerning the effect of Lord Manſfield's declaration of his opinion, in favour of the ſole legiſlative authority of the Crown over conquered countries, in the judgement he delivered in the ſaid caſe of Campbell and Hall; that is, whether, or no, the ſaid declaration

claration of his opinion is a decisive establishment of that doctrine, though it should before have been held to be doubtful or erroneous. This inquiry is prosecuted in the following pages 388, 389, &c. to page 399: and in the course of it the determinations of courts of justice are divided into four different classes, that have different degrees of weight and authority belonging to them; and it is shewn that this decision of the Court of King's Bench in favour of the king's sole legislative authority over conquered countries, (even if we suppose that the other judges of that court concurred with Lord Mansfield in making it,) is only a decision of the fourth, or lowest, class.

The few remaining pages of the Dialogue contain a remark on the expediency of settling the law on this subject by act of parliament, in a manner contrary to Lord Mansfield's doctrine.

This

This is as particular an account of the contents of this Second Dialogue as ſeems neceſſary to be given of them in a Preface, in order to apprize the reader beforehand of the nature of the entertainment that is ſet before him. They are drawn out more fully and diſtinctly in the abſtracts of them which I have cauſed to be printed in a ſmaller letter in the margin of the book, and which, I hope, the reader will find to be very convenient to him in referring to particular parts of the Dialogue after he has read it.

THE

THE

Canadian Freeholder.

DIALOGUE II.

FRENCHMAN.

I HAVE waited with impatience for this ſecond meeting, in which you have promiſed to inform me of the doctrine of the law of England concerning the extent of the prerogative of the crown of Great-Britain with reſpect to conquered countries. I hope you are now at leiſure to perform your promiſe, and let me know what I ought to think upon this important ſubject. For, as I am myſelf become a ſubject of

Of the legiſlative power of the Crown with reſpect to conquered countries.

his Majeſty in conſequence of the conqueſt of Canada in the late war, it is natural for me to deſire to know the whole of the relation in which I ſtood to him after the ceſſion of the country to the Crown by the late peace, and before the publication of the royal proclamation of October 1763, which made us partakers of the Engliſh laws and conſtitution, but which, to our great misfortune, has been reſcinded by the late Quebeck-act.

ENGLISHMAN.

Uncertainty of the law upon this ſubject.

I remember my promiſe, and am ready to uſe my beſt endeavours to perform it. But I much fear they will not be ſucceſsful. Indeed they hardly can be ſo in the degree you wiſh for, ſo as to enable you to form a clear and poſitive opinion upon this queſtion on the one ſide or the other: becauſe the Engliſh lawyers themſelves are divided in their opinions upon it. For there are ſome lawyers who think that the king has no more power over conquered countries, that have been finally ceded to the crown of Great-Britain by their former ſovereigns, than

The opinion of one ſet of lawyers upon it.

than over countries that have been planted by colonies of Engliſhmen with the permiſſion and encouragement of the Crown, or than over Great-Britain itſelf; that is, that he has the whole of the executive power over them, but only a part of the legiſlative. He may therefore, according to this opinion, appoint the governours, and judges, and ſheriffs, and juſtices of the peace, and other officers of juſtice, in ſuch conquered countries; and may receive, and diſpoſe of, all the publick revenues already legally ſubſiſting in them, and appoint the neceſſary officers for that purpoſe; and may raiſe, and arm, and command, the militia of ſuch countries, in caſe they ſhould be either invaded by foreign enemies or diſturbed by domeſtick inſurrections: but he cannot make laws for them, or impoſe new taxes on them, by his ſingle authority; but only in conjunction with the two houſes of the Britiſh parliament, or with an aſſembly of repreſentatives choſen by the inhabitants of thoſe countries themſelves reſpectively. This is the opinion of one ſet of lawyers in England. But there are other lawyers of great

The opinion of another ſet of lawyers upon it, who aſcribe more power to the Crown.

eminence, who aſcribe to the crown a greater degree of legiſlative power over conquered and ceded countries than over Great-Britain, or the provinces planted by Engliſh colonies. But yet, if I underſtand them right, they do not allow the king a compleat and entire legiſlative authority over ſuch countries, but acknowledge his power to be limited by ſuch previous acts of parliament, made before ſuch conquered countries were acquired, as were expreſsly declared to comprehend them when they ſhould be acquired; to all which acts either himſelf or his predeceſſors muſt have given their royal aſſent. Of this kind is the ſtatute of the firſt year of queen Elizabeth, for aboliſhing the authority of the pope, and all other foreign juriſdiction, in ſpiritual matters in England and the other dominions of the Crown, which enacts, " that no foreign prince, perſon, " prelate, ſtate, or potentate, ſpiritual or " temporal, ſhall at any time after the laſt " day of the then ſeſſion of parliament, uſe, " enjoy, or exerciſe, any manner of power, " juriſdiction, ſuperiority, authority, pre- " eminence, or privilege, ſpiritual or eccleſi- " aſtical,

" aſtical, within this realm, *or within any* " *other your Majeſty's dominions and countries,* " *that now be, or hereafter ſhall be*; but " from thenceforth the ſame ſhall be clearly " aboliſhed out of this realm and all other " your Majeſty's dominions for ever." And of this kind is the ſtatute of the fifteenth year of the reign of king Charles II. chapter 7, intitled, " *An act for the encouragement* " *of trade*;" in the ſeventh ſection of which it is enacted, " that, after the 25th day of " March, 1664, no commodity of the " growth or manufacture of Europe ſhall " be imported into any land, iſland, plant- " ation, colony, territory, or place, to his " Majeſty belonging, *or which ſhall hereafter* " *belong unto, or be in the poſſeſſion of, his* " *Majeſty, his heirs and ſucceſſors,* in Aſia, " Africa, or America, (Tangier only ex- " cepted) but what ſhall be laden and " ſhipped in England, Wales, or the town " of Berwick upon Tweed, and in Engliſh- " built ſhipping." And of this kind alſo is the ſtatute of the 7th and 8th years of the reign of king William and queen Mary, chap. 22, intitled, " *An act for preventing* " *frauds,*

" *frauds, and regulating abuſes, in the Plant-*
" *ation Trade,*" by which it is enacted,
" That, after the 25th day of March in
" the year 1698, no goods or merchandizes
" whatſoever ſhall be imported into, or ex-
" ported out of, any colony, or plantation,
" to his Majeſty in Aſia, Africa, or Ame-
" rica, belonging, or in his poſſeſſion, *or*
" *which may hereafter belong unto, or be in*
" *the poſſeſſion of, his Majeſty, his heirs, or*
" *ſucceſſors,* in any ſhip or bottom but what
" is or ſhall be of the built of England, or
" of the built of Ireland, or of the built of
" the ſaid colonies or plantations." Theſe acts of parliament, and others of the like kind, or which expreſsly relate to the future, as well as preſent, dominions of the Crown, are conſidered by theſe latter lawyers as reſtraints upon the legiſlative authority of the Crown over conquered and ceded countries; inſomuch that they hold that the king cannot, by his ſingle authority, either repeal theſe acts with reſpect to ſuch countries, or make any other laws for ſuch countries that ſhall be inconſiſtent with them. But this they declare to be the only limitation of the king's

king's original legiſlative authority over ſuch countries immediately after the conqueſt and ceſſion of them, and affirm that in all other matters, not ſettled by ſuch previous acts of parliament, he may, after the conqueſt and ceſſion of any country, make and unmake laws for it by his own ſingle authority, in whatever manner he ſhall think fit, as freely as he may make and unmake laws for the kingdom, or iſland, of Great-Britain in conjunction with both houſes of parliament. This they conſider as the original legiſlative authority belonging to the Crown over a conquered and ceded country in conſequence of the conqueſt and ceſſion of it. But they allow that the king may afterwards, by his own act under the great ſeal of Great-Britain, diveſt himſelf and his ſucceſſors of this high legiſlative authority, and grant to the people of the conquered and ceded country the privilege of being bound by no laws but ſuch as ſhall be made for them either by the king and parliament of Great-Britain, or by the king, or his repreſentative the governour of ſuch ceded country, in conjunction with the repreſentatives

of

of its inhabitants. And, when this privilege has once been ſo granted by the Crown to the inhabitants of ſuch a ceded country, theſe lawyers hold that it can never be reſumed except by act of parliament. The opinion of theſe latter lawyers ſeems beſt intitled to be conſidered as *the law* upon this ſubject, becauſe it has been ſolemnly adopted and declared by lord Mansfield, the chief juſtice of the King's-Bench in England, and the other judges of that great court, in their judgement on the caſe above-mentioned of Campbell againſt Hall. For they then declared that the ſaid four and a half per cent. duty impoſed on the inhabitants of Grenada by the king's letters patent of July, 1764, and which the plaintiff Campbell had been compelled to pay to the defendant Hall, (who was the collector of the cuſtoms in that iſland) on certain ſugars of the growth of that iſland which he, the ſaid Campbell, had exported from thence, was illegally impoſed, and ought not to have been collected, merely becauſe the king had, by his proclamation above-mentioned, of October, 1763, (which was antecedent to the ſaid letters patent of July, 1764,

The latter opinion has been adopted by Ld. Mansfield and the other judges of the court of King's-Bench in England.

1764, which impoſed the ſaid duty,) diveſted himſelf of the power he had before poſſeſſed, by virtue of the conqueſt and ceſſion of the ſaid iſland, of making laws and impoſing taxes on the inhabitants of it at his pleaſure; and that, if the ſaid duty of four and a half per cent. on goods exported had been impoſed by his Majeſty before the ſaid proclamation of October, 1763, (which communicated to the inhabitants of Grenada the free conſtitution of the other royal governments in America) had been publiſhed, it would have been legally impoſed, and the plaintiff Campbell would have been legally bound to pay it.

This was the judgement of the Court of King's-Bench in that celebrated cauſe, which was argued three different times before them by ſome of the ableſt lawyers at the Engliſh bar. And therefore I think it may be ſaid to be now the law of England upon this ſubject, there being (as I am told) no other deciſion upon this point, either one way or the other, in all the volumes of the Engliſh law. Yet, if it were not for this great

Yet the former opinion ſeems moſt agreeable to reaſon.

authority, I ſhould, from the mere reaſon of the thing, have been inclined to the opinion of the other lawyers who hold that the King, Lords, and Commons conjointly, who are the legiſlature of Great-Britain itſelf, muſt neceſſarily become the legiſlature of every country which, by conqueſt or ceſſion, becomes dependant on Great-Britain; and, in general, that that man, or body of men, which poſſeſſes the right of making laws for any conquering country, muſt of courſe become poſſeſſed of the ſame right with reſpect to every country which is conquered by, and ceded to, it.

FRENCHMAN.

That ſeems to be a much more rational opinion than the other, which, you ſay, has been adopted by the judges of the court of King's-Bench in England, ſuppoſing the point to be quite new and open to arguments deduced from reaſon only and the general principles of government and the law of nations. I therefore imagine there muſt have been ſome poſitive law, or ſome deciſion of a court of juſtice, that either eſtabliſhed, or ſeemed

ſeemed to acknowledge, the other opinion, or that the practice with reſpect to countries conquered by the crown of Great-Britain has been favourable to it. For without ſome ſuch powerful argument from authority it is hardly to be conceived that thoſe learned and able judges would have determined, that the king of Great-Britain, who, in his ſingle capacity, is only the firſt magiſtrate of that kingdom, and intruſted with the executive power of the ſtate, but not with that of making or repealing laws for it, except with the concurrence of the parliament, ſhould, upon conquering another country with the arms and treaſure of Great-Britain, become inſtantly poſſeſſed of an abſolute power of making what laws he pleaſed for that country without any concurrence of the parliament of the nation by whoſe arms and for whoſe ſake the conqueſt was made. I therefore deſire you would inform me upon what grounds the judges of the court of King's-Bench in England founded that opinion of the king's being the abſolute legiſlator of all countries that are conquered by the Britiſh arms except in thoſe points in

which his legiſlative power is reſtrained either by acts of parliament made before the conqueſt of ſuch countries, or by acts of parliament, or royal proclamations or charters, or other acts of ſtate, made by himſelf after the conqueſt of them.

ENGLISHMAN.

The reaſons aſſigned by Lord Mansfield in ſupport of the latter opinion.

The reaſons aſſigned by the lord Mansfield, the chief juſtice of the court of King's-Bench, in delivering the judgement of the ſaid court in the aforeſaid caſe of Campbell and Hall, in ſupport of this opinion of the legiſlative power of the Crown over conquered countries, ſeem to be reducible to theſe three; to wit, Firſt, the king's acknowledged right of making peace and war, which he ſuppoſed to include in it the power of making laws and impoſing taxes on the conquered people; Secondly, the practice which has taken place with reſpect to the countries which have, from time to time, been conquered by the crown of England, or Great-Britain, ſuch as Ireland, Wales, Berwick upon Tweed, and Calais, and more eſpecially the little territories of Gibraltar and

Firſt, the king's right of making peace and war.

Secondly, the practice which has taken place with reſpect to conquered countries.

and the iſland of Minorca, which have been conquered from the crown of Spain, and ceded to, and enjoyed by, the crown of Great-Britain ever ſince the peace of Utrecht; and, Thirdly, the opinions of former judges and eminent lawyers upon this ſubject, teſtified by occaſional and collateral declarations of the judges concerning it, or by the anſwers given by lawyers out of court to queſtions of law upon which they were conſulted, there having been no expreſs deciſion upon the point before that in the ſaid caſe of Campbell and Hall. But none of theſe reaſons appear to me to be very ſatisfactory.

Thirdly, the opinions of judges, given occaſionally in deciding upon other ſubjects; and the opinions of lawyers, given out of court upon caſes concerning which they were conſulted.

FRENCHMAN.

The firſt reaſon, which is derived from the king's right of making peace and war, I think I can perceive the weakneſs of. For why ſhould the right of making peace and retaining a conquered country by the ceſſion of its former ſovereign upon certain conditions agreed upon with the ſaid ſovereign, intitle the new king to govern the inhabitants of ſuch conquered country for ever after according to his ſingle will and pleaſure?

Inſufficiency of the firſt reaſon.

pleaſure? I can ſee no ground for ſuch a concluſion; but ſhould rather think that the king's abſolute power over ſuch a country (which power I will ſuppoſe to have continued during the war, from the neceſſity of the caſe;) muſt ceaſe at the very inſtant of the ceſſion of it by a peace, when things return from their unnatural and violent ſtate into a ſtate of tranquillity and civil government. And from that moment I ſhould imagine that the conquered inhabitants, who had been permitted, and had choſen, to remain in the ceded country and take the oath of allegiance to the new ſovereign, would become one people with the conquering nation, and intitled to partake of the ſame government with them, ſo as to be governed by the king, lords and commons conjointly, when that is the legiſlature of the conquering country, (as is the caſe in England,) and to become ſubject to the king alone in ſuch countries only as are governed by abſolute monarchs.

It is more reaſonable to ſuppoſe that the king's abſolute power over a conquered country, being founded on neceſſity, ſhould ceaſe at the inſtant of the ceſſion of the country by a peace.

ENG-

ENGLISHMAN.

I intirely agree with you in your opinion of the inſufficiency of this firſt reaſon of the ſuppoſed abſolute power of the Crown over conquered countries. But that you may be the better able to judge of it, I will repeat to you, as nearly as I can recollect them, the words in which it was expreſſed by lord Mansfield in delivering that famous judgement. It was nearly in theſe words. " The " king has a power to grant or refuſe a ca- " pitulation to the conquered enemy. If " he refuſes it, and puts the inhabitants of " the conquered country to the ſword, or " extirpates them; as he obtains the country " by conqueſt, the lands of it are his, and " he may grant them to whom he pleaſes: " and, if he plants a colony upon them, " the new ſettlers will hold the ſhares of " the ſaid lands which ſhall have been allotted " them, ſubject to the prerogative of the " conqueror. If, on the other hand, he " does not put to the ſword, or extirpate, " the old inhabitants, but receives them into " his obedience, and grants them a conti-

Lord Mansfield's manner of ſtating the aforeſaid firſt reaſon.

" nuance

" nuance of their property in their own " lands, he has power to impoſe a tax upon " them. He is intruſted with the terms " of making peace at his diſcretion; and he " may retain the conqueſt or yield it up on " ſuch conditions as he ſhall think fit to " agree to. This is not a matter of diſputed " right. It has hitherto been uncontro- " verted that the king may change a part, " or all, of the political form of govern- " ment over a conquered dominion."

FRENCHMAN.

Obſcurity and confuſion of the foregoing words; in which three powers, quite diſtinct in their nature from each other, are confounded together.

Theſe words ſeem to be very obſcure. They jumble together in a ſtrange manner three things that are in their nature perfectly diſtinct; namely, in the firſt place, the power of the conquering king, at the moment of the conqueſt, to grant or refuſe a capitulation, and to put the inhabitants to the ſword, or baniſh them from the country, and take poſſeſſion of their lands, or to grant them their lives and the continuance of the poſſeſſion of their lands and other property, or to grant them their lives only and deprive them of their property, or, in ſhort, to

Firſt, the power of impoſing terms upon the conquer'd people at the time of the conqueſt.

impoſe

impoſe ſuch terms upon them as he ſhall think proper; and, ſecondly, the power of either relinquiſhing the conquered country at the end of the war by a ceſſion of it to its former ſovereign, or retaining it as a permanent part of the conquering king's dominions, in conſequence of a ceſſion made of it to him by its former ſovereign, (as was the caſe with reſpect to Canada and Grenada in the late war;) and *that* upon ſuch terms of favour and indulgence to the inhabitants of ſuch ceded country as ſhall be agreed on in the treaty of peace between the old and new ſovereigns of it, by which it is ceded to the new ſovereign; and, thirdly and laſtly, the power of making laws for the inhabitants of ſuch conquered and ceded country, and of impoſing taxes upon them, after the ſaid final ceſſion of it to the new ſovereign by the treaty of peace by which the war is concluded. Their three powers are certainly diſtinct from each other; and it is extreamly poſſible that the king of Great-Britain may be poſſeſſed of the two former powers by the conſtitution of the Britiſh government, (which, I underſtand, has

Secondly, the power of reſtoring the conquered country to its former ſovereign by a treaty of peace, or of retaining the peaceable and permanent poſſeſſion of it by means of a ceſſion of it by the former ſovereign.

Thirdly, the permanent power of making laws for its inhabitants, and impoſing taxes on them, after the final ceſſion of it by the peace.

veſted in the king alone the right of making peace and war,) and yet not have a right to the laſt power, which can be exerted only when both the war and peace are compleatly terminated. And yet all the three powers ſeem, in thoſe words you have mentioned of lord Mansfield, to be mingled together and conſidered *in the lump*, as if they were one and the ſame power, or neceſſarily connected with each other.

ENGLISHMAN.

I agree with you in thinking that there is in thoſe words of Lord Mansfield the confuſion you have deſcribed; which is indeed ſurprizing in a perſon of ſuch eminent abilities, and ſo much celebrated for his powers of reaſoning. The three powers you have mentioned are certainly diſtinct from each other; and the poſſeſſion of the firſt of them, or even of the firſt and ſecond of them, by no means implies a right to the poſſeſſion of the third. The firſt of theſe powers ſeems to be implied in the right of making war, which is generally acknowledged to be a part of the king of Great-Britain's

The firſt of the aforeſaid powers ſeems to be implied in the power of making war.

Britain's prerogative: and the ſecond of theſe powers ſeems to be implied in the right of making peace, which is alſo conſidered as a part of his Majeſty's prerogative, though of late years it ſeems to have been the practice, (and it is moſt undoubtedly very reaſonable;) for his Majeſty to conſult his parliament upon the terms of the intended peace, before he finally concludes it. But the third power, to wit, that of making laws for the inhabitants of the conquered and ceded country, and impoſing taxes on them, after the country has been finally ceded by a treaty of peace, and is thereby become a permanent part of the dominions of the Crown, ſeems to have no connection with the right of making either war or peace; but, if it belongs at all to the Crown, muſt belong to it upon ſome other ground than its poſſeſſion of either of thoſe rights, and muſt be a part of the permanent, quiet, and (if I may ſo expreſs it,) *civil prerogative* of the Crown, which it poſſeſſes independently of its military prerogative, and for the purpoſes of civil government only, in times of profound peace and tranquillity. I have, however,

And the ſecond in the power of making peace.

But the third is not neceſſarily connected with either the power of making war, or the power of making peace.

But there are learned lawyers in England who aſcribe this third power to the Crown, and conceive it to follow from the king's right of making war and peace.

however, heard ſome learned lawyers in private converſation declare it to be their opinion, that, by the law of England, the king has ſuch a legiſlative power over conquered and ceded countries; and, when preſſed to explain the grounds of their opinion, they have ſaid they conceived ſuch a power to be implied in, or to follow from, the king's right of making peace and war, and the abſolute power which he acquires, or may acquire, by conqueſt over the lives and properties of the conquered people, if no capitulation has been granted to them to the diminution of it, either by himſelf or his generals who act by his authority. This kind of reaſoning I have ſometimes heard uſed by lawyers upon this ſubject, before the deciſion of the aforeſaid caſe of Campbell and Hall: and it ſeems to be the ſame with that which is briefly and obſcurely contained in thoſe words of Lord Mansfield which we have been conſidering. But both then and now I have always thought it extreamly inconcluſive and unſatisfactory.

FRENCH-

FRENCHMAN.

I beg you would mention, as fully and clearly as you can, the manner in which the lawyers you mention ſtated their argument, ſuch as it was, and the manner in which you thought it might be anſwered. For, though I am already of opinion that this argument was by no means concluſive, yet I ſhould be glad to hear the matter diſcuſſed in as full a manner as poſſible, as I think it a moſt important ſubject. For, in truth, I can hardly conceive a law-queſtion that can be more curious and intereſting than this of the ſuppoſed right of the crown of Great-Britain, independently of the parliament, to make laws for, and impoſe taxes on, the inhabitants of the countries that may be conquered by the Britiſh arms, upon which the fate and political ſituation of thouſands, and, if we turn our eyes towards the Eaſt-Indies, even of millions, of people may depend.

The queſtion, whether the king is, or is not, the ſole legiſlator of all countries conquered by the Britiſh arms, is of the greateſt importance.

It concerns, in the firſt place, the inhabitants of the conquered countries.

ENG-

ENGLISHMAN.

And, in the ſecond place, it concerns even the inhabitants of Great-Britain itſelf.

You might have added that the fate of the inhabitants of Great-Britain itſelf does likewiſe depend upon this queſtion. For, if the king ſhould conquer and keep poſſeſſion of ſome of the rich provinces of Indoſtan, and exerciſe this ſuppoſed right of levying taxes upon them without the concurrence of his parliament, he might ſoon increaſe his revenue to ſuch a degree as to be able to pay his fleet and army, and carry on the government, without the aſſiſtance of the parliament. And in ſuch an event he might ſafely lay aſide the uſe of parliaments, as their meetings depend intirely upon his pleaſure, there being no law now in force that authorizes the members of either houſe of parliament to meet at a certain time of their own accord without the king's ſummons or appointment. And if this ſhould be done, it is eaſy to foreſee that, in a few years, the very exiſtence of the Britiſh parliament might be forgot, or become a mere hiſtorical event, known only to the ſpecula-

tive

tive inquirers into the Engliſh hiſtory, juſt as the exiſtence of the States-general of France (who once were ſharers with the kings of that country in the exerciſe of the legiſlative authority over it,) is now known only to the lawyers and other learned men who inquire into the hiſtory of that kingdom.

FRENCHMAN.

This is indeed a very ſerious danger ariſing from the legiſlative and taxative power aſcribed to the Crown by Lord Mansfield, and which I was not at firſt aware of, though now, that you point it out to me, I ſee it very plainly. And it ought, I ſhould think, to have alarm'd all the lovers of liberty in Great-Britain. Pray, have not they expreſſed ſome apprehenſions upon this ſubject? more eſpecially ſince the deciſion of the caſe of Campbell and Hall, in which Lord Mansfield ſo formally delivered his opinion in favour of this dangerous power of the Crown?

Some few Engliſhmen, and but a few, have expreſs'd a ſenſe of the dangers that may ariſe to them from this prerogative.

I do not hear that they have, in general, expreſſed any apprehenſions of this kind; though ſome individuals among them appear to have had a juſt ſenſe of this danger, and have not failed to admoniſh their countrymen of it. In particular I obſerve that the author of a pamphlet intitled, "*Conſiderations on the impoſition of four and a half per cent. collected in Grenada, &c.*" which was publiſhed at London in the year 1774, while the aforeſaid cauſe of Campbell and Hall was ſtill depending, expreſſes himſelf in a very juſt and lively manner upon this ſubject. His words are as follows. "I ſhall "leave it to abler pens to confute the pre- "tenſion now ſet up of his Majeſty's having "a right to levy taxes in a conquered country "by virtue of his prerogative royal. I always "have been taught to think, that, when the "Britiſh arms conquered any country, the "common law of the land always was ſup- "poſed to accompany them.——If it does "not, I am ſure our conqueſts muſt be "fatal indeed, and, when we think we are

An extract from a pamphlet publiſhed on this ſubject in the year 1774.

"vanquiſhing

" vanquiſhing our enemies, we are only " forging fetters for ourſelves and our poſte- " rity.——If the infatuated inhabitants of " Great-Britain ſhall acquieſce in this claim " of power, and ſuffer their fellow-ſubjects " and countrymen in the colonies to be thus " arbitrarily taxed at the will of the king, " they will too late find, how little able they " will be to defend their own liberties, if " they ſhould hereafter be invaded. The " great ſecurity we at preſent have, is the " right of being taxed only by our repre- " ſentatives. But, if once it is in his Ma- " jeſty's power to raiſe taxes on the Britiſh " dominions abroad, by virtue of his pre- " rogative royal, that right will be rendered " very precarious. Four and an half per cent. " on the produce of Bengal alone, would " amount to a ſufficient ſum, without grant " of parliament, to pay and maintain armies, " by whoſe aſſiſtance, *if any future king* " *ſhould think fit*, neither the repreſentatives " nor the people would have any thing left " to grant." To the truth of theſe ſenti- ments, I muſt confeſs, I moſt cordially ſub- ſcribe.

FRENCHMAN.

Expediency of paſſing an act of parliament for ſettling the legiſlative power over conquered countries in the king and parliament conjointly.

And ſo do I. And ſo ought every Britiſh ſubject to do. And indeed I ſhould think it natural for the parliament of Great-Britain itſelf to take the matter up before it is too late, and to paſs a bill, either to declare the law upon this ſubject to be directly contrary to what Lord Mansfield has repreſented it, if they think that learned lord's opinion to be erroneous, or, if they think the law, as it now ſtands, to be agreeable to his opinion, to change it for the future, and to veſt the right of impoſing taxes on, and making laws for, the inhabitants of all countries that ſhall be hereafter conquered by, or ceded to, the Crown of Great-Britain, in the king and parliament conjointly.

ENGLISHMAN.

There is but little reaſon to expect that ſuch an act of parliament will be paſſed in England.

I heartily wiſh that ſuch an act of parliament were to paſs, though, by all the accounts I have heard of the preſent ſtate of England, I have little expectation that any ſuch thing will be ſo much as attempted. So low is the ſpirit of liberty at preſent amongſt

amongſt the Engliſh nobility and upper gentry! and ſo much are they ſunk in pleaſure and diſſipation of the moſt wild and extravagant kind, ſuch as gaming to a degree that was not heard of twenty years ago; by which it happens, not only that many of them, in the courſe of a few years, run out the moſt ample fortunes, and bring themſelves into circumſtances of diſtreſs that render them dependant on the crown for a ſupport, but that they loſe the very taſte for liberty, and that habit of ſerious reflection upon important ſubjects, which is neceſſary to make them rightly underſtand, and duly eſtimate, the advantages of a free government! At leaſt this is the account which has been tranſmitted of them to us, inhabitants of North-America; and it has greatly contributed to indiſpoſe the greater part of us againſt any cloſe connection with, and, ſtill more, againſt a ſubjection to, a parliament compoſed of ſuch members.

The love of liberty is leſs ſtrongamongſt the Engliſh than it uſed to be.

This circumſtance has made the Americans unwilling to be connected with the Britiſh parliament.

But, if the preſent temper of the people of Great-Britain ſhould take a turn, (as ſometimes happens moſt unaccountably,) and ſhould become again favourable to publick

liberty, and an act of parliament of the kind you have mentioned, for vesting the legislative authority over conquered countries in the king and parliament conjointly, should be then proposed, I should wish that another point, of almost as much consequence to publick liberty as this legislative power, should be settled at the same time in such a manner as would be compatible with the continuance of that invaluable blessing.

There is another point of importance relating to conquered countries, which ought likewise to be settled by act of parliament in a manner that may be consistent with publick liberty.

FRENCHMAN.

Pray, what may that other point be? For I may truly say that, (though I was born in Canada and under the dominion of an absolute monarch,) I have as great a relish and value for civil liberty as any of you, natives of Great-Britain or the antient British colonies in America, though I may not be so well acquainted with the proper means of acquiring or preserving it. And the same may be said of a great many other Canadians. The ease and freedom we have enjoyed under the English government for these fifteen years past, till the fatal 1st of May last, when the new act relating to the government of this province

province took place, has given us ſuch an agreeable taſte of the pleaſures of Engliſh liberty as will not ſoon be obliterated from our memories, though we ſhould now be again reduced to our former ſtate of ſervitude. And our former, and, (as we have reaſon now to apprehend,) our future, experience of this latter unfortunate ſituation, will probably only heighten our reliſh of the happier condition we once enjoyed under the compleat protection of the Engliſh laws and conſtitution. I therefore beg you would inform me, what that other point is, which you conſider as being of nearly the ſame importance to the preſervation of publick liberty in Great-Britain as the veſting the legiſlative power over the inhabitants of conquered and ceded countries in the king and parliament conjointly.

ENGLISHMAN.

That other point is the right which the king of Great-Britain is by many people ſuppoſed to have

That point is the right of the king to ſuch publick revenues and taxes in conquered countries as are legally exiſting in them at the time of the conqueſt.

have (as the law now ſtands) to collect from the inhabitants of a conquered and ceded country all the publick taxes which are already legally eſtabliſhed in ſuch country at the time of the conqueſt, and to diſpoſe of them, when collected, in whatever manner he ſhall think fit: which, you cannot but obſerve, is quite a diſtinct right from that of impoſing new taxes on the inhabitants of ſuch countries.

Two opinions are entertained upon this ſubject.

This prerogative is not indeed univerſally allowed to belong to the crown in the extent I have mentioned; there being ſome gentlemen of great judgement and extenſive knowledge in the laws and hiſtory of England who are of opinion that the right of *diſpoſing of* the revenues of ſuch conquered countries, when collected, does not belong to the king alone, but to the king and parliament conjointly, though they allow that the right of *collecting them* belongs to the king alone. But other perſons, (and, I am inclined to think, they are more in number than the former,) are of opinion that the king may legally do both theſe things, laying it down as a general maxim in the Engliſh government, "That the

the king (though he cannot levy money upon his ſubjects without conſent of parliament,) may diſpoſe of all publick money already levied, and of the continual produce of all taxes already legally exiſting, in any manner that he ſhall think proper; except where ſuch money ſhall have been appropriated, by act of parliament, to certain ſpecified publick uſes, or reſerved by the ſame authority for the future diſpoſition of parliament." *

Which of theſe two opinions deſerves to be conſidered as the true one, is more than I will pretend to determine. But, as I juſt now obſerved, the latter, (which gives the king the right of diſpoſing of the publick revenues of conquered and ceded countries, as well as that of collecting them,) ſeems to be the moſt generally adopted. Now, if this latter opinion

* According to both theſe opinions the king might legally collect the poll-tax in the iſland of Grenada which was paid in the time of the French government. And accordingly I do not find that any action has been brought againſt the collectors of the ſaid poll-tax, as having collected it illegally.

The right aſcribed to the crown by the latter of the two foregoing opinions, (though it may legally belong to the crown) may, in ſome caſes, be very dangerous to the liberties of Great Britain.

opinion be true, it is certain that this right of the crown to collect and diſpoſe of the publick revenues of conquered countries may become extremely dangerous to the liberty of the inhabitants of Great-Britain; as will eaſily appear by ſuppoſing a caſe in which an ample annual revenue ſhould accrue by virtue of it to the crown. The wealth of the large provinces of Indoſtan, and their weak, unwarlike, and diſunited, ſtate will enable us to imagine ſuch a caſe without tranſgreſſing the bounds of probability.

Caſe of the conqueſt of certain provinces of Eaſt-India.

We have ſeen that the rich provinces of Bengal, Bahar, and Orixa, in that great peninſula, have already, in effect, been reduced to a ſtate of obedience to the Eaſt-India company, though they continue, nominally, to be governed by one of their own natives, who is permitted to call himſelf their nabob, or ſovereign. The publick revenue collected in theſe three provinces is generally allowed to be three millions, ſix hundred thouſand pounds, ſterling. This revenue was collected there in the time of the independant

dependant nabobs, or ſovereigns, of thoſe provinces: and therefore, I preſume, the taxes, or rents, out of which it ariſes, were impoſed upon the inhabitants of them by what was then conſidered as the legal authority by which thoſe provinces were governed. This revenue has, for theſe eight, or nine, years paſt, been received by the Eaſt-India company; who have been inveſted with the office of *Dewan*, or publick treaſurer, of thoſe provinces: and they allow a ſmall portion of it (two, or three, hundred thouſand pounds a year,) to the nominal, or dependant, Nabob, whom they have permitted, or, rather, appointed, to govern thoſe provinces under their protection; and they employ another part of it in the maintenance of their own armies, and forts, and other eſtabliſhments, civil and military, in that country; and then they divide the remainder of it (over and above what is neceſſary for theſe purpoſes,) amongſt themſelves, that is, amongſt the ſeveral proprietors of Eaſt-India ſtock. Now let us ſuppoſe that another ſuch conqueſt ſhould be made in that

country by the crown inſtead of the Eaſt-India Company; as for example, a conqueſt of the province of *Arcot* (of which we have lately heard a great deal,) or of the province of *Decan*: and that the publick revenues regularly collected in the country ſo conquered ſhould amount to three, or four, millions of pounds ſterling *per annum*. Of this large revenue it is probable that, with good management, one or two millions might be ſufficient to defray the expences of the civil and military eſtabliſhments that would be found neceſſary for the maintenance of the king's authority and the adminiſtration of government in the ſaid country; and conſequently that two millions of pounds ſterling might be remitted every year to England, to be diſpoſed of as the king ſhould pleaſe. There is nothing in this ſuppoſition that is at all improbable; nor would the making ſuch a new conqueſt, and the acquiſition of ſuch a new revenue, by the Crown be at all inconſiſtent with the rights of the Eaſt-India Company, or their enjoyment of the acquiſitions they have already made of the provinces of Bengal, Bahar, and Orixa.

The Crown might, probably, derive from ſuch a conqueſt, (without impoſing any new taxes,) a clear revenue of two millions of pounds ſterling *per ann.*

Orixa. Now, with ſuch an annual increaſe of the royal revenue, the Crown might either govern the Britiſh nation without the aſſiſtance of parliament, (as king Charles the 1ſt did during the ſpace of eleven years, till the people had almoſt forgot what a parliament was;) or, (which would be a milder and ſafer way of proceeding,) it might ſo influence the elections of members of the Houſe of Commons as to cauſe a great majority of them to be choſen out of ſuch perſons as the miniſters of ſtate ſhould have recommended for that purpoſe; or, if thoſe members had been choſen freely, it might influence them, when choſen, to paſs ſuch bills, and give their ſanction to ſuch meaſures, (whatever their tendency might be,) as the Crown ſhould think fit to adopt. In either of theſe three ways it is evident the freedom and excellence of the Britiſh conſtitution would be greatly impaired, and, in the firſt way, totally extinguiſhed. You now ſee the danger that may ariſe from this other prerogative of the Crown, "to diſpoſe of the revenues "already legally exiſting in conquered and "ceded countries in ſuch manner as it ſhall

Ill conſequences to publick liberty that might ariſe from ſuch an increaſe of the revenue of the Crown.

" think fit," which is much more generally allowed to belong to the Crown than the former prerogative of impoſing laws and taxes on the inhabitants of ſuch countries.

FRENCHMAN.

You have made it very plain to me that this prerogative may become exceeding dangerous to Great-Britain; and therefore I join with you moſt heartily in wiſhing it were put under ſome regulation, or reſtraint, that would remove this danger. But, pray, in what manner would you propoſe to regulate this dangerous prerogative? For I do not think it would be eaſy ſo to regulate it as intirely to remove the danger you have been deſcribing.

Difficulty of regulating this prerogative of the Crown.

ENGLISHMAN.

I agree with you that it cannot eaſily be regulated ſo as to avoid thoſe dangerous conſequences we have been ſpeaking of. Nay more, I believe it cannot poſſibly be ſo regulated. And therefore (as we now are ſpeculating upon this ſubject, and inquiring,

ing, not what is moſt likely to happen, but what is beſt,) I do not wiſh it to be regulated, but to be wholly given up by the crown and veſted, by act of parliament, in the king and parliament conjointly, " ſo that, for the " future, the publick revenues of all ſuch " countries as ſhall be conquered by the Bri- " tiſh arms and ceded to the crown of Great- " Britain, which ſhall be found to be legally " exiſting in the ſaid countries at the time of " the conqueſt and ceſſion of them, ſhould be " diſpoſed of by act of parliament only;" like the overplus of the taxes granted by parliament in Great-Britain itſelf, above the ſums neceſſary to defray the expences of the ſervices for which they are granted, which overplus, I am aſſured, is always reſerved, by ſpecial clauſes in the acts by which thoſe taxes are granted, for the future diſpoſal of parliament.

Expediency of totally aboliſhing it by act of parliament.

FRENCHMAN.

This would undoubtedly be a moſt deſireable method of preventing the dangers we have been ſpeaking of. But, as it would ſo greatly diminiſh his Majeſty's perſonal emoluments from all future acquiſitions of his crown,

crown, it ſeems hardly reaſonable to expect that he ſhould conſent to it: and without ſuch conſent, I preſume it cannot be taken.

ENGLISHMAN.

There is reaſon to rhink that his preſent Majeſty would generouſly aſſent to ſuch an act of parliament, if he were requeſted by his parliament, or adviſed by his miniſters, to do ſo.

It certainly cannot. But there is reaſon to think that, if his Majeſty were to be ſollicited by his parliament to give his aſſent to a bill of this kind, or even if he were to be ſtrongly adviſed by his miniſters of ſtate to declare to his parliament before-hand his diſpoſition to aſſent to ſuch a bill, (which would be a more decent and proper way of conducting the buſineſs than the other,) he would graciouſly condeſcend to ſacrifice his own perſonal intereſt to the ſafety and ſatisfaction of his people. For he has already vouchſafed to do a ſimilar act of noble generoſity towards his ſubjects, in giving up to the publick revenue of Great-Britain the ſum of ſeven hundred thouſand pounds ſterling, which was the produce of the ſales of the French ſhips which had been taken by the late king's ſhips of war in the years 1755 and 1756, in the beginning of the hoſtilities of the late war

This may be inferred from a ſimilar act of generoſity performed by his Majeſty ſince the laſt peace, with reſpect to the money produced by the ſale of the French prizes taken before the declaration of war.

war againſt France, and before the war had been declared in form, and the uſual act of parliament had been paſſed for veſting the property of the ſhips and goods, that ſhould be taken at ſea in the courſe of the war, in the officers and ſailors of the veſſels by which they ſhould be taken. After ſuch an act of generoſity one can hardly doubt of his Majeſty's willingneſs to conſent to ſuch an act of parliament as I have mentioned, if he were to be adviſed to ſuch a meaſure by his parliament or by the miniſters of ſtate whom he honours with his confidence.

FRENCHMAN.

The inſtance you have mentioned of his Majeſty's generoſity to his ſubjects in giving up to them the ſaid ſum of ſeven hundred thouſand pounds ſterling, is indeed a very noble one, and warrants you in the opinion you entertain that he would not refuſe his royal aſſent to an act of parliament of the kind you have ſuggeſted, if it were properly recommended to him. The probability therefore of ſuch an act's being paſſed will depend upon the diſpoſition of the parliament to requeſt,

requeſt, or of his Majeſty's miniſters of ſtate, to adviſe, his Majeſty to agree to ſuch a meaſure. How far they are likely to ſollicit or recommend ſuch a meaſure, I know not: but to me it appears to be a matter of ſo much importance that I ſhould think it a good bargain for the Britiſh nation to purchaſe his Majeſty's reſignation of this prerogative at the expence of half a million, or even a million, of pounds ſterling, which, (as the emoluments which his Majeſty might derive from this prerogative are diſtant and uncertain,) might, I ſhould imagine, be thought no contemptible compenſation for the loſs of it. And thus both the king and his ſubjects would reap benefit from ſuch a meaſure.

It would be beneficial to the nation to purchaſe his Majeſty's conſent to ſuch a meaſure by a grant of a handſome ſum of money.

ENGLISHMAN.

I have no objection to purchaſing ſo great a ſecurity for the national liberties for what the lawyers call *a valuable conſideration*; more eſpecially as it would give the reſignation of this prerogative on the part of the Crown the greater appearance of freedom and perfect approbation, and would thereby contribute

contribute to make it more binding and permanent. Nor do I think the greater of the ſums you have mentioned too great a price for ſo important an advantage.——But now, if you pleaſe, we will go back to the ſubject we were before conſidering, when this inquiry concerning the danger ariſing from the king's right to the legally-exiſting revenues of conquered countries, called us away; that is, to the right of making new laws for, and impoſing new taxes on, the inhabitants of ſuch countries; which right Lord Mansfield has declared to be veſted, by the Engliſh conſtitution, in the king alone, without the concurrence of his parliament.

FRENCHMAN.

You were ſaying, if I remember right, that you had known ſome private lawyers who, (before the deciſion of the caſe of Campbell and Hall,) had declared it to be their opinion that, by the law of England, the king has ſuch a legiſlative power over conquered and ceded countries; and that, when preſſed to explain the grounds of their opinion, theſe lawyers had ſaid that they

conceived ſuch a power to be implied in, or to follow from, the king's right of making peace and war, and the abſolute power which he acquires by conqueſt over the lives and properties of the conquered people, when no capitulation has been granted to them, either by the king himſelf or the generals who act by his authority, whereby the ſaid power has been diminiſhed: which reaſoning ſeemed to be much the ſame with that which is briefly and obſcurely contained in thoſe words of Lord Mansfield which you had cited from the judgement he had delivered in the court of King's-Bench upon the aforeſaid caſe of Campbell and Hall. Now I ſhould be glad to hear, in as full a manner as you are able to ſtate it, the whole argument of theſe lawyers, ſuch as it was, and the anſwers that you thought might be given to it.

ENGLISHMAN.

An argument uſed by ſome private Engliſh lawyers in ſupport of the king's abſolute legiſlative authority over conquered countries.

The principal argument, alledged by thoſe lawyers in ſupport of this ſuppoſed prerogative of the Crown, may be ſtated in the following manner. "The king, ſay they, without the parliament, is, by the Engliſh conſtitution,

" conſtitution, inveſted with the power of
" making peace and war, and intitled to the
" abſolute property of all the captures made
" in war, unleſs he has previouſly diveſted
" himſelf of his right to ſuch property by
" ſome voluntary act of his own, as, for
" example, by giving his royal aſſent to
" ſome act of parliament made in favour of
" the officers and ſoldiers, or ſailors, by
" whom the ſaid captures ſhall be made.
" He is maſter of the lives of all priſoners
" of war who are taken without a capitu-
" lation: —— He is abſolute maſter of all
" the ſhips, and money, and merchandize,
" or other plunder, his troops and ſhips get
" poſſeſſion of, and may diſpoſe of them in
" what manner he thinks fit. And, if he
" thus becomes abſolute maſter of all the
" moveable property he can ſeize, (which
" is clear beyond a doubt,) then alſo, by
" parity of reaſon, ſay theſe lawyers, he
" muſt become maſter likewiſe of all the
" immoveable property he can take from
" his enemies, that is, of all the lands and
" houſes of the countries his armies con-
" quer; ſo that, if the country ſurrendered

" at diſcretion and without a capitulation, " he might, by right of conqueſt, lawfully " diſpoſſeſs every freeholder in the country " of his land, and give it away to other " perſons, or ſell it to the higheſt bidder, " and apply the money thence ariſing to " whatever uſes he thought fit. He is there- " fore, ſay they, abſolute monarch of the " country, ſince the lives and fortunes of " the inhabitants are thus intirely at his diſ- " poſal."

This is the ſtrongeſt way I know of ſtating this argument of theſe lawyers; in anſwer to which we may make the following remarks.

An anſwer to the ſaid argument.

All the premiſſes in this argument I allow to be true; but do not think that the concluſion, which theſe gentlemen would draw from them, is juſt, namely, that the king is, therefore, the abſolute monarch of ſuch a country, or has, in his ſingle capacity, the right of making laws for it. The power over the lives of the conquered people is certainly only a temporary power. If the king does not cauſe them to be put to death immediately

immediately after they are taken, or, at leaſt, during the remaining part of the war, he loſes his right of doing it. For, when a peace is made, and the conquered country is ceded and transferred to the conqueror by the former ſovereign, and the old, or conquered, inhabitants are ſuffered to continue in the country, and admitted to the rank of ſubjects, and to take the oath of allegiance, it ſeems clear that they have a right to be protected in their perſons and future property, acquired after the peace, in the ſame manner as the other ſubjects of the conqueror: That is, in other words, after the peace is made, the grand preliminary propoſition upon which the above-mentioned lawyers grounded their argument, to wit, "that the king is the abſolute maſter of the "lives and fortunes of the conquered people," is no longer true; and conſequently the concluſion they draw from it, "that therefore "the king was the abſolute monarch and "legiſlator of the country," will not follow from it.

The

The falſhood of this preliminary propoſition, when extended beyond the concluſion of the peace and the final ceſſion of the country, will be further evident by conſidering the original foundations of the rights of war. Now theſe rights of war over the perſons and property of a conquered people, are evidently only temporary rights, founded on neceſſity, in order to enable the conquerour to preſerve the advantages he has gained in the war, and compel the enemy to accept of a reaſonable peace: and, therefore, they can ſubſiſt no longer than the neceſſity that gives riſe to them, that is, no longer than the war continues.——And, as the rights of war themſelves are founded on neceſſity, ſo the power, or prerogative of exerciſing thoſe rights, that is, the prerogative of managing the war, is veſted, by the laws of England, in the king alone for almoſt the ſame reaſon, namely, on account of the high expediency, amounting to a kind of neceſſity, of entruſting this matter to the direction of one man, ariſing from the extreme difficulty of carrying on the operations of the war, and of making the ſudden and temporary regulations fit

Of the original foundations of the rights of war.

The probable foundation, or reaſon, of the king's prerogative of conducting the operations of war by his ſingle authority.

fit to be obſerved in conquered countries immediately upon their firſt ſubmiſſion, by a numerous body of men, and who are not at all times aſſembled together, ſuch as the parliament of Great-Britain. This I conceive to be the reaſon why the power of making theſe regulations is veſted in the king alone immediately upon the conqueſt of a country and during the remainder of the war; during all which time the inhabitants of ſuch a country, though no longer in arms againſt their conqueror, muſt ſtill be ſuppoſed to be ſecretly his enemies, and to be inclined to take the firſt opportunity of throwing off his authority and returning to their former maſters, and are, in truth, neither more nor leſs than priſoners of war who are permitted to be at large upon their parole of honour. While this violent ſtate of things continues, the king continues to have the ſole power of governing the conquered country and its inhabitants, and conſequently that of making temporary laws for them according to his diſcretion, as being a neceſſary part of ſuch government. But, when the peace is made, and the country is ceded for

ever

This reaſon ceaſes to exiſt, when the peace is concluded, and the conquered country has been ceded by its former ſovereign to the Crown of Great-Britain.

ever to the crown of Great-Britain by the former ſovereign of it, and the old inhabitants of the country are permitted to continue in it as ſubjects to the conquering ſovereign, and to take the oath of allegiance to him, (either with or without a reſtoration of their lands to them,) there ſeems to me to be an end of the exerciſe of the king's prerogative of making war in ſuch a country, and of all the incidental powers belonging to ſuch prerogative. From that moment the laws of peace take place, and, as I ſhould conceive, the legiſlative authority with reſpect to ſuch new part of the Britiſh dominions as well as with reſpect to the former parts of them, muſt revert to its proper channel, in which it runs in times of tranquillity, that is, to the king and the two houſes of parliament conjointly. And, if it does not then ſo revert, it muſt be owing to ſome other cauſe, or reaſon, than the king's having the ſole prerogative of making war and peace, becauſe at this time both the war and the peace are ſuppoſed to be compleatly terminated.

FRENCH

FRENCHMAN.

I am thoroughly convinced, or rather confirmed in my former opinion, that this legiſlative power of the Crown over conquered and ceded countries can never be derived from the royal prerogative of making war and peace, whatever other foundation it may have in the laws or conſtitution of Great-Britain. But was this argument, (derived from the prerogative of making war and peace,) the only argument by which the lawyers you converſed with, endeavoured to maintain their opinion of the legiſlative authority of the Crown over conquered countries? Did they alledge no circumſtance in ſupport of it, that continued to have an exiſtence after the concluſion of the peace and the final ceſſion of the conquered territory, when the legiſlative power in queſtion was ſuppoſed by them ſtill to continue in the Crown?

Of other arguments alledged by the aforeſaid Engliſh lawyers in ſupport of the king's legiſlative power over conquered countries.

ENGLISHMAN.

They were very indiſtinct in their manner of ſtating the grounds of their opinion. They partly aſſerted this legiſlative power to belong to the Crown as a ſort of known propoſition, or maxim of law, and partly endeavoured to prove it; and it was not very eaſy to diſtinguiſh their aſſertions from their proofs, or to diſcern in what their proofs conſiſted; which muſt often be the caſe when the proofs alledged in ſupport of a propoſition are in themſelves weak and inconcluſive. Their firſt and beſt argument (bad as we think it,) was that which I have already ſtated to you, which is grounded upon the king's prerogative of making war and peace. But they did alſo ſeem to found another argument upon the king's becoming owner of all the lands of the country he had conquered, and having a power to grant them either to the old inhabitants, who had poſſeſſed them under the former government, or to any other perſons, and upon ſuch terms and conditions as he ſhould think proper; from

An argument for this purpoſe derived from the king's becoming owner of all the lands of the countries he conquers.

from which they seemed to infer that he had likewise a right to make what laws for them, and impose what taxes upon them, he should think fit. And something of this kind, you may observe, seems to be hinted at in the words of Lord Mansfield above-mentioned, where he says, "That the lands of the "country are the king's, and he may grant "them to whom he pleases; and, if he plants "a colony upon them, the new settlers will "hold the shares of the said lands which "shall have been allotted to them, subject "to the prerogative of the conqueror." These words seem to me to mean, that the king's legislative authority over these new settlers is derived from the circumstance of his having granted them their lands; though still the last words, *subject to the prerogative of the conqueror*, seem very obscure, since the whole matter in question is to know *what is the prerogative of the conqueror*. However, some kind of right of legislation in the Crown seems intended by these words to be derived from the king's having been the original owner of the lands immediately upon the

Lord Mansfield's words to this effect.

conqueſt, and having granted them to their preſent poſſeſſors upon ſuch conditions as he thought fit.

FRENCHMAN.

A remark on the foregoing argument, ſhewing its inſufficiency.

This ſeems to me a ſtrange way of arguing; to found a right of impoſing laws and taxes on the inhabitants of a given diſtrict, on the mere ownerſhip of the lands, or rather on the circumſtance of having once owned them and afterwards granted them away. It is true indeed that the owner of any lands, (whether he be a king or a private perſon,) may annex what conditions he pleaſes to the grants that he makes of any parcels of them, ſo far as ſuch conditions are not contrary to the general laws of the country to which the lands belong; he may grant them to be holden only at his will and pleaſure, (though ſuch a ſlight tranſmiſſion of them would hardly deſerve to be called *a grant*;) or he may grant them for a term of years, or for the life of the grantee, or for ſeveral lives, or to the grantee and his heirs for ever. And he may require either a ſmall, or a very heavy, annual rent to be paid

paid for them, as he and his grantees ſhall agree. But, when once the grant is made, his power, as owner of the land, ſeems to me to be at an end, and he will have no right to impoſe any new rents or conditions on them ever after, provided they pay the rents and perform the conditions that have been originally agreed on. There is nothing therefore in this circumſtance of the king's being owner of all the lands of a conquered country, immediately after the conqueſt of it, that can give him the leaſt ſhadow of a right to impoſe laws or taxes on the inhabitants of it, whatever other grounds there may be for ſuch a power. Not to mention that it hardly ever happens, in modern times, that the conqueror of any country belonging to one of the civilized ſtates of Europe becomes the owner of all the lands of it even for an inſtant, it being almoſt the conſtant practice, in ſuch conqueſts, to grant to the inhabitants of the conquered country the quiet poſſeſſion of their lands immediately upon their ſubmiſſion to the conqueror. And this, we have ſeen in particular, was done in the caſe of the iſland of Grenada, where all the inhabitants who held

lands

lands in it, were continued in the enjoyment of them by the articles of the capitulation and the peace: ſo that no ſuch pretence to a legiſlative power derived from the original ownerſhip of the land, (weak as it is,) can be applied to that iſland. But indeed this argument for the legiſlative power of the Crown over conquered countries, which is grounded on the original ownerſhip of the lands of them, is too weak to need a confutation.

ENGLISHMAN.

I think of it in the ſame manner as you do, and was therefore half-inclined to paſs it over and ſay nothing to you about it, if you had not preſſed me ſo earneſtly to inform you of every other argument that had been alledged by the lawyers I had converſed with in ſupport of this legiſlative power of the Crown. However, ſince we *have* touched upon it, I will mention an additional obſervation or two that have occurred to me concerning it, over and above the remarks which you have made on it, to which I intirely ſubſcribe.

The

The idea of deriving the legiſlative power of the Crown over a conquered country from its original ownerſhip of the lands of the country immediately after the conqueſt, (though that effect of conqueſt does not, as you rightly obſerved, happen once in a hundred years in the wars between civilized nations, but is prevented by capitulations;) ſeems to have ariſen from a want of attention to the true nature of legiſlative power. The legiſlative power over a civil ſociety is not a ſudden and temporary power, which is to be exerciſed once for all, and then to ceaſe and be extinguiſhed, but is an authority conſtantly in being, and incapable of any reſtriction, becauſe it is founded on the power of the whole ſociety, who are ſuppoſed to have delegated to a particular man, or body of men, the power, originally inherent in themſelves, of making new laws to bind the whole ſociety, whenever they ſhall think it neceſſary. This is a very different thing from the power of an owner of lands with reſpect to the perſons to whom he means to grant them, ariſing from that ownerſhip, even ſuppoſing that it were lawful for

Another remark to the ſame effect.

Of the nature and foundation of legiſlative power over a civil ſociety.

Difference between this power and the power of an owner of lands over the perſons to whom he grants them.

for ſuch owner to require of his grantees, as a neceſſary condition of their enjoying the lands he was about to grant them, that they ſhould be governed by ſuch a particular ſyſtem of laws which he had appointed for them. For by ſuch a condition, if it were lawful for the original owner of lands to annex ſuch a condition to his grants, (which it is not in moſt caſes,) he would only become *a temporary* legiſlator, with a power to introduce that original ſyſtem of laws. But he could not afterwards make any alteration in thoſe laws, or any new law to bind his grantees, or impoſe any new tax upon them, over and above the rents originally reſerved in his grants, by virtue of ſuch former ownerſhip; becauſe every ſuch new law and tax would be a breach of his own grants, which are the only foundation of his authority. This power, therefore, of impoſing the original ſyſtem of laws by which his grantees were to be governed, as a condition of the tenure of their lands, (if ſuch a condition could be legally required of them,) would be only a temporary legiſlative power, which might be executed once

for

for all, at the time of making the grants; but then muſt ceaſe and be extinct for ever; which cannot happen to the true and genuine legiſlative authority over a ſociety, which is, as I before obſerved, a permanent authority, and incapable of diſſolution, ſo long as the ſociety, which is the object of it, continues to be a civil ſociety. Now it is by confounding the temporary power of a granter of lands, ariſing from his power of preſcribing the conditions on which he will make grants of them, with the permanent power of a regular and genuine legiſlator, that, as I conjecture, the lawyers I converſed with were induced to ground, on the circumſtance of the king's original ownerſhip of the lands of conquered countries, immediately after the conqueſt of them, their opinion that he was the conſtant and regular legiſlator of them.

FRENCHMAN.

That ſeems to be the moſt natural way of accounting for their manner of reaſoning; which, after all, appears to me to be ſurprizingly weak and inconcluſive. For who could ever have thought of deriving a right

Abſurd conſequences that would reſult from a ſuppoſition that the ownerſhip of lands could give the owner of them a legiſlative authority over the perſons who inhabit them.

of making laws from the circumſtance of being a great land-owner? At this rate every rich man in England, who is poſſeſſed of a large tract of land which is occupied by his tenants, might not only introduce a new ſyſtem of laws among them by requiring them to promiſe obedience to ſuch laws as a condition of the leaſes he was willing to make them of a part of it, but might alſo, after the leaſes were made to them, change thoſe laws for another ſyſtem, and double the rents he had reſerved in their leaſes by impoſing a tax upon them. Nothing, ſurely, can be more extravagant than ſuch an opinion.

ENGLISHMAN.

The extravagance of it is ſo ſtriking in the caſe, which you ſuppoſe, of a private perſon, that I believe no man could, for an inſtant, be perſuaded to entertain ſuch an opinion. And yet, if the mere ownerſhip of the land could create a legiſlative authority over the perſons who inhabit it, it muſt be confeſſed that ſuch a concluſion might juſtly be inferred from it. But in the caſe of a king people are apt to think the reaſoning leſs abſurd.

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The ſplendour of majeſty dazzles their imagination and overpowers their underſtanding. And yet, I preſume, there are few poſitions in the law of England more certain than this, " That, if any county in England, as, for inſtance, Yorkſhire, (which is the largeſt county in the kingdom) was, by purchaſes, and eſcheats and forfeitures for high-treaſon, and other lawful methods, to become the ſole property of the king, his Majeſty would not thereby acquire one jot more legiſlative power over the inhabitants of ſuch country, in conſequence of ſuch ſole and full poſſeſſion of it, than he has at preſent; but the ſame laws would take place in it after ſuch transfer of the property of the lands to the Crown as did before, and they would be liable to be changed, or altered, only by the ſame legiſlature as before, that is, by the king and parliament of Great-Britain conjointly, but not by the king alone. Nor would the king acquire, by ſuch a property in the whole county, even the imperfect and temporary legiſlative power above-mentioned, or the right of impoſing a new ſyſtem of laws upon the inhabitants of it once for all, as a condition

The king, by becoming owner of all the lands of any particular county in England, would not thereby acquire any power of making laws by his ſingle authority for the inhabitants of it.

dition annexed to the grants of land he might be willing to make them in it; but he muſt either not make any grants of land in it at all, or he muſt make them upon the uſual and known conditions upon which, by the laws already in force, lands may be granted in England. And every condition, annexed to a grant of land, that ſhould not be agreeable to thoſe laws, would either make the whole grant void, or, at leaſt, be void itſelf. Thus, for example, if the king were to grant a parcel of land in ſuch county to a man and his heirs for ever, with a condition, that neither he nor any of his heirs ſhould ever ſell it, or give it away from the next right heir, and that, if he ſhould attempt to make any ſuch alienation of it, the grant ſhould become void, and the land ſhould revert to the right heir of the grantor immediately upon the taking of the firſt neceſſary ſtep towards ſuch an alienation, and before the alienation is compleat; that condition of the grant would be void, becauſe it would tend to create a perpetual eſtate indefeaſibly veſted in the ſame family, or line of deſcent, which is a thing the laws do not allow. In the ſame manner, if the

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king were to grant a parcel of land in the ſaid county, (of which he had by divers accidents become the ſole proprietor,) and to annex to his grant any other condition that was contrary to the general laws of England, as, for inſtance, a condition that the youngeſt ſon ſhould inherit the land inſtead of the eldeſt, or the eldeſt daughter inſtead of the eldeſt ſon, ſuch a condition would be a void condition. And ſtill more certain it is, that, if the king were to grant ſuch whole county, (of which he was become the ſole proprietor) in ſeveral parcels, to a ſet of new grantees, with a condition that they ſhould be governed by the laws of Hanover, or the cuſtom of Paris, inſtead of the laws of England, the ſaid condition would be void, and the grantees would be bound to obey the laws of England.

This reſtraint upon the power of the Crown with reſpect to granting lands in the caſe I have here ſuppoſed, does not, indeed, ariſe from any right, or privilege, of the grantees themſelves; who, naturally, ought to be bound by every condition to which they have freely conſented: but it ariſes collaterally from

The true ground of the reſtraint under which the Crown would lie in ſuch a caſe.

from the intereſt that the other ſubjects of the Crown have, that no unreaſonable, or inconvenient, laws, or cuſtoms, ſhould take place in any part of the dominions that are ſubject to the ſame ſovereign with themſelves, and which by means of the neceſſary connection between the ſeveral parts of one and the ſame kingdom, or empire, might ultimately be prejudicial to themſelves.

The Crown, therefore, would not, in the caſe I have ſuppoſed, have even the temporary power of legiſlation above-mentioned, or the right of requiring the new grantees of the lands of the county of which it had acquired the ſole property, to obſerve any particular ſyſtem of laws different from the laws of England, as a condition of the tenure of their lands: much leſs would it thereby become poſſeſſed of the conſtant, or permanent, right of making laws and impoſing taxes on its inhabitants, which alone deſerves the name of *the legiſlative authority*, and which is the authority aſcribed to the Crown in the iſland of Grenada by Lord Mansfield, before the iſſuing of the proclamation

mation of October, 1763, by which the Crown relinquished it.

But we have dwelt too long on this whimsical argument for deriving the king's legislative authority over conquered countries from an original ownership of the lands of them, since, for the most part, no such ownership ever exists even for an hour, but the inhabitants are permitted to retain their lands by the terms of the capitulations, as was the case with Grenada in the late war, and with all the other islands then taken from the French king in the West-Indies.

It must further be observed that, in almost all the conquests made by the Crown of Great-Britain in modern times, the king is precluded from becoming owner of all the lands of the conquered countries by previous capitulations permitting the inhabitants to keep their lands.

FRENCHMAN.

I think indeed we have had enough of this argument. But, if these are all the arguments that are to be derived from reason and general principles in support of the king's legislative authority over conquered countries, I must needs think it requires other grounds than reason and general principles to support it. But, perhaps, there may be precedents, or other arguments from authority, to be alledged in favour of it: and, if

End of the consideration of the arguments derived from reason and general principles in support of the king's legislative authority over conquered countries.

Of precedents and other arguments from authority in favour of such

a legislative power in the Crown.

if I remember right, you, ſome time ago, ſaid that Lord Mansfield, in delivering the judgement of the Court of King's-Bench in that caſe of Campbell and Hall, mentioned ſome ſuch arguments. I therefore beg you would ſtate them to me, if it is not too much trouble.

ENGLISHMAN.

Lord Mansfield did mention two arguments of the kind you mention, the one derived from the hiſtory of the countries conquered by the crown of England or Great-Britain, the other from the opinions of Engliſh judges and other lawyers of eminence occaſionally given upon this ſubject, though without any formal deciſion of the point by any court of juſtice in the determination of a cauſe which turned upon it.

FRENCHMAN.

Of the arguments from hiſtory in favour of this legiſlative power of the Crown.

Pray, let me hear what were the arguments from hiſtory in favour of this legiſlative authority of the Crown. For, if theſe are clear and poſitive and uniform, I ſhould think they muſt have more weight than any other.

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ENGLISHMAN.

They certainly would deſerve great regard, if they had the qualities you mention. But, as they are, the greater part of them appear to me to be intitled to very little. The inſtances mentioned by Lord Mansfield of countries conquered by the crown of England before the Union, and of Great-Britain ſince that happy period, were thoſe of Ireland, Wales, Berwick upon Tweed, Calais, Gaſcony, New-York, Gibraltar and Minorca.

Lord Manſfield's aſſertions concerning the legiſlative power exercised over Ireland.

Concerning Ireland his words are as follows. "The alteration of the laws of Ireland has been much diſcuſſed by lawyers and writers of great fame. No man ever ſaid the change was made by the parliament. No man, unleſs perhaps Mr. Molyneux, ever ſaid the king could not do it. The fact, in truth, after all the reſearches that could be made, comes out clearly to be as laid down by Lord Chief Juſtice Vaughan; namely, That "Ireland received the laws of "England by the charters and command of "king Henry the 2d, king John, Henry

" the 3d, &c.; which &c. is added by Lord " Chief Juſtice Vaughan in order to take in " Edward the 1ſt and the other ſucceſſors " of the princes he had named. That the " charter of the 12th year of king John's " reign was by aſſent of parliament in Ire- " land, Lord Chief Juſtice Vaughan ſhews " clearly to be a miſtake. Whenever a par- " liament was called in Ireland, that change " in their conſtitution was without an act of " parliament in England, and therefore " muſt have been derived from the king."

Remarks on them.

This is all that is ſaid by Lord Mansfield concerning Ireland; which at moſt proves that, five hundred years ago, the kings of England, upon the conqueſt of Ireland, exerciſed one ſpecies of legiſlation over it, to wit, that of aboliſhing the Iriſh laws and introducing the laws of England in their ſtead. But it does not prove that they became the permanent and general legiſlators of Ireland, and made and unmade laws there, and impoſed taxes upon the inhabitants, at their pleaſure, without the concurrence of either the Engliſh or Iriſh parliament; which

was

was the legiſlative power ſuppoſed by Lord Mansfield, (if I underſtand him right,) to belong to the king in the iſland of Grenada, before he had diveſted himſelf of it by his proclamation of October, 1763. Now, as to this one ſpecies of legiſlation, that of introducing the laws of England into the conquered country, as it no way leſſens the rights and privileges of the Engliſh, or conquering, nation, nor tends to give the king new and dangerous powers which may hereafter be uſed to their prejudice, but rather tends to confirm them in their enjoyment of thoſe rights and privileges, by extending them to their new fellow-ſubjects, the inhabitants of the newly-conquered country, it may well be preſumed to have the approbation of the conquering nation, though done without an expreſs concurrence of their parliament. It can therefore be no ground for the exerciſe of a permanent and general legiſlative authority by the Crown alone over the conquered people in other inſtances; as, in raiſing taxes upon them; eſtabliſhing a religion amongſt them; compelling them to ſerve as ſoldiers in regular armies otherwiſe

than for the defence of their own country; altering the mode of adminiſtring juſtice amongſt them, ſo as to make it different from that of the Engliſh, or conquering, nation, as well as from that which took place before the conqueſt of the country; introducing, or abrogating, amongſt them the cuſtom of having ſlaves; altering the laws of tenure, or of inheritance; or the age of majority or diſcretion; or the privileges of marriage; or the legitimacy, or illegitimacy, of children in certain caſes; or the powers of parents over their children; or the power of entailing eſtates, or of freeing them from entails; and ſettling all theſe matters in a manner not known to the laws of England; and of making other, the like, changes in the civil condition of the conquered people. All theſe acts appear to me to be acts of legiſlation of a very different kind from that of introducing the laws of England into the conquered country. The former are the acts of a real and general legiſlator: the latter may reaſonably be conſidered as an act of the executive power, by which the king, acting as the great executive magiſtrate of the Engliſh

liſh nation, executes their preſumed intention by extending the operation of thoſe laws which have already received the ſanction of their approbation. And for this reaſon this inſtance of Ireland appears to me to have but little weight with reſpect to the purpoſe for which it is adduced, that of proving that the king had a right to make laws for, and impoſe taxes on, the inhabitants of Grenada before the proclamation of October, 1763.

But, beſides this objection to the above argument drawn from Ireland, we may obſerve that great alterations have happened in the conſtitution of the Engliſh government ſince the days of king John, and, for the moſt part, in favour of the liberty of the ſubject, and to the diminution of the power of the crown: ſo that I can allow but little weight to a precedent, in favour of a doubtful prerogative of the crown, drawn from thoſe antient and obſcure times, unleſs it has been followed by others of the ſame kind in more modern times, which are better known and bear more reſemblance to the preſent. Now, if we purſue the hiſtory of

Ireland,

Ireland, we ſhall find that, in after times, the parliament of England concurred with the king in making laws for the people of Ireland; of which there are the following examples in the collection of the Engliſh Statutes.

Acts paſſed by the Engliſh parliament concerning Ireland.

In the reign of king Henry V. there is a ſtatute of the Engliſh parliament, which ordains, that all Iriſhmen, who have benefices or offices in Ireland, ſhall reſide upon them, on pain of loſing the profits of them.

And in the third year of the reign of king William and queen Mary, juſt after the late reduction of Ireland to the obedience of England, (which is a time much fitter to be argued from, on a point reſpecting the preſent conſtitution of the Engliſh government, than the reigns of king Henry II. and king John,) there is an act of the Engliſh parliament reſpecting Ireland that is of great importance. For it ſettles the oaths which are to be taken by the members of both houſes of parliament in Ireland before they can ſit and vote in their reſpective houſes, beſides many other matters of great conſequence. And in the eleventh

year

year of the ſame king William's reign there is another act of the Engliſh parliament which enacts that the forfeited eſtates in Ireland ſhall be ſubject to the ſame quit-rents as they were ſubject to on the 13th day of February, 1688, and that the ſaid quit-rents and all other quit-rents which had belonged to the crown of Ireland on the ſaid 13th day of February, 1688, ſhall be for ever after appropriated to the ſupport of the government of Ireland, and ſhall be unalienable; which, by the bye, is preciſely the ſame regulation which, we have agreed, would be extremely proper to be made with reſpect to the quit-rents of North-America.

In queen Anne's reign there are four acts of the Engliſh parliament concerning Ireland.

And in the ſixth year of the reign of king George I. there is an act of the Engliſh parliament to the following purport: "To de-
" clare that the kingdom of Ireland ought to
" be ſubordinate unto, and dependent upon,
" the imperial crown of Great-Britain, as
" being inſeparably united thereto; and that
" the

" the king's majeſty, with the conſent of
" the lords and commons of Great-Britain
" parliament, hath power to make laws to
" bind the people of Ireland."

Concluſion drawn from the ſaid acts.

From theſe inſtances it is plain that the king and parliament of England or Great-Britain, have exerciſed a legiſlative authority over Ireland ever ſince the reign of Henry V. that is, for the ſpace of 350 years, and conſequently that the king alone has not been their legiſlator during all that time. For, if the kings alone had had that authority, we may preſume they would ſometimes have uſed it. And even in the old times between the reigns of king John and king Henry V. it ſeems to have been the practice of the kings of England, in making ordinances of importance for the good government of Ireland, to act in conjunction either with the Iriſh parliament or a very reſpectable council in Ireland, which conſiſted not only of the king's ordinary counſellors in that country, but of the prelates and great men thereof, and others of the moſt diſcreet and reſpectable Iriſh gentlemen who dwelt in the neighbourhood

hood of the place where ſuch council was to meet, and ſuch ordinances were to be paſſed; which council was a kind of *local*, or *partial*, parliament for that part of the country where it was held. All this is very manifeſt from the following ſhort chapter of a certain ancient ordinance, thought to have been made about the 31ſt year of the reign of king Edward III. which is intitled, *Ordinatio facta pro ſtatu terræ Hiberniæ. Item volumus et præcipimus, quod noſtra et ipſius terræ negotia, præſertim majora et ardua, in conſiliis, per peritos conſiliarios noſtros, ac Prælatos et Magnates, et quoſdam de diſcretioribus et probioribus hominibus de partibus vicinis, ubi ipſa conſilia teneri contigerit, propter hoc evocandos; in parliamentis verò per ipſos Conſiliarios noſtros, ac Prælatos et Proceres, alioſque de terrâ prædictâ, prout mos exigit; ſecundùm Juſtitiam, Legem, conſuetudinem, et rationem, tractentur, deducantur, et fideliter, (timore, favore, odio, aut pretio, poſtpoſitis,) diſcutiantur et etiam terminentur.*

A remarkable paſſage in an old act of the Engliſh parliament in the reign of king Edward III. concerning the legiſlation to be exerciſed over Ireland.

In this paſſage we may obſerve two things; 1ſt, that parliaments in Ireland are ſpoken of as

as known and cuſtomary aſſemblies even in that ancient time; for that, I preſume, is the meaning of the words, *prout mos exigit*; and, ſecondly, that even in the council, (which is diſtinguiſhed from the parliament,) there were to be, beſides the King's counſellors, (who are denoted by the words *peritos conſiliarios noſtros)* ſome prelates and great men (expreſſed by the words *Prælatos et Magnates)* and ſome other men of reſpectable condition and character, who were to be ſummoned from the neighbouring diſtrict to the ſaid councils for the purpoſe of making theſe ordinances; which is expreſſed by theſe words, *quoſdam de diſcretioribus et probioribus hominibus de partibus vicinis propter hoc evocandos.* It can hardly be pretended, when one conſiders this paſſage, that the king of England was at that time the ſole legiſlator of Ireland, with a right to make what laws, and impoſe what taxes, he thought proper there, as Lord Mansfield ſaid the King might lawfully do in the iſland of Grenada after the peace in February, 1763, and before the proclamation in the October following.

Whether

Whether or no the kingdom of Ireland is now ſubject to both the parliament of Great-Britain and its own parliament, and how and when it became ſo, are queſtions of conſiderable difficulty, but which it is by no means neceſſary to diſcuſs on the preſent occaſion. All that I am now endeavouring to prove is, that the King is not now, and has not been for more than four centuries, (namely, from the 31ſt year of the reign of king Edward III.) and does not appear clearly to have been in any former age, the ſole legiſlator of that country, ſo as to afford a ground for ſuppoſing that he became ſo in the iſland of Grenada by virtue of the conqueſt of it.

FRENCHMAN.

I think this example of Ireland makes rather *againſt* than *for* the ſuppoſed legiſlative authority of the Crown in the iſland of Grenada; more eſpecially after that act of the Britiſh parliament of the 6th of King George I. which ſeems to me to be a ſort of general declaration of the law upon this ſubject. For, if it be juſt reaſoning to declare, "that the "kingdom of Ireland ought to be ſubordinate "unto, and dependent upon, the imperial

Application of the reaſoning uſed concerning Ireland in the ſtatute of the 6th of Geo I. to the iſland of Grenada.

" Crown of Great-Britain, as being inſepa-
" rably united thereto; and that the king,
" with the conſent of the parliament of
" Great-Britain, hath power to make laws
" to bind the people of Ireland;" it ſeems to be equally juſt to conclude the ſame thing with reſpect to the iſland of Grenada, that is, that, as the ſaid iſland of Grenada is inſeparably united to the imperial Crown of Great-Britain by the final ceſſion made thereof to the ſaid Crown by the king of France in the late treaty of peace, it ought to be ſubordinate unto, and dependent upon, the ſaid imperial Crown, and that the king of Great-Britain, with the conſent of the parliament of Great-Britain, hath power to make laws to bind the people of the ſame. I can ſee no difference between the caſes.

ENGLISHMAN.

I own I am much inclined to reaſon in the ſame manner, and more eſpecially ſince the year 1766, when, upon the repeal of the ſtamp-act, a ſimilar declaratory act was paſſed with reſpect to the Britiſh colonies in America,

Confirmation of the ſame opinion of the parliamentary right of legiſlation over the iſland of Grenada, by the famous declaratory act of parliament in the year 1766, concerning all the Britiſh dominions in America.

rica, which is expreſſed in theſe words, to wit, " *That the colonies and plantations in* " *America have been, are, and of right* " *ought to be, ſubordinate unto, and dependent* " *upon, the imperial Crown and Parliament* " *of Great-Britain; and that the King's* " *Majeſty, by and with the advice and conſent* " *of the Lords ſpiritual and temporal, and the* " *Commons of Great-Britain, in parliament* " *aſſembled, had, hath, and of right ought to* " *have, full power and authority to make laws* " *and ſtatutes of ſufficient force and validity to* " *bind the colonies and people of America, ſub-* " *jects of the Crown of Great-Britain, in all* " *caſes whatſoever.*" This ſtatute makes no diſtinction between ſuch colonies and plantations as were properly *colonies*, or were planted by emigrants from Old England (ſuch as Virginia and New-England,) and ſuch territories as were obtained by conqueſt, (as Quebeck, Jamaica and Grenada,) which might with more propriety be called *provinces* than *colonies:* but it relates equally to them both; ſo that both are, in the eye of the law, in the ſame political ſituation, that is, ſubject to the legiſlative authority

rity of the king and parliament of Great-Britain acting conjointly, but not to that of the king alone. And, as this ſtatute is merely declaratory of what the law was at the time of paſſing it, and does not purport to transfer any legiſlative power that had hitherto been veſted in the king alone over any part of America, or that might hereafter legally become veſted in the king alone over any future dominion of the Crown in that quarter of the world, from the king alone to the king and parliament conjointly, I ſhould have thought it ought to have been conſidered as a parliamentary deciſion of all doubts that might have been entertained before concerning the legiſlative authority over conquered countries, in favour of the king and parliament conjointly and againſt the pretenſions of the Crown alone.

FRENCHMAN.

It ſeems to me to put an end to the whole queſtion. However, as we have entered upon this ſubject, I beg you would go on with it, if not as a ſubject of law, yet, at leaſt,

leaſt, as a ſubject of hiſtory of a peculiar and curious kind, and inform me what Lord Mansfield ſaid concerning the exerciſe of this ſuppoſed legiſlative authority of the crown in the caſe of Wales and the other countries conquered by the Crown of England, which, you ſaid, he cited in ſupport of it.

ENGLISHMAN.

What he ſaid of Wales was in theſe words. " As to Wales, Mr. Barrington is " well warranted in what he has ſaid upon " the famous *Statutum Walliæ*, or Statute of " Wales, in the 12th year of the reign of " Edw. I. That ſtatute was certainly no " more than a regulation made by the king, " *as conqueror*, for the government of that " country, which, the preamble of that ſta- " tute ſays, was then totally ſubdued. And, " however, for purpoſes of policy, he might " think fit to claim it as a fief appertaining " to the realm of England, he could never " think himſelf intitled to make laws, with- " out aſſent of parliament, to bind the ſub- " jects of any part of the realm. There- " fore, as he did make laws for Wales with-

Lord Mansfield's aſſertions concerning Wales.

" out

" out aſſent of parliament, the clear conſe-
" quence is, that he governed it as a con-
" queſt; which was his title in fact, and
" the feudal right but a fiction." This was all that Lord Mansfield ſaid concerning the king's legiſlative power over Wales.

FRENCHMAN.

Remarks on them.

Theſe words appear to me to be rather obſcure and unſatisfactory, conſidering the importance of the propoſition they are intended to prove. For, in the firſt place, Lord Mansfield ſeems to invert the argument that was neceſſary to his purpoſe, and, inſtead of ſhewing that Wales was confeſſedly a conquered country, and that king Edward, conſidering it as ſuch, grounded upon that circumſtance a right of making laws for it by his ſingle authority, and actually did make laws for it in that manner, he affirms that king Edward did make laws for it by his ſingle authority, and from thence concludes that he muſt have conſidered it as a conqueſt. This reaſoning may be juſt; but it is too ſubtle and refined for my comprehenſion, and

ſerves

ſerves only to perplex me. And, in the ſecond place, I obſerve that Lord Mansfield won't take king Edward's word, (as it is given us in the preamble of this ſtatute,) that Wales was a fief of the Crown of England, or that he conſidered it as ſuch, and proceeded to make laws for it as being ſuch, (which comes to the ſame thing,) but will needs inſiſt upon it's having been a mere conqueſt, and upon king Edward's having thought it ſo, and treated it accordingly. Now, for my part, I am inclined to give more credit to king Edward's own declarations concerning his opinions and the grounds of his proceedings upon this occaſion, than to Lord Mansfield's account of them; and therefore I muſt needs think, either that Wales was really a fief of the Crown of England before king Edward's reduction of it, or, at leaſt, that king Edward thought fit to conſider it as ſuch, and treated it as if it had been ſuch; which, with reſpect to the preſent queſtion, comes to exactly the ſame thing, becauſe, if it was treated as a fief, and not as a conqueſt, it does not afford a precedent of the manner in which it is lawful for a king of England to treat a con-

An inquiry into the truth of the facts asserted by Lord Mansfield concerning Wales.

quered country. But I am somewhat curious to know how the fact stood upon this subject, both with respect to the feudal dependance of Wales on the Crown of England before the reign of Edward I. and with respect to the authority by which king Edward made the regulations contained in the *Statutum Walliæ*.

First fact.

Is it true, in the first place, as Lord Mansfield seems to assert, that the princes who governed Wales before the reign of king Edward I. were totally independent of the Crown of England, and never did homage for their principality to it's kings? and, in the second

Second fact.

place, that king Edward passed the *Statutum Walliæ* by his single authority and without the concurrence of his parliament? These are facts that are curious in themselves, as points of history, and on that account I am desirous to be informed of the truth concerning them, though, perhaps, they are not very material to the decision of the question now under our consideration, concerning the extent of the prerogative of the Crown of Great-Britain with respect to conquered countries at this day, because the constitution of the English government has undergone very

considerable

conſiderable alterations ſince the reign of king Edward I. though ſome of the great foundations of it may be ſtill the ſame.

ENGLISHMAN.

Your laſt remark is certainly very juſt; that the proceedings of the Crown in that remote part of the Engliſh hiſtory are but indifferent grounds to ſupport any doubtful claims upon, unleſs they have been followed by ſimilar exertions of authority in more modern times, with the hiſtory of which we are better acquainted, and thoſe exertions have been generally acquieſced in and approved of. But, to come to the facts you inquire after;—I have had the ſame curioſity which you expreſs concerning them, and have therefore looked into books of hiſtory, and into the *Statutum Walliæ* itſelf, to ſee how the truth was concerning them. And the reſult is, that both theſe facts appear to me to be otherwiſe than Lord Mansfield has repreſented them: the country of Wales having not been totally independent of England before the reduction of it by king Edward I. but in a

They do not, upon inquiry, appear to be as Ld. Mansfield has repreſented them.

ſtate of feudal dependance on the kings of England, as king Edward affirms in the *Statutum Walliæ*; and the ſaid ſtatute not having been made by the ſingle authority of the ſaid king Edward, but with the aſſent of the great men of his kingdom, or the *proceres regni*, which I take to mean the parliament of the kingdom. But, that you may judge for yourſelf upon theſe matters, I will mention to you ſome of the paſſages in the old writers of the Engliſh hiſtory, and in the *Statutum Walliæ*, upon which I ground theſe opinions.

Proofs from hiſtory, of the feudal ſubjection of Wales to the kings of England before the final conqueſt of it by king Edward I.

In the firſt place, then, I find in the hiſtory of Matthew Paris, (one of the moſt reſpectable of the old Engliſh hiſtorians,) the following paſſages relating to ancient victories gained by the kings of England over the people of Wales before the final conqueſt of it by Edward I. even from the time of William the conqueror, which was more than two centuries before the ſaid conqueſt by king Edward. And moſt of theſe victories were concluded by a feudal ſubjection of the country of Wales to the Crown of England, agreeably

agreeably to king Edward the firſt's declaration in the *Statutum Walliæ*, that is, by the performance of homage to the kings of England by the princes, or the nobles, of Wales.

In the reign of king William the Conqueror.

In his account of the reign of king William the Conqueror, that faithful hiſtorian relates that in the year 1079, (which was the 13th year of the reign of William the Conqueror,) that warlike king marched into Wales with a numerous army, and intirely ſubdued it, and received homage and fealty from the petty kings, or princes, of that country. This is expreſſed in theſe words. *Anno Domini* 1079 *Rex Anglorum Willielmus in Walliam duxit exercitum copioſum, et eam ſibi ſubjugavit, et à regulis illius ditionis homagia et fidelitates accepit.*

In the reign of William Rufus.

The next king, William Rufus, made an expedition againſt the Welch, which was leſs ſucceſsful than his father's. Yet he by no means yielded up thoſe claims of feudal ſuperiority over them which had been either eſtabliſhed, or confirmed, by his father, and which ſeem to have been quietly ſubmitted

to

to during the remainder of the Conqueror's reign, and for the firſt years of William Rufus's. Matthew Paris's account of this expedition is in theſe words. *Eodem anno (ſcilicet, anno domini* 1094*) Rex Willielmus in Walliam exercitum ducere feſtinavit, quod anno præterito Wallenſes, multis Normannorum occiſis, procerum confractis firmitatibus, caſtello Montis Gomerii directo et habitantibus in eo interfectis, igne et ferro finitimos depopulati fuerant. Rex autem Willielmus, omnes fines Waliiæ hoſtiliter ingreſſus, cum, per montium diverticula et ſylvarum denſitates, ipſos perſequi non valeret, conſtructis in confinio caſtris, ad propria remeavit.*

In the reign of Henry I.

The next king, Henry I. reduced the Welch to ſubmit intirely to his pleaſure, as appears from this paſſage of Matthew Paris. *Eodem anno (ſcilicet, anno domini* 1113,*) Rex Henricus, exercitum ducens in Walliam, ſubdidit ſibi Wallenſes pro arbitrio regiæ voluntatis.* And in the account of the tranſactions of the year 1121 the ſame hiſtorian has theſe words. *Inde autem (ſcilicet, a Londoniis) cum rex ad Walliam tenderet cum exercitu copioſo, Wallenſes,*

Wallenſes, ei ſuppliciter obviantes, concordati ſunt cum ipſo juxtà ſuam magnificentiam voluntatis.

In the reign of king Henry II. in the year of Chriſt 1157, the Welſh were again obliged to do homage to the king of England. This is related by Matthew Paris in the words following. *Eodem anno Rex Henricus magnam paravit expeditionem, ita ut duo milites de totâ Angliâ tertium invenirent, ad expugnandum Wallenſes per terram et per mare. Intrans ergo Walliam rex, extirpatis ſylvis, nemoribuſque ſucciſis, atque viis patefactis, caſtrum Roelent firmavit, alias munitiones, anteceſſoribus ſuis ſurreptas, potenter revocavit, caſtellum etiam Baſingwere reſtauravit, et, Wallenſibus ad libitum ſubjectis, cum triumpho Angliam repetivit. Apud Suanduum * multorum cepit homagia, ſcilicet, nobiliorum.* In the reign of Hen. II.

In the reign of king John they were again invaded by the Engliſh, and reduced to ſubjection to the Crown of England, and were forced to deliver up to the king twenty-eight perſons by way of hoſtages for their continuing In the reign of king John.

* Probably Snowdon.

nuing ſubject to him for the future. This is expreſſed by Mathew Paris in the following words. *Anno gratiæ milleſimo, ducenteſimo, undecimo (A. D. 1211) Rex Anglorum Johannes fuit ad Natale Domini apud Eboracum, præſentibus comitibus et baronibus regni. Quo etiam anno idem rex apud Album monaſterium, magno exercitu congregato, profectus eſt in Walliam, octavo Idus Julii: ubi in fortitudine gravi, Walliæ interiora perluſtrans, ad Snaudunam uſque, obvia ſibi quæque conterendo, penetravit; reges omnes et nobiles ſine contradictione ſubjugavit. De ſubjectione in poſterum obſides viginti octo ſuſcepit; et inde cum proſperitate, in die aſſumptionis beatæ Mariæ, ad Album monaſterium remeavit.* In the following year the Welchmen made an incurſion into England, and took ſome of king John's caſtles, and put the garriſons of them to death, beſides ſetting ſeveral villages on fire, and doing other miſchief. This made king John collect a large army together, in order to invade Wales and deſtroy it with fire and ſword, and exterminate it's inhabitants in revenge for the ſaid treacherous rebellion. And he immediately put to death the twenty-eight perſons,

perſons, who had been put into his hands the year before as hoſtages for the fidelity of the Welch. But he was perſuaded to deſiſt from his main purpoſe, of invading Wales, by ſome intimations he received of an intention in his army (by the greateſt part of whom he was deſervedly hated for his innumerable acts of tyranny and oppreſſion,) either to take away his life themſelves or deliver him into the hands of the Welch. Nor did he afterwards reſume his deſign of invading Wales and reducing it again to his obedience, the remaining part of his reign (which was but four years,) being full of inteſtine troubles. But he does not appear to have ever done any thing that tended to a ſurrender of his claim of a feudal ſuperiority over the Welch, or of his right to the homage of their princes.

In the reign of king Hen. III.

In the year 1231, in the reign of king Henry III. (who was the ſon of king John, and the father of Edward I.) the Welch again made incurſions into England, near Montgomery caſtle, under the command of Lewellin their prince, and gained an advantage over the Engliſh forces belonging to that

caſtle: which occaſioned the king to march thither with a body of troops to revenge theſe injuries. And he on this occaſion rebuilt Matilda's caſtle in Wales in an elegant manner with ſtone and mortar, and put a garriſon into it, in order to reſtrain the Welch from making the like incurſions into England for the future. This caſtle had been deſtroyed by the Welch a conſiderable number of years before.

Submiſſion of Lewellin, pr. Wales, to king Henry, in 1237.

In the year 1237 Lewellin, prince of Wales, ſent an embaſſy to king Henry, repreſenting to him that he was now grown old and infirm, and deſirous of living in peace and harmony with all the world, and ſolliciting the friendſhip and protection of the king of England upon that account, and offering, in order to obtain it, to ſubmit himſelf and all his poſſeſſions to the government and protection of the king of England, and to hold his lands of him in fealty and friendſhip, by a perpetual and indiſſoluble compact, and, whenever the king ſhould engage in any military expedition, to aſſiſt him with ſoldiers, arms, horſes and money,

to

to the beſt of his ability, as his faithful vaſſal or liegeman. The words of Matthew Paris are theſe; *quod ſe ſuaque omnia ditioni ac tutelæ regis Anglorum ſubdere decrevit; et de eo teneret terras ſuas in fide et amicitiâ, inito fœdere indiſſolubili; et, ſi rex in expeditionem iturus eſſet, militiâ, armis, et equis et theſauro, ſecundùm vires ſuas, ut ſuus fidelis, eum fideliter adjuvando promoveret.* This propoſal was accepted by king Henry, and confirmed by ſeveral of the great men of Wales, (the *magnates Walliæ,)* as well as by the two biſhops of Hereford and Cheſter on the part of prince Lewellin himſelf. Now the foregoing words contain the very definition of a fief, or territory holden of another by a feudal and military tenure.

Remarkable words, deſcriptive of a feudal ſubjection.

Prince Lewellin at the time of this treaty was much afflicted by the ambitious and undutiful conduct of his eldeſt ſon Griffin, who was preparing to make war upon him in order to diſpoſſeſs him of the government. And it was, in a great meaſure, with a view to repreſs the inſolence of this ſon that he applied on this occaſion to king Henry for his protec-

Prince Lewellin's diſſatisfaction at the undutiful behaviour of his eldeſt ſon, Griffin.

tion. The conſequence was ſuch as he had wiſhed. He got the better of his ſon Griffin, and reduced him to a compleat ſubmiſſion to his will; inſomuch that, when, in about three years after, to wit, in the year 1240, he found his death approaching, he obliged his ſaid ſon to conſent to a ſettlement he had reſolved to make of his principality of North-Wales upon his ſecond ſon David, who was Griffin's younger brother. Lewellin died ſoon after, to wit, in April, 1240. But after Lewellin's death Griffin refuſed to ſubmit to this ſettlement, and a war aroſe between the two brothers, till David, by an act of treachery, got Griffin into his power and threw him into priſon; upon which Griffin's party, having loſt their leader, ſubmitted to the government of David. This act of treachery conſiſted in an invitation which David gave to his brother Griffin to come and meet him at a certain place, to treat of peace together; where when Griffin, confiding in David's promiſe of ſafety to his perſon, came in a peaceable manner, and in the company of Robert, biſhop of Bangor, and other great men of Wales, David cauſed him to be

He reduces Griffin to ſubmiſſion.

Death of Lewellin, in April, 1240.

Diſſenſions between his ſons Griffin and David.

The former is treacherouſly apprehended and impriſoned by David.

be apprehended and ſent to priſon, notwithſtanding all the remonſtrances that were made againſt ſuch a proceeding by the ſaid biſhop and other great men in whoſe company Griffin had come to the ſaid meeting. The biſhop of Bangor, through an honeſt indignation at this piece of treachery, excommunicated prince David, and retired from Wales into England, and there ſollicited king Henry to oblige David to ſet his brother Griffin at liberty, whom he had ſo perfidiouſly thrown into priſon. And the biſhop urged the king to do ſo to prevent a blemiſh in his own honour from a connivance at ſo baſe an act of injuſtice in prince David, *ne tanta taliſque facinoroſa tranſgreſſio* (ſays Matthew Paris,) *remotas regiones curiamque Romanam, in honoris regii læſionem, macularet*; which is agreeable to the notion that Wales was at that time a fief of the crown of England, by reaſon of which it became the duty of the king of England, as upper Lord of it, to attend to the complaints made by it's inhabitants of acts of injuſtice committed by it's princes who were his vaſſals or liegemen. Accordingly it appears that, upon this complaint of the biſhop

Complaints are made of this act of treachery to king Henry

biſhop of Bangor, king Henry wrote to prince David to command him to ſet his brother Griffin at liberty. But David refuſed to do ſo, and aſſured the king that, if his brother were at liberty, Wales could never be at peace. Theſe things coming to the ears of Griffin, he ſent a private meſſage to king Henry, by which he aſſured him that, if he would uſe his power to ſet him at liberty and inveſt him with the government of North-Wales inſtead of his brother David, he would hold all the country from him, the ſaid king Henry, and faithfully pay him every year the ſum of two hundred marks, as an acknowledgment for it, and would moreover aſſiſt him to ſubdue all the Welch who were in rebellion againſt him, and who were ſituated at the greateſt diſtance from England and as yet unſubdued, *juvaret eum diligenter omnes ſibi rebelles Wallenſes, longinquos et indomitos, ſubjugare.* This offer of Griffin's ſhews that the greater part of Wales was at that time conſidered as under a feudal ſubjection to the kings of England, and that only a few of the moſt remote parts were conſidered as hitherto unſubdued by them, *(indomitos,)* or not reduced to ſuch ſubjection.

The king commands David to ſet Griffin at liberty: which David refuſes to do.

A propoſal made by Griffin to king Henry.

This

This ſecret propoſal of prince Griffin to the king was ſupported by the ſollicitations of a very powerful Welch nobleman, whoſe name was Griffin ap Madoch, who exhorted him to enter Wales with an army and make war againſt prince David, who, beſides his treacherous behaviour to his brother, had done injuries to many perſons of conſequence in that country. The king liſtened to this propoſal and advice, and immediately raiſed a large army and marched with it towards Wales, declaring that he had found prince David to be a moſt diſloyal evader of the commands he had thought fit to ſend him, and a rebel to his authority, inaſmuch as he had refuſed to come before him to confer upon matters relating to the peace of Wales, according to an order which the king had ſent him for that purpoſe, though the king had promiſed him a ſafe conduct, *quem cavillatorem in omnibus invenerat et rebellem, nec volentem ad pacis colloquium, juxtà mandatum regis, etiam ſub ſalvo ducatu, aliquando venire.* This is the language of a king towards a ſubject, and not towards an independent prince: ſo that Wales muſt at this time have been conſidered by king

King Henry marches into Wales againſt prince David, with a large army.

king Henry III. and the people of England, as a fief of the Crown of England, agreeably to what was afterwards aſſerted by king Edward I. in the *Statutum Walliæ*.

David treats with k. Hen. and promiſes obedience to him, and delivers his brother Griffin nto his hands: but adviſes the king to keep him in cuſtody.

The approach of the Engliſh army towards Cheſter, together with the conſciouſneſs that he had many enemies amongſt the Welch themſelves, terrified prince David and made him reſolve to ſollicit king Henry's favour. He therefore ſent word to king Henry that he was ready to deliver his brother Griffin into the king's hands, provided the king would leave him in poſſeſſion of his principality of North Wales, which he was willing to hold of the king, and not only to take the uſual oath of fidelity to him on that account, but alſo to give him hoſtages for the continuance of his obedience. But he at the ſame time exhorted the king to keep prince Griffin in confinement, and aſſured him that, if he did not do ſo, but ſhould ſet that prince at liberty, he would ſoon kindle new diſturbances in Wales, even in oppoſition to the king's authority. The king liſtened to this propoſal of David and followed his advice. Griffin was

delivered

delivered by his brother David into king Henry's hands, with ſeveral of the moſt eminent perſons of Wales who were given as hoſtages for the peaceable conduct of prince David and the reſt of the Welch nation. And they were all, by the king's order, carried to London under a guard, and there kept in ſafe cuſtody in the Tower of that city. Theſe things were tranſacted in the ſummer of the year 1241, and were compleated before Michaelmas day. And, in eight days after Michaelmas, prince David himſelf, having firſt obtained a ſafe conduct from king Henry, came to London and preſented himſelf before the king, and then and there took an oath of allegiance and fidelity to king Henry, and ſoon after returned to Wales in peace. *Et poſt octavum diem feſti ſancti Michaelis venit David Londinum ad Regem; et, factis ibidem regi ligantiâ, fide, et juramento omnimodæ fidelitatis et ſecuritatis, . . . dimiſſus in pace eſt ad propria remeare. Rex igitur, ſic Walliâ ſibi ſubjugatâ, ſine ſanguinis effuſione et ancipitis belli caſibus, de hoſtibus ſuis, Deo propitio, triumphavit.* Here again we have a proof that Wales was *ſubjugata regi*

The king impriſons prince Griffin in the tower of London. A. D. 1241.

Prince David comes to London, and takes the oath of allegiance to K. Henry.

Angliæ, reduced to a feudal ſubjection to the king of England, or, in other words, was a fief of the crown of England. Matthew Paris has recorded the very inſtrument by which king Henry III. on the foregoing occaſion, entered into an agreement with the wife of prince Griffin, who was then a priſoner in his brother David's hands, to ſet him at liberty and put him in poſſeſſion of that part of his father Lewellin's lands which, by the cuſtom of Wales, he was intitled to; and that likewiſe by which prince David bound himſelf to king Henry to deliver up into the king's hands his brother Griffin, whom he then detained in priſon, and Owen, the eldeſt ſon of the ſaid Griffin, whom he likewiſe kept at that time in priſon, and all the other perſons whom he had hitherto detained in priſon on account of the ſaid Griffin, and to abide ſuch judgment as ſhould be given by the king's court concerning the ſaid Griffin's claim to a part of his father Lewellin's lands. The whole tenor of theſe inſtruments proves ſo clearly the feudal ſubjection of Wales at that period to the crown, that Matthew Paris, after reciting them and relating the attempt which

prince

prince David made three years after, to wit, in the year 1244, to withdraw himſelf from the ſaid feudal ſubjection, and become a vaſſal of the Pope, cannot forbear expreſſing his wonder that the court of Rome ſhould countenance ſuch rebellious and treacherous behaviour, and exclaiming in theſe lively words againſt any plea of ignorance of the ſtate of Wales which the defenders of the proceedings of that court may be ſuppoſed to ſet up as an excuſe for them; *Et quis chriſtianorum ignorat Principem Walliæ regis Angliæ eſſe Vaſſalulum?* Theſe inſtruments contain ſuch a lively picture of the dependance of the principality of Wales upon the Crown of England according to the feudal cuſtoms then in uſe in England, that they are exceeding curious and well worth your reading at ſome hour of leiſure, as you ſeem fond of this ſpecies of antiquities.

FRENCHMAN.

I ſhall be extremely glad to read them, or rather to hear you read them to me; and that at this very time, that we are examining the queſtion, whether Wales was or was not a

fief of the Crown of England before the reign of Edward I. For I am now perfectly at leiſure, and my curioſity is awakened upon the ſubject: and I ſuppoſe you have the book at hand, as you ſeem to have been lately collecting thoſe extracts from it which you have been juſt now reading to me in the courſe of our converſation. I therefore beg you would read me thoſe inſtruments without further ceremony, if it does not give you too much trouble. For my part, I am ſo deſirous of hearing them that I am ſure I ſhall not find them tedious.

ENGLISHMAN.

The keenneſs of your curioſity makes me think it no trouble at all to read them over to you, notwithſtanding I have ſo lately read them by myſelf. For ſociety in the purſuit of knowledge, as in every other occupation, doubles the pleaſure that ariſes from it, and leſſens our ſenſe of the labour we beſtow upon it. And you rightly conjecture that I have the book at hand, and have lately been making the abovementioned extracts from it.

I will

I will therefore immediately fetch it from the next room, which is my library, and read theſe inſtruments to you without further delay. But you muſt take care not to gape while I am reading them, which perhaps you may find yourſelf inclined to do, as I believe they are longer than you perhaps imagine.

FRENCHMAN.

Never fear me. My curioſity will prevent that: and, beſides, I am bound in honour to hear them out patiently, after having preſſed you ſo earneſtly to take the trouble of reading them.

ENGLISHMAN.

Well, here's the book that contains theſe inſtruments. The firſt of them is a deed of covenant between two parties, to wit, Henry, the third, king of England, on the one hand, and Senena, the wife of prince Griffin, eldeſt ſon of Lewellin, the late prince of North Wales, then a priſoner to his brother David, acting in the behalf of her ſaid huſband Griffin,

A deed of covenant between king Hen. III. and Senena, the wife of Griffin, prince of Wales, for the releaſe of Griffin from the impriſonment in which he was detained by his brother David.

Griffin, on the other hand. It is in these words. *Convenit inter dominum Henricum tertium, Regem Anglorum illustrem, ex unâ parte, et Senenam, uxorem Griffini, (filii Leolini, quondam Principis Northwalliæ) quem David frater ejus tenet carceri mancipatum, cum Owenio filio suo, nomine ejusdem Griffini, ex alterâ: Scilicet, quòd prædicta Senena manu cepit pro prædicto Griffino, viro suo, quòd dabit domino Regi sexcentas marcas, ut dominus Rex eum & prædictum Owenium, filium suum, liberari faciat à carcere prædicto; ita quòd stabit judicio curiæ suæ, si de Iure debeat carcere detineri. Et ut dominus Rex postea judicium: curiæ suæ, secundùm legem Wallensium, ei & hæredibus suis habere faciat, super portione quæ eum contingit de hæreditate quæ fuit prædicti Leolini, patris sui, & quam prædictus David deforciat ipsi Griffino. Item quòd, si idem Griffinus, vel hæredes sui, per considerationem curiæ domini Regis recuperent portionem, quam se dicunt contingere de hæreditate prædictâ; Eadem Senena manu cepit pro prædicto Griffino, viro, & hæredibus suis, quòd ipse & hæredes sui in perpetuum inde reddent domino Regi trecentas marcas annuas; scilicet tertiam partem in de-*

nariis,

nariis, & tertiam partem in bobus & vaccis, & tertiam partem in equis, per æſtimationem legalium hominum, liberandum Vicecomiti Salopeſburiæ & per manus ipſius Vicecomitis ad Scaccarium domini Regis deferendum, & ibidem liberandum: Scilicet unam medietatem ad feſtum ſancti Michaelis, & alteram ad Paſcham. Eadem etiam Senena, pro præfato Griffino, viro ſuo, & hæredibus ſuis manu cepit, quòd firmam pacem tenebunt cum præfato David, fratre ſuo, ſuper portione quæ eidem David remanebit de hæreditate prædictâ. Manucepit etiam eadem Senena pro dicto Griffino, viro ſuo, & hæredibus ſuis, quòd ſi aliquis Wallenſis aliquo tempore domino Regi, vel hæredibus ſuis, rebellis fuerit, præfatus Griffinus & hæredes ſui, ad cuſtum ſuum proprium, ipſum compellent ad ſatisfaciendum domino Regi & hæredibus ſuis. Et de his omnibus ſupradictis firmiter obſervandis, dicta Senena dabit domino Regi David & Rotherum, filios ſuos, obſides: ita tamen, quod ſi de præfato Griffino, viro ſuo, & Owenio filio ſuo, qui cum eo eſt in carcere, humanitùs contingat antè quàm inde liberentur, alter prædictorum filiorum eidem Senenæ reddetur, reliquo obſide remanente.

remanente. Juravit insuper eadem Senena, tactis sacrosanctis Euangeliis, pro se & pro præfato Griffino, viro suo, & hæredibus suis, quòd hæc omnia firmiter observabunt. Et manucepit, quòd dictus Griffinus, vir suus, idem jurabit cùm à carcere liberatus fuerit. Et super præmissis se submisit, nomine dicti Griffini, viri sui, Jurisdictioni venerabilium patrum Herefordensis & Lichefeldensis Episcoporum: Ita quòd præfati Episcopi, vel eorum alter, quem dominus Rex elegerit, ad requisitionem ipsius domini Regis, per sententias excommunicationis in personas, & interdicti in terras, eos coerceant ad prædicta omnia & singula observanda. Hæc omnia manucepit prædicta Senena & bonâ fide promisit se facturam & curaturam quòd omnia impleantur: & quòd præfatus Griffinus vir suus, cùm liberatus fuerit, & hæredes sui, hæc omnia grata habebunt, & complebunt, & instrumentum suum inde dabunt domino Regi in formâ prædictâ. Ad majorem siquidem hujus rei securitatem, factum est hoc scriptum inter ipsum dominum Regem & dictam Senenam nomine præfati Griffini, viri sui: ita quòd parti remanenti penes ipsum dominum Regem appositum est sigil-

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lum præfati Griffini, per manum dictæ Senenæ uxoris ſuæ, unà cum ſigillo prædictæ Senenæ; & parti remanenti penès ipſam Senenam, nomine præfati Griffini viri ſui, appoſitum eſt ſigillum domini Regis: quòd de ſupradictis etiam omnibus complendis, & firmiter obſervandis, dedit prædicta Senena, nomine præfati Griffini, viri ſui, domino Regi plegios ſupraſcriptos; Videlicet, Radulphum de Mortuo mari, Walterum de Clifford, Rogerum de Monte alto, Seneſcallum Ceſtriæ, Mailgun filium Mailgun, Mereduc filium Roberti, Griffinum filium Maddoc de Brunfeld, Houwell & Mereduc fratrem ejus, Griffinum ſilium Wenunwen. Qui hæc omnia pro prefatâ Senenâ manuceperunt, & chartas ſuas ipſi domino regi fecerunt. Acta apud Salopeſburiam die Lunæ proximâ ante Aſſumptionem beatæ Mariæ virginis. Anno regni regis ipſius vigeſimo quinto.

The next inſtrument recited by Matthew Paris on this occaſion, is the charter of Roger de Montalt, ſteward of Cheſter, a great Engliſh baron of thoſe days, (who probably had poſſeſſions in the Engliſh counties bordering upon Wales,) whereby he became a pledge,

or ſurety, to king Henry for the due performance of every thing that Senena, the wife of prince Griffin, had covenanted to be performed to the ſaid king, by the ſaid Griffin. And there were ſimilar inſtruments executed to the king by all the other barons, both Engliſh and Welch, mentioned in Senena's deed of covenant above recited, as her pledges to the king for the due performance of the ſaid covenant, namely, Ralph Mortimer, Walter Clifford, Mailgun the ſon of Mailgun, or, (as I ſuppoſe) Mailgun ap Mailgun, Mereduc the ſon of Robert, or Mereduc ap Robert, Griffin, the ſon of Madoc, of Brunfeld, or Griffin ap Madoc, of Brunfeld, Howel, and Mereduc, his brother, and Griffin, the ſon of Wenunwen, or Griffin ap Wenunwen; of whom all but Ralph Mortimer and Walter Clifford, ſeem to have been powerful men of Wales. This charter of pledgeſhip is in theſe words. *Omnibus hoc ſcriptum viſuris Rogerus de Monte alto, Seneſcallus Ceſtriæ, ſalutem. Sciatis quòd ego me conſtitui plegium Senenæ uxoris Griffini filii Leolini, quondam Principis Norwalliæ, & manucepi pro eâ ergà dominum meum Henricum, regem Angliæ illuſtrem,*

A charter, or deed, of pledgeſhip, of Roger de Montalt.

trem, quòd omnia quæ conventionavit eidem domino meo nomine præfati viri ſui, pro liberatione ſuâ & Owenii filii ſui à carcere in quo David frater ejus eos detinet, & pro portione quæ ipſum Griffinum contingit de hæreditate, quæ fuit prædicti Leolini patris ſui, & quam præfatus David frater ejus ei deforciat, domino regi firmiter obſervabit. In cujus teſtimonium, huic ſcripto ſigillum meum appoſui. Actum apud Salopesburiam die Lunæ ante aſſumptionem B. Mariæ. Anno regni ipſius xxv.

The next inſtrument recited by Matthew Paris is a charter, or deed, of fealty, by which Mardoc ap Howel, a powerful Welch baron, recorded and confirmed an oath of fealty, or allegiance, which he had taken to king Henry, by which he had bound himſelf to be for ever faithful to him, and alſo recorded and confirmed a certain truce, or ſuſpenſion of hoſtilities, which he had lately made with the above-mentioned Ralph Mortimer, with whom he had been at war. This inſtrument ſeems to be curious alſo in another view, by ſhewing us that, in this remote age, the great barons of England did ſometimes make war

upon each other, like little ſovereigns, without the king's command. It is in the words following. *Sciant præſentes & futuri, quòd ego Merducus, filius Howel, tactis ſacroſanctis juravi, quòd ab iſto die in anteà omnibus diebus vitæ meæ ero ad fidelitatem domini regis Angliæ, & ſerviam ei fideliter & devotè cum omnibus viribus meis, & toto poſſe meo, quandocunque indiguerit ſervitio meo; & treugam inter dominum Radulphum de Mortuo Mari & me initam, uſque ad feſtum ſancti Michaëlis, anno regni regis Henrici vigeſimo quinto, ex parte meâ fideliter obſervabo: & tam ad fidelitatem domino regi in perpetuum obſervandam, quàm ad treugas prædictas obſervandas uſque ad terminum predictum, ſuppoſui me juriſdictioni domini Hereford enſis epiſcopi, & domini Coventrenſis & Litchfeldenſis epiſcopi, vel alterius eorum, quem dominus rex ad hoc elegerit, ut ſi in aliquo contrà prædictam fidelitatem domini regis, vel contrà obſervantiam prædictarum treugarum, venero, liceat eis, vel eorum alteri, quem dominus rex ad hoc elegerit, perſonam meam & omnes meos excommunicare, & terram meam interdicere, donec de tranſgreſſione ipſâ ſatisfecero ad plenum. Et ſi forſitan infrà prædictum*

A charter, or deed, of fealty of a great Welch baron, or land-holder, to king Henry III.

feſtum

feſtum S. Michaëlis, inter prædictum Radulphum de Mortuo Mari & me nulla pax fuerit reformata, licèt poſt feſtum illud bellum moveam prædicto Radulpho, non obligabit me prædictum juramentum, dum tamen ergà dominum regem fidelitatem obſervem continuam, ſicut prædictum eſt. Et ſi bellum poſt prædictum terminum inter nos moveatur, nihilominùs dominus rex ſuſtinebit, quòd ego & mei receptemur in terrâ ſuâ, ſicut alii fideles ſui. Ad prædicta autem obſervanda domino regi & hæredibus ſuis, obligo me per juramentum prædictum, & per ſigilli mei appoſitionem, quod huic ſcripto appoſui, ad majorem confirmationem prædictorum. Actum in craſtino aſſumptionis beatæ Mariæ, anno regni regis Henrici vigeſimo quinto.

The hiſtorian then tells us that the following Welch barons, to wit, Owen ap Howel, Mailgun ap Mailgun, Mereduc ap Mereduc, Howel ap Cadwalthlen, and Cadwalthlen ap Howel, executed charters of fealty to the king of the ſame tenour with the foregoing.

The

Substance of a charter, or deed, of fealty made by David, prince of Wales, to K. Henry III.

The laſt inſtrument recited by Matthew Paris upon this occaſion is the charter of prince David, by which that prince binds himſelf to king Henry to deliver up his brother Griffin, then a priſoner in his cuſtody, and his brother Griffin's eldeſt ſon, Owen, and the other perſons then in priſon by his, David's, order on account of his ſaid brother Griffin, into king Henry's hands; and to ſubmit to the judgement of king Henry's court with reſpect to the claim of Griffin to a part of his father Lewellin's lands; and to do many other things, therein mentioned, for king Henry's ſatisfaction; and, particularly, to hold his ſhare of his father Lewellin's inheritance, that ſhall be adjudged to him by the king's court, of king Henry *in capite*; and that his brother Griffin ſhall do the ſame with reſpect to the part thereof which ſhall be adjudged to him. The words of this deed, or charter, are as follows. *Omnibus Chriſti fidelibus, ad quos præſentes literæ pervenerint, David, filius Leolini, ſalutem. Sciatis quòd conceſſi domino meo, Henrico, regi Angliæ illuſtri, filio domini Johannis regis: quòd deliberabo Griffinum fratrem meum, quem teneo incarceratum,*

The words of the ſaid charter.

incarceratum, unà cum filio ſuo primogenito, & aliis, qui occaſione prædicti Griffini ſunt in parte meâ incarcerati, & ipſos eidem domino meo regi tradam. Et poſteà ſtabo Iuri in curiâ ipſius domini regis, tàm ſuper eo, utrum idem Griffinus debeat teneri captus, quàm ſuper portione terræ, quæ fuit prædicti Leolini patris mei, ſi qua ipſum Griffinum contingere debeat ſecundùm conſuetudinem Wallenſium; ita quòd pax ſervetur inter me & prædictum Griffinum fratrem meum, [et] quòd caveatur de ipſâ tenendâ ſecundùm conſiderationem curiæ ipſius domini regis: & quòd tam ego quàm prædictus Griffinus portiones noſtras, quæ nos contingent de prædictis terris, tenebimus in capite de prædicto domino rege. Et quòd reddam Rogero de Monte alto, ſeneſcallo Ceſtriæ, terram ſuam de Muhant cum pertinentiis: & ſibi & aliis baronibus & fidelibus domini regis, ſeiſinas terrarum ſuarum, occupatarum à tempore belli orti inter ipſum dominum Johannem, regem, & prædictum Leolinum, patrem meum: ſalvo jure proprietatis cujuſlibet pacti & inſtrumenti, ſuper quo ſtabitur Iuri hinc, inde, in curiâ ipſius domini regis. Et quòd reddam ipſi domino regi

omnes

omnes expenſas, quas ipſe & ſui fecerunt occaſione exercitûs iſtius. Et quòd ſatisfaciam de damnis & injuriis illatis ſibi & ſuis, ſecundùm conſiderationem curiæ prædictæ, vel malefactores ipſos ipſi domino regi reddam. Et quòd ſimiliter domino regi reddam omnia homagia, quæ dominus Johannes, rex, pater ſuus, habuit, & quæ dominus rex de jure habere debet: & ſpecialiter omnium nobilium Wallenſium. Et quòd idem dominus rex non dimittet aliquem de ſuis captivis, quin ipſi domino regi & ſuis remaneant ſeiſinæ ſuæ. Et quòd terra de Engleſmere, cum pertinentiis ſuis, in perpetuum remanebit domino regi & hæredibus ſuis. Et quòd de cætero non receptabo vtlagos vel foris banniatos ipſius domini regis, vel baronum ſuorum de marchiâ, in terrâ meâ, nec permittam receptari. Et de omnibus articulis ſupradictis, & ſingulis, firmiter & in perpetuum obſervandis, domino regi & hæredibus ſuis, pro me & hæredibus meis, cavebo per obſides & pignora, & aliis modis, quibus dominus rex dicere voluerit & dictare. Et in his & in omnibus aliis ſtabo voluntati & mandatis ipſius domini regis, & Iuri parebo omnibus in curiâ ſuâ. In cujus

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rei teſtimonium præſenti ſcripto ſigillum meum appendi. Actum apud Alnet. juxta fluvium Elvey de ſancto Aſapho, in feſto decollationis S. Johannis Baptiſtæ, anno prædicti domini regis Henrici vigeſimo quinto. Et ſciendum, quod illi qui capti detinentur cum prædicto Griffino, eodem modo tradentur domino Regi, donec per curiam ſuam conſideratum fuerit, utrum, & quomodo, debeant deliberari. Et ad omnia firmiter tenenda, ego David juravi ſuper crucem ſanctam, quam coràm me feci deportari. Venerabilis etiam pater Howelus epiſcopus de ſancto Aſapho, ad petitionem meam, firmiter promiſit, in ordine ſuo, quòd hæc omnia prædicta faciet & procurabit, modis quibus poterit, obſervari. Edenevet ſiquidem Wangan, per præceptum meum, illud idem juravit ſuper crucem prædictam. Actum ut ſuprà. Præterea conceſſi pro me & hæredibus meis, quòd ſi ego vel hæredes mei contrà pacem domini regis vel hæredum ſuorum, vel contrà articulos prædictos, aliquid attentaverimus, tota hæreditas noſtra domino regi & hæredibus ſuis incurratur. De quibus omnibus & ſingulis, ſuppoſui me & hæredes meos juriſdictioni archiepiſcopi Cantuarienſis, & epiſ-

coporum Londinenſis, Herefordenſis, & Coventrenſis, qui pro tempore præerunt, quòd omnes, vel unus eorum, quem dominus rex ad hoc elegerit, poſſit nos excommunicare, & terram noſtram interdicere, ſi aliquid contrà prædicta attentaverimus. Et procuravi, quòd epiſcopi de Bangor, & de ſancto Aſaph, chartas ſuas domino regi fecerunt, per quas conceſſerunt, quòd omnes ſententias, tam excommunicationis quàm interdicti, à prædictis archiepiſcopo, epiſcopis, vel aliquo eorum, ferendas, ad mandatum eorum exequentur.

FRENCHMAN.

Concluſions drawn from the foregoing charters.

I am much obliged to you for reading theſe charters to me, and have been greatly entertained by them. They ſeem to me to prove moſt clearly that Wales was at that time held of the crown of England as much as any part of England itſelf; or, at leaſt, that thoſe parts of Wales over which the influence of the two brothers Griffin and David extended, were held ſo. Griffin's wife Senena even engages for him that he and his heirs for ever ſhall pay a yearly rent, or acknowledgement, to king Henry and his ſucceſſors,

ceſſors, of the value of 300 marks *per annum*, for his portion of his father Lewellin's lands, beſides engaging that he ſhall, at his own expence, compel any of the Welch, who ſhall at any time rebel againſt the king, to return to his obedience and make the king full ſatisfaction. And David, (whoſe charter of fidelity ſeems to be more important than the other, becauſe David was at that time in poſſeſſion of the government of Wales, and was permitted by king Henry to continue ſo in conſequence of his performing the things ſtipulated in that charter,) ſpeaks of king Henry as being *his Lord*, [*domino meo Henrico, regi Angliæ,*] and promiſes to abide the judgement of the king's court, both concerning the juſtice of his impriſonment of his brother Griffin, and concerning the claim of Griffin to a part of his father Lewellin's lands, and that both he and Griffin ſhall hold their lands of Henry *in capite*. And he further engages to procure king Henry all the homages in Wales which king John, his father, had received, and which king Henry himſelf ought by right to have received, that is, he ſays, the homages

of all the nobles of Wales. [*Et quod ſimiliter domino regi reddam omnia homagia quæ dominus Johannes rex, pater ſuus, habuit, et quæ dominus rex de jure habere debet, et, ſpecialiter, omnium nobilium Wallenſium.*] Nothing can be a clearer proof than theſe words, that Wales was at the time of this charter in a ſtate of feudal ſubjection to the crown of England. But, I think, they ſeem alſo to ſhew that it was not a ſingle fief of the crown, held of the kings of England by the princes of Wales alone, (as Normandy had been held of the crown of France by the dukes of Normandy alone,) but rather that it was an aſſemblage of fiefs of the crown of England, held ſeverally by all the nobles of the country as well as by the princes of it. For the nobles of Wales do not appear to have held their lands of the princes of Wales (as the nobles of Normandy held their lands of the duke of Normandy) but to have held them immediately of the king of England, and that by military tenure. For this ſeems to be the meaning of the words uſed in the ſecond inſtrument you read to me, to wit, the charter of allegiance, or fealty, of the Welch nobleman named *Merduc ap* Howel, which are as follows;

Wales was not a ſingle fief holden of the crown of England by the prince of Wales, but an aſſemblage of fiefs holden ſeverally of the crown of England by the princes and other great barons, or land-holders, of the country.

lows; *Juravi, quod omnibus diebus vitæ meæ ero ad fidelitatem domini regis Angliæ, et ſerviam ei fideliter et devotè cum omnibus viribus meis et toto poſſe meo, quandocunque indiguerit ſervitio meo.*

ENGLISHMAN.

Your remark ſeems very juſt. It does indeed appear from theſe inſtruments, that Wales was not a ſingle fief of the crown of England, but an aſſemblage of fiefs, the ſeveral nobles, or great land-holders, of the country, all holding their lands immediately of the crown, and doing, or owing, homage for them to the king. And, as to the government of it, it ſeems probable from ſeveral paſſages in the ſaid Matthew Paris's hiſtory, that the kings of England permitted them at this time to elect their own governours, whom they called princes, and to make uſe of their own laws and cuſtoms, ſo far as was conſiſtent with their allegiance to the crown of England, and with the obligation they lay under, in conſequence of that allegiance, to ſubmit to the judgement of the king's great court in ſuch caſes as ſhould be brought before

A conjecture concerning the government of Wales about the year 1241.

fore it, as for inſtance, in diſputes with their princes, or between baron and baron, both tenants *in capite* of the crown, concerning their lands. This ſeems to me to have been at this time the political condition of Wales.

FRENCHMAN.

This political condition ſeems to be a cloſer connection with the crown of England than the condition of a country holden of the ſame crown as a ſingle fief by the prince of it, and in which all the land-holders but the prince, had held their lands immediately of the prince, and not of the king of England. For in that caſe only the prince of the country would be immediately connected with the crown, whereas in the preſent caſe every great noble, or land-holder, was ſo connected. Wales therefore was at this time more diſtant from the ſtate of a country that was totally independant of the crown of England, (which was the ſtate in which Lord Mansfield ſeems to have ſuppoſed it to be before the conqueſt of it by king Edward the 1ſt,) than it would have been if

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it had been held of the crown by its princes as a ſingle fief, in the ſame manner as Normandy had been held by its dukes of the crown of France. And therefore it ought by no means to be conſidered in the light of a mere conquered country, taken from an alien enemy, when Edward the 1ſt reduced it to his obedience, as Lord Mansfield ſeems to have conſidered it; nor can any argument be derived from it, one way or the other, concerning the extent of the prerogative of the crown with reſpect to conquered countries.

No argument can be drawn from the caſe of Wales with reſpect to the power of the Crown over conquered countries.

But, pray, ſince we have gone ſo far into the hiſtory of the dependance of Wales on England, let me know what Matthew Paris and the other old hiſtorians ſay of the condition of that country during the remaining part of the reign of king Henry the 3d after the year 1241, when the aforeſaid charter of prince David was executed, and during the ten or eleven firſt years of the reign of king Edward the 1ſt, and before his final reduction of the country and paſſing the *Statutum Walliæ*, which, I think you ſaid, was in the year 1284. Did either king Henry or king Edward,

Of the political condition of Wales from the year 1241 to the final reduction of it by K. Edw. I. in the year 1284.

Edward, during this interval, remit the homages of the princes and other great barons of Wales, or, in any other manner, renounce their ſovereignty over Wales, and acknowledge it to be an independent country?

ENGLISHMAN.

Far from it. The connection between Wales and the crown of England was rather ſtraightened than relaxed during this period, as you will judge from the ſhort ſummary of the hiſtory of it which I will now endeavour to relate to you.

After the aforeſaid agreement between David, prince of Wales, and king Henry, which was in the year 1241, every thing went on ſmoothly between them for about three years. And it ſeems probable that David's ambition during this time was ſomewhat reſtrained by the fear that king Henry might, if he was provoked by any new attempts of David, ſet his brother Griffin (who was a priſoner all that time in the Tower of London) at liberty, and encourage him to lay claim to the government of Wales.

But

But he was delivered from this apprehenſion in the month of March in the year 1244, by the death of Griffin, who, growing impatient of his confinement, was killed in endeavouring to make his eſcape from the Tower. The manner of his death was this. He tore into long ſlips the ſheets and tablecloths and tapeſtry of his apartments, and ſewed, or faſtened, them together ſo as to make a long ſtring, by which he hoped he ſhould be able to let himſelf down from one of the windows of his apartment and ſo make his eſcape. And he accordingly attempted it. But, the ſtring proving to be too ſhort to reach the ground, he hung for ſome time in the air at the end of the ſtring at a conſiderable height from the ground; and at laſt, the ſtring breaking with his weight, he fell down through that remaining ſpace upon the ground, and broke his neck. King Henry, when he heard of it, was angry with the perſons who had the cuſtody of him, for their negligence in not preventing him from making ſuch an attempt, and ordered his eldeſt ſon, Owen, who had been kept a priſoner with him in the Tower, to be

Death of Griffin, the Welch prince, in the Tower of London, in March, 1244.

guarded with greater care. But the death of this prince Griffin ſeems in the event to have been a misfortune to king Henry. For very ſoon after it we find his brother David caballing with the Pope to ſhake off his obedience to the king, and become a vaſſal, or tenant, of the Pope, and pay him a rent of five hundred marks *per annum* for the lands he held in Wales, if the Pope would abſolve him from his oath of allegiance to king Henry, which he pretended had been extorted from him by violence: and the Pope agreed to the propoſal, to the great and juſt indignation of our honeſt hiſtorian, Matthew Paris.

Prince David prevails with the Pope to abſolve him from his allegiance to K. Henry. A. D. 1244.

Upon this agreement with the Pope, which was in the year 1244, prince David and the Welchmen openly took arms againſt king Henry and invaded the adjoining counties of England; and, by the negligence and inactivity of the king, they met with conſiderable ſucceſs. The war, or rather rebellion, continued through the year 1245 and to the year 1246, but with great loſſes and misfortunes to the Welch as well as the Engliſh; and in the

Prince David and the Welchmen rebel againſt king Henry, and make incurſions into England. A. D. 1244.

the ſpring of the year 1246 prince David died, leaving Wales in a miſerable ſtate of confuſion and deſolation. Upon David's death the Welchmen choſe for their prince, or leader, the ſon of one Griffin, who was a great favourite of king Henry, who ſeems to have been the perſon mentioned in the account of the year 1241, under the name of Griffin ap Madock, as a very powerful Welchman, who at that time perſuaded the king to march into Wales with an army againſt prince David in order to force him to ſet his brother, prince Griffin, at liberty. When this Griffin, king Henry's favourite, heard that the Welchmen had choſen his ſon for their prince in the year 1246, he left the king, who had till then entertained him at his court with great honour, and fled into Wales to ſupport his ſon in his new dignity. And the hoſtilities continued between the Engliſh and Welch for ſome years, to the great diſadvantage of the Welch and devaſtation of their country, inſomuch that ſome of the Welch biſhops fled into England to beg a charitable ſubſiſtence from ſome of the rich religious houſes there, the lands of their

Upon the great devaſtation of Wales in the courſe of the rebellion, ſome of the Welch biſhops fled into England for a ſubſiſtence.

biſhopricks being laid waſte and rendered of no value to them. At laſt in the year 1250, that is, four years after the death of prince David, and ſix years after the commencement of this rebellion, the Welch were quite conquered and reduced to the obedience of king Henry, and obliged to receive the Engliſh law amongſt them, and an Engliſh baron for their governour, to whom king Henry let their country, or the government of it, to farm for a yearly rent in money. The firſt perſon he appointed in this manner to govern Wales was one John de Grey, who paid him five hundred marks, or three hundred and thirty three pounds ſterling, a year for the government; and in a ſhort time after he removed this John de Grey from the government, and gave it to another Engliſh baron, named *Alan de Zouch*, who offered him a higher rent for it, namely, the yearly ſum of eleven hundred marks, or ſeven hundred and thirty three pounds ſterling a year. This was the caſe with that part of Wales which was adjoining to Cheſhire. It does not appear that the more remote and interiour parts of Wales were yet reduced to this condition.

In A.D 1250 the Welch are intirely reduced to the obedience of king Henry.

The king appoints John de Grey, an Engliſh baron, for their governour, in conſideration of a yearly rent of 333 pounds ſterling.

And ſoon after appoints another Engliſh baron, nam'd Alan de Zouch, governour of Wales in the room of John de Grey, in conſideration of a yearly rent of 733 pounds ſterl.

This

This *Alan de Zouch* had the title of *Juſtitiarius Walliæ*, or Juſtitiary of Wales, or thoſe parts of Wales which were adjoining to Cheſhire. And Matthew Paris ſays that in the year 1252, he brought a conſiderable quantity of money from thence, of the king's revenue, in carts, to the Exchequer in London, and that he there publickly declared on that occaſion, *quòd tota Wallia obedientèr et in pace legibus ſubjacet Anglicanis*, that all Wales was reduced to the king's obedience, and had quietly ſubmitted to the Engliſh law. And the biſhop of Bangor, who had retired to the abbey of Saint Alban's, ſaid the ſame thing. At this time therefore Wales was more than a fief of the crown of England; it was a part of the realm of England in the actual poſſeſſion of the king.

The title of Alande Zouch was *Juſtitiarius Walliæ*, or Juſtitiary of Wales.

In the year 1254 king Henry the 3d gave Wales, Gaſcony, Ireland, Briſtol, Stamford, and Graham, to his eldeſt ſon prince Edward, who was afterwards king Edward the 1ſt, but who was at that time a boy of fifteen years of age, and whom he had juſt then married to Eleanor, the ſiſter of Alphonſo, one

King Henry makes a donation of Wales and Ireland, and ſeveral other dominions, to his ſon Prince Edward upon his marriage. A. D. 1254.

one of the kings of Spain. By this donation, I conceive, Wales for the firſt time became a *ſingle* fief of the crown of England, having before the late rebellion been (as we before obſerved) an aſſemblage of fiefs holden of the Crown by the ſeveral great land-holders, or nobles, amongſt whom it was divided, who all did homage to the kings of England for the lands they reſpectively poſſeſſed.

New diſturbances ariſe in Wales in conſequence of the oppreſſions of one Godfrey de Langley, their governour.

The peace of Wales was ſoon after diſturbed by the oppreſſions of one Godfrey de Langley, whom the king had ſet over them as their governour, or juſtitiary, and who ſeems to have been continued in that office after the king's giſt of the country to his ſon Edward. Theſe oppreſſions were ſo many and great that the Welchmen again took arms for their defence.

They will not acknowledge Pr. Edward for their lord.

They had not acknowledged Prince Edward for their lord, in conſequence of the above donation of his father, though they had ſubmitted to the king himſelf: but they ſeem to have thought that the king had no right to alienate his immediate ſovereignty over them to his ſon without

without their consent; and they were not disposed to consent to have Prince Edward for their lord on account of the extream insolence and injustice with which he and his whole household, by his example and permission, treated every one they had any concern with. For such were the unpromising beginnings of prince Edward's conduct, though he afterwards proved a great and prudent king. The Welch, however, were not terrified by his haughtiness, but boldly made war upon him about this time, and penetrated as far as Chester in their incursions on the English territory, laying all the country waste as they passed through it. Nor was prince Edward, or the king his father, at this time able to resist them, the king's treasures having been lately exhausted by expences in foreign parts, and the English nation being highly discontented with the repeated acts of oppression committed by the king, and the disgusting behaviour of his son Edward, so as to be unwilling to assist them in repulsing the Welch, and not sorry to see them involved in difficulties which might tend to repress their tyranny. These things happened

Pr. Edward in this early part of his life behaved with great insolence and injustice.

The Welch make incursions into England; and meet with but little resistance. A. D. 1256.

The English nation are dissatisfied with the behaviour of both king Henry and his son, Prince Edward.

pened in the years 1256 and 1257, in which latter year the revolt of the Welch ſeems to have been very general, as they are reported to have raiſed two armies againſt the Engliſh of no leſs than thirty thouſand men each, of whom five hundred men in each army were horſemen cloathed in elegant armour, and mounted on horſes which were covered all over with iron. Prince Edward, being unable to reſiſt this force with the troops he had then at his command in England, and being unable to procure any aſſiſtance from his father for the reaſons above-mentioned, threatened to bring over an army from Ireland, (which the king had made over to him as well as Wales,) to reduce the Welch to obedience, threatening to break them to pieces like a potter's veſſel. But this invaſion they endeavoured to prevent by building a number of gallies, and fitting them out for the ſea with arms and victuals, to oppoſe any ſuch Iriſh forces in their paſſage on the ſea from Ireland to the coaſt of Wales. Theſe efforts for their defence at this time were attended with ſucceſs under the command of the prince they had choſen to command them, whoſe

The Welch raiſe two very powerful armies.

Pr. Edward threatens to bring over an army from Ireland to reduce them.

The Welch provide ſhipping to prevent ſuch an invaſion from Ireland.

whoſe name was Lewellin, and who was one of the ſons of the late prince Griffin who had died in confinement in the Tower of London. And Matthew Paris (who had blamed them before for rebelling againſt king Henry in the year 1244, under their former prince David, as being guilty of perfidy and injuſtice againſt the king) commends them for their preſent inſurrection, as being juſtly warranted in taking arms by the oppreſſions they had ſuffered from Godfrey de Langley, the juſtitiary whom the king had ſet over them; and ſays that their cauſe was allowed to be a juſt one even by their enemies. This honeſt hiſtorian (who ſeems to have had no notion of the doctrines of paſſive obedience and non-reſiſtance,) laments at the ſame time the ignominious tameneſs and timidity of the Engliſh nation in ſubmitting to the various oppreſſions the king had exerciſed towards them, inſtead of riſing in arms like the gallant Welchmen, to procure the redreſs of their grievances. The Welch, under the command of their prince Lewellin, gained a victory in this year 1257 over an army which king Henry brought againſt them;

They gain a victory over king Henry's army, in the year 1257:

but, ſoon after, ſue for peace upon moderate and reaſonable terms.

but, upon the king's raiſing another great army to oppoſe them, and procuring bodies of troops to be ſent him from Scotland and Ireland, in order to ſurround and invade their country on every ſide, prince Lewellin, by the advice of his great men [*de conſilio ſuorum optimatum*] ſent meſſengers to the king to beg for peace, but upon condition that they ſhould be reſtored to the enjoyment of their own laws and antient liberties, as they had enjoyed them till within a few years paſt; and that they ſhould not be ſubject to prince Edward, or any other perſon than the king himſelf: for that they would not bear for the future to be transferred, or ſold, from one perſon to another, like ſo many oxen or aſſes. This juſt and moderate requeſt the king refuſed to grant, threatening to puniſh the Welch with great ſeverity. But he gained no advantage over them during the ſummer, and in the winter returned ingloriouſly to London.

King Henry refuſes to make peace with them.

An inference from the ſaid propoſal of the Welch to king Henry for peace.

From this propoſal of prince Lewellin it appears that the Welch conſidered themſelves as ſubjects of the king of England, but as ſubjects who had been oppreſſed by his government,

vernment, and who had been driven by ſuch oppreſſion to the neceſſity of taking up arms for their defence: and the oppreſſions they ſeem to have had in view, were, firſt, the abolition of their laws and cuſtoms by the introduction of the Engliſh laws, which had lately been eſtabliſhed among them; 2dly, the extortions of money and goods from them which had been committed by the governours, or juſtitiaries, whom the king had ſet over them; and, 3dly, the transferring the immediate feudal ſuperiority over them from the king to his ſon, prince Edward, without their conſent. But they acknowledge that they ought to be ſubject to the king himſelf, provided he will govern them with juſtice and moderation.

The war continuesbetween the Welch and Engliſh.

King Henry having rejected the propoſition made him by prince Lewellin for a peace, the war continued, and the Welch gained conſiderable advantages in it, meeting with but little reſiſtance from the Engliſh, and being ſecretly encouraged by ſome powerful barons in England (of whom it was ſuſpected that Simon de Montfort, earl of

The Welch are ſecretly encouraged by ſome powerful Engliſh barons.

Leiceſter, was one,) to continue their hoſtilities. This was the ſame earl of Leiceſter who became ſoon afterwards ſo famous by heading the confederacy of the Engliſh barons who took arms to redreſs the tyrannical government of the king.

The Engliſh gain an advantage over the Welch by treachery. A. D. 1258.

In the year 1258 the Engliſh gained an advantage over the Welch by means of a treacherous attack upon them at the time they were treating about a peace. Yet the Welch defended themſelves with bravery, and killed many of their treacherous aſſailants.

The Welch again make an offer of peace to king Henry. A. D. 1259.

In the year 1259 the Welch again made king Henry an offer of peace, fearing that, when the diſſenſions then prevailing in England ſhould be pacified, the whole Engliſh nation would unite in endeavouring to ſubdue them, and would then ſucceed in the attempt, and would treat them with extream ſeverity. They therefore propoſed to buy a peace of them; by giving to the king himſelf the ſum of four thouſand marks, or 2666 pounds ſterling; three hundred marks, or two hundred pounds, to prince Edward;

and

and two hundred marks, or 166 pounds, to the queen. But the king rejected the offer with contempt: and thereupon the Welch reſolved to continue the war in their own defence to the beſt of their abilities.

But the king rejects their offer, and the war goes on.

The inteſtine troubles of England, known by the name of *the barons wars*, began in a little time after this; during which the king was not at leiſure to proſecute the war againſt the Welch; who were alſo protected by an alliance they had formed with Simon de Montfort, earl of Leiceſter, and the barons of his party. In purſuance of this alliance they joined the barons army with a large body of men, of whom a great number was ſlain in the important battle of Eveſham, which was gained by prince Edward over Simon de Montfort and his army in the year 1265, and which ended that civil war.

The civil war, called *the barons war*, breaks out in England.

The Welch join the army of the barons with a large body of men, of whom many are ſlain at the battle of Eveſham. A. D. 1265.

In the year 1268 king Henry, being then rid of the oppoſition of his Engliſh barons, marched with a powerful army into Shropſhire, with an intent to take an ample revenge upon his enemies in Wales, who had

King Henry marches into Shropſhire with a great army, to invade Wales. A. D. 1268.

ſo

so long resisted his authority, and had lately taken part with Simon de Montfort and the other confederate barons against him. But, upon prince Lewellin's sending messengers to treat with him of peace upon such terms as he thought proper to impose, and at the intercession of the Pope's legate, he granted the Welch a peace upon their paying him the very large sum of thirty thousand pounds sterling, and restored to prince Lewellin the possession of four districts of land in Wales, called Cantreds, of which he had some time before deprived him on account of his rebellion. This seems to have been the last publick transaction relative to Wales in the reign of king Henry the 3d, who died in the month of November of the year 1272.

But, upon the submission of the Welch to his pleasure, he grants them a peace on the payment of thirty thousand pounds sterling.

Death of K. Henry the 3d. A. D. 1272.

In the beginning of king Edward the 1st's reign prince Lewellin was summoned to attend the ceremony of the king's coronation, as being one of the king's liegemen who ought to do homage to him. But the prince refused to attend this duty. And in a short time after, upon the king's calling a parliament at Westminster, he was again summoned by

K. Edw. the 1st summons Lewellin, Pr. of Wales, to attend his coronation and do him homage.

by meſſengers from the king to come to Weſtminſter and perform his homage. But he excuſed himſelf from his duty on this occaſion upon a pretence of danger to his life, if he went into England, from the wicked deſigns of ſome powerful Engliſhmen againſt him; and he therefore deſired that the king's ſon and Gilbert de Clare, earl of Glouceſter, and Robert Burnel, the king's chancellor, ſhould be put into his hands, as hoſtages for his ſafe return to Wales, in caſe he obeyed this ſummons: but did not deny that he owed king Edward homage. King Edward rejected this requeſt of the ſaid hoſtages with indignation, and went on with the buſineſs of the parliament without taking further notice of the Welch prince on that occaſion, and paſſed all thoſe acts which are ſtill extant, and well known to Engliſh lawyers under the name of *the Statute of Weſtminſter the firſt*. But when the parliament was at an end, the king went to Cheſter, which is on the confines of Wales, and to which it was therefore eaſy for prince Lewellin to come without any danger to his perſon from his enemies in England. And therefore he

there

there ſent another ſummons to Lewellin to attend him and perform his homage. But the prince ſtill refuſed to obey him: upon which the king drew together an army, and reſolved to march into Wales, and expel the prince from the fief, or land, he held under him, ſince he refuſed to do him homage for it. *Quo mandatis regiis parere detrectante, rex exercitum convocat, diſponens principem, ſibi denegantem homagium, de feodo ſuo expugnare.* Theſe are the words of Thomas of Walſingham, an old hiſtorian of conſiderable credit. By theſe words it is plain that king Edward at this time conſidered the prince of Wales as his liegeman, or feudatory, and not as an independant prince, and prepared to make war upon him in the former character only. And we have ſeen by the whole ſeries of the hiſtory of the former reigns that, in ſo doing, he only trod in the ſteps of his predeceſſors ever ſince the time of William the Conqueror, to moſt of whom the princes, and other great land-holders, of Wales, had done homage for their lands.

Upon prince Lewellin's repeated refuſals to do homage to king Edward for his land in Wales, the king raiſes an army in order to expel him from it.

Inference therefrom.

King

King Edward accordingly made war upon prince Lewellin, and in the courſe of a couple of years reduced him to the neceſſity of ſuing for peace; which he granted him in the year 1278 upon the following conditions; to wit, 1ſt, That prince Lewellin ſhould ſet all thoſe priſoners at liberty without ranſom, or demand of any kind, who were in priſon for having aſſiſted king Edward, or, in any manner, on account of the war with England; 2dly, That he ſhould pay to the king, for his friendſhip and favour, the ſum of fifty thouſand pounds ſterling; 3dly, That the four cantreds of land, which he had hitherto enjoyed as his own patrimony, and alſo all the lands in Wales which the king and his army had conquered in the courſe of this war, ſhould for ever after belong to the king and his heirs, excepting only the iſle of Angleſey, which the king conſented to give to prince Lewellin, to be holden of the king and his heirs by the yearly rent of 1000 marks, beſides 5000 marks to be paid immediately as a fine for entering into poſſeſſion of it. And, if prince Lewellin died without heirs of his body, this iſland was to revert to the

King Edward makes war upon Prince Lewellin with ſucceſs.

The prince ſues for, and obtains, peace from the king. A. D. 1278.

The conditions of the peace.

king, and remain in the poſſeſſion of him and his heirs for ever after. 4thly, That prince Lewellin ſhould attend king Edward in England at the enſuing Chriſtmas and do homage to him for the ſaid iſland of Angleſey, which he was to hold of him. 5thly, That all the other land-owners in Wales ſhould do homage for their lands to the king, except five barons in the neighbourhood of Snowdon, the high mountain in South Wales, who ſhould do homage for their lands to prince Lewellin; becauſe, he ſaid, he could not with propriety take upon him the title of Prince, unleſs he had ſome barons under him who held their lands of him. But it was agreed that the homages of theſe five barons ſhould be ſeparated from the crown of England only during the life of prince Lewellin, and after his death ſhould be made to the king of England and his heirs. 6thly, That he ſhould give ten hoſtages for the performance of theſe articles. 7thly, That the great men of Wales ſhould bind themſelves by an oath to compel prince Lewellin to obſerve theſe articles, and to make war upon him for the king of England, if ever he

he ſhould break them, and, after being required by them to redreſs the breaches he ſhould have made of them, ſhould refuſe or neglect to do ſo. 8thly, That he ſhould be reconciled to his brothers, whom he had treated with ſeverity. Theſe were Owen, his eldeſt brother, (the eldeſt ſon of prince Griffin, his father, who had died in the Tower of London,) and Roderick and David; of whom Owen, the eldeſt, had been many years a priſoner with his father Griffin in the Tower of London, and had, not long before this war, eſcaped from thence, and had afterwards been apprehended by his brother Lewellin's order, and together with his brother Roderick, was at this time detained in priſon by him. The other brother, David, had fled into England, and taken part with king Edward in this war againſt Lewellin, and had done the king ſuch acceptable ſervice in it by his valour and activity, that the king thought fit to reward him by a grant of the caſtle of Denbigh with lands to the amount of a thouſand pounds a year, and gave him likewiſe in marriage the daughter of the earl of Derby, who had lately loſt her former huſband.

David, brother to prince Lewellin, having ſerved king Edward in the late war againſt his brother Lewellin, is rewarded by the king with a grant of Denbigh caſtle and a marriage with an Engliſh lady of diſtinction.

Owen and Roderick, two other brothers of Lewellin, who had been kept in prison by him, are set at liberty.

In consequence of this pacification (which was made in the year 1278) prince Owen and prince Roderick were set at liberty by their brother Lewellin; and Lewellin married, with king Edward's consent, a daughter of Simon de Montfort, the late earl of Leicester, to whom she had been betrothed in her father's life-time during the alliance between the said earl and Lewellin in the time of the barons war: and the king and queen of England were present at the nuptials.

Pr. Lewellin himself, with the king's consent, marries a daughter of Simon de Montfort, the late earl of Leicester.

Fresh troubles break out in Wales A. D. 1282.

This peace continued to be observed for about four years, when fresh troubles broke out in Wales by the instigation of prince David, who, notwithstanding the fidelity he had shewn to king Edward in the late war, and the favours he had received from him in return, now ungratefully stirred up his brother, prince Lewellin, and the rest of the great men of Wales, to begin a new rebellion against king Edward. The hostilities were begun by David himself, as an example and encouragement to his countrymen, by suddenly and treacherously laying hands, on

Hostilities are begun against the English by prince David in a treacherous manner.

Palm-

Palm-Sunday, on Roger de Clifford, an Engliſh nobleman of great birth and eminence, whom king Edward had appointed to the office of juſtitiary of all Wales, *tanquam totius Walliæ juſtitiarium*. This great officer was made a priſoner by prince David; and ſome knights, who were his attendants, and who, though unarmed, endeavoured to defend him againſt prince David's party, were ſlain in the ſcuffle. After this the war was renewed between the Welch and Engliſh; and for ſome time with various ſucceſs. But at laſt the event was, that prince Lewellin was killed in a ſudden attack made upon him unawares by John Giffard and Edmund de Mortimer, two eminent Engliſh barons, at a time when he was at a diſtance from his main army and had only a ſmall guard to attend him; and his head was cut off and ſent immediately to the king, and afterwards, by the king's order, ſet upon the Tower of London with a crown of ivy on it: and David was taken alive by ſome of king Edward's partiſans, and, by the king's order, tried as a traitor, condemned, and executed, by drawing, hanging, and quartering,

Pr. Lewellin is ſlain in a ſudden attack by two Engliſh barons.

Prince David is taken priſoner, and tried and put to death by king Edward as a traitor.

quartering, according to the law of England for the puniſhment of high treaſon: and all Wales, with all its ſtrong places, was intirely reduced to the king's obedience, *et tota Wallia, cum omnibus caſtris ſuis, ſubacta eſt regiæ voluntati.* This was in the year 1284; and in the ſame year, (ſays Thomas of Walſingham,) the king cauſed the laws of England to be obſerved in Wales, and appointed ſheriffs for the execution of them, that is, he made the famous ſtatute we have before ſpoken of, which is called the *Statutum Walliæ.* You are not, however, to underſtand by this that he inſtantly aboliſhed all the laws that had hitherto been obſerved in Wales, and eſtabliſhed the laws of England in their ſtead; for he proceeded in a much gentler and more judicious manner, and, firſt, inquired from the moſt able and knowing men in Wales, what were the laws that had till then been obſerved there, and then, after this information, permitted ſeveral of thoſe laws to continue in force among them, and corrected only thoſe that he moſt diſapproved, and introduced the laws of England upon thoſe ſubjects in their ſtead. For example;

And all Wales is intirely reduced to the king's obedience. A. D. 1284.

King Edward paſſes the famous act for the regulation of Wales, called the *Statutum Walliæ.*

His gentle and judicious manner of proceeding on this occaſion.

example; by the Welch law a baſtard might ſucceed to his father's lands as well as a ſon born in lawful wedlock; and daughters could not inherit their father's lands even when there were no ſons; but the lands went over to the next male relations. Theſe two things king Edward changed; excluding baſtards intirely from the inheritance of their father's lands, and admitting daughters to it in default of ſons, according to the cuſtom of England. But he permitted their cuſtom of inheriting lands, by equal partition amongſt all the ſons of the deceaſed owner of them, to continue, though different from the law of England, which gives all the father's lands to the eldeſt ſon only, to the excluſion of all the other children. Nor was this Engliſh law of inheritance by primogeniture introduced into Wales till 250 years after the reduction of it by king Edward the 1ſt, when, in order to render its union with England more compleat, and alſo to avoid the inconveniences which had been found to ariſe from the too great ſubdiviſions of lands by repeated partitions of them upon inheritance, king Henry the 8th eſtabliſhed it in that country by

by an act of the Engliſh parliament. Such was king Edward's temperate and prudent conduct on this occaſion. Therefore, when Thomas of Walſingham and the other writers of the hiſtory of king Edward the 1ſt's reign, ſay, that king Edward on this occaſion introduced the laws of England into Wales, they muſt be underſtood to mean only that he introduced *ſome* of the laws of England into it, which he thought moſt eſſentially neceſſary for the peace and happineſs of the people, and that he took the whole adminiſtration of juſtice into his own hands, appointing, not only a juſtitiary of the country, (as his father, king Henry the 3d, had done before him,) but likewiſe ſheriffs in the ſeveral counties, by whoſe means all the executive power of the country was at his diſpoſal.

And thus I have given you a ſummary account of what the old Engliſh hiſtorians, and particularly Matthew Paris, (who lived in the reign of king Henry the 3d, and died in the year 1259) relate concerning the connection between England and Wales from the

the time of king William the Conqueror to the final reduction of Wales by king Edward the 1ſt, and the paſſing of the *Statutum Walliæ* in the year 1284. You will now judge for yourſelf whether Wales was, or was not, in a ſtate of feudal dependance on the crown of England during this period, and particularly in the reign of king Henry the 3d, the immediate predeceſſor of king Edward.

FRENCHMAN.

I am much obliged to you for this account of the dependance of Wales upon England during that antient period, which, though neceſſarily of ſome length, I have not thought in any degree tedious. For it has enabled me to form a clear and poſitive opinion, that the ſuppoſition "that Wales had been a fief of the crown of England," was not a fiction of king Edward, invented for purpoſes of policy, as Lord Mansfield conceives it to have been, but a certain and indiſputable truth, or, in other words, that the princes, and other great land-holders, of Wales were bound to do homage for their lands to the

Concluſion reſulting from the foregoing account of Wales.

kings of England, and uſually did do homage for them, in all the reigns from that of the Conquerour to that of king Edward the 1ſt, (before his laſt reduction of them,) inclu-ſively. But it ſeems probable to me from this account, that this obligation of doing homage for their lands aroſe at firſt, in the time of king William the Conquerour, or, perhaps, before, from their fear of the power of England, and was not the conſequence of their having received their lands originally from the kings of England by grants accompanied with this obligation of doing homage, and performing other feudal duties, to the grantors and their heirs, according to the more cuſtomary method of creating feudal ſubordinations throughout Europe. And this, I imagine, may have induced Lord Mansfield and the learned Mr. Barrington, and perhaps other learned men, to conſider Wales as not having been a fief of the crown of England. But they ſhould have recollected that a feudal ſubjection of one country to another, or rather of the poſſeſſor of one country to the poſſeſſor of another, may as well ariſe after a former independency of the one on the other, by a compact

Of the manner in which Wales was brought into a ſtate of feudal ſubjection to the crown of England.

compact between the parties for that purpose, as be originally created before one of the parties is put into possession of the country which he holds of the other party. And many instances may be found of countries which have in this manner become dependent on other countries by a feudal subordination to them, after having been antecedently independent of them. And this seems to have been the case with Wales.

ENGLISHMAN.

You are certainly right in your conception of the manner in which Wales became dependant upon the crown of England. It must have been by acts of submission of the Welch princes, and other land-holders, to the kings of England, after a prior state of independency on them; because the Welch were the oldest inhabitants of the island, and possessed both Wales and England before the Saxons, or English, arrived in the island and erected those seven kingdoms in it, which, after their union under Egbert, king of the West Saxons, were called *England*, or *the kingdom of England*. And it

is alſo pretty certain that thoſe acts of ſubmiſſion of the Welch princes, and other land-holders, to the kings of England, whereby they conſented to do homage to them for their lands, were the effect of their fear of the power of the kings of England. But, when theſe acts *were* done, (let the motive that gave riſe to them be what it would,) the country of Wales was as truly in a ſtate of feudal ſubjection to the kings of England, as if it had been a mere uninhabited country, to which no perſon had any claim, and the kings of England had, firſt, taken poſſeſſion of it themſelves, and afterwards granted it out in parcels to their friends and favourites to be holden of themſelves and their heirs and ſucceſſors, being kings of England, by homage and military ſervice. And we have ſeen by the paſſages above recited from the old writers of the Engliſh hiſtory, that Wales was in this condition of feudal ſubjection to the kings of England long before the reign of Edward the 1ſt. It ought not therefore to be conſidered as an independant country, which king Edward invaded and conquered for the firſt time, without any prior claims of ſuperiority over it, as his preſent

ſent Majeſty conquered the iſland of Grenada in the late war: and conſequently it can afford no argument one way or the other, concerning the prerogative of the king of England, or Great-Britain, with reſpect to the government of conquered and ceded countries.

The *Statutum Walliæ* was not made by the ſingle authority of king Edward the 1ſt, but with the advice and concurrence of his barons.

But in truth the *Statutum Walliæ* does not appear to have been made by king Edward's ſingle authority, but by his authority and that of his barons, or great men, conjointly. For we find theſe words in the pre-amble of it; *Nos itaque . . . volentes prædictam terram noſtram Snaudun, et alias terras noſtras in partibus illis, ſicut et cæteras ditioni noſtræ ſubjectas, . . . ſub debito regimine gubernari, et incolas terrarum illarum . . . certis legibus et conſuetudinibus ſub tranquillitate et pace noſtrâ tractari, leges et conſuetudines partium illarum hactenus uſitatas coràm nobis et proceribus regni noſtri fecimus recitari; quibus diligentèr auditis, et pleniùs intellectis, quaſdam ipſarum, de conſilio procerum prædictorum, delevimus, quaſdam permiſimus, et quaſdam correximus, et etiam quaſdam alias adjiciendas et ſtatuendas decrevimus, et eas de cætero in terris noſtris*

in

in partibus illis perpetuâ firmitate teneri et obſervari volumus, in formâ ſubſcriptâ.— By theſe words, *coràm nobis et proceribus regni noſtri*, and *de conſilio procerum prædictorum*, it is plain that the *proceres regni*, the great men, or barons, of the realm, concurred with king Edward in enacting this ſtatute: and theſe barons were the only parliament then in being, the knights, citizens, and burgeſſes, who compoſe the Houſe of Commons, not making at that time, nor till about eleven years after, a part of the Engliſh legiſlature. So that, if Wales had hitherto been perfectly independent of the crown of England, and now for the firſt time reduced to a ſubjection to it by conqueſt, (as Lord Mansfield had erroneouſly conceived,) yet this inſtance of king Edward's legiſlation would not have afforded a precedent in favour of the abſolute legiſlative power of the Crown alone over a conquered country. And ſo we may take our leave of the hiſtory of Wales with reſpect to the preſent queſtion.

End of the inquiry concerning the condition of Wales, and the legiſlative authority exerciſed over it by K. Edw. the 1ſt.

FRENCH-

FRENCHMAN.

But I think you mentioned ſome other countries which Lord Mansfield cited as countries which had been conquered by the crown of England, and in which the kings of England had exerciſed a legiſlative authority by virtue of their prerogative, and without the concurrence of the parliament. Pray, what countries were thoſe? and what kind of authority have the kings of England exerciſed in the government of them?

ENGLISHMAN.

Other places mentioned by Ld. Mansfield as inſtances of the exerciſe of the ſole legiſlative power of the crown.

The places mentioned by Lord Mansfield as inſtances of the exerciſe of this ſuppoſed legiſlative power of the Crown, are the town of Berwick upon Tweed, the town of Calais on the northern coaſt of France, the dutchy of Guienne or Gaſcony, in France, the province of New-York in North-America, and the town of Gibraltar and iſland of Minorca, which two laſt places, before the conqueſt of them by the Britiſh arms in the courſe of queen Ann's war, were a part of the monarchy

Lord Manſfield's words concerning Berwick upon Tweed.

narchy of Spain. Lord Mansfield's words concerning Berwick upon Tweed are theſe. "Berwick, after the conqueſt of it, was governed by charters from the Crown, till the reign of James the 1ſt, without interpoſition of parliament."

FRENCHMAN.

A remark upon them.

Is that all that was ſaid about Berwick, to prove that the king had a right of making laws for its inhabitants by his prerogative only, and without the concurrence of parliament? Surely this can never be thought concluſive. For, if it was, it would prove too much;---it would prove that the king had the power of making laws without the concurrence of parliament for the provinces of the Maſſachuſets Bay, and Connecticut, and Rhode-Iſland, and Penſylvania, to all which his predeceſſors have given charters without the interpoſition of parliament, as well as to Berwick upon Tweed; and he would alſo have this power in all the cities and towns in England itſelf which have charters, thoſe charters having all been given them, (as I have always heard,) by the kings alone

alone without any interpoſition of parliament. And yet in all theſe caſes it is not pretended that the king alone is poſſeſſed of the legiſlative authority.

ENGLISHMAN.

I intirely agree with you in thinking the argument for the king's legiſlative authority derived from the caſe of Berwick upon Tweed, extreamly inconcluſive: and for the reaſon you have given. The power of giving charters has always been conſidered as a part of the royal prerogative of the kings of England; but it has never been ſuppoſed to involve in it the power of making laws and impoſing taxes on the people to whom they have been granted. And I have therefore been as much ſurprized as you can be, at its having been alledged on this occaſion for ſuch a purpoſe. And, further, in the ſecond year of the reign of king James the 1ſt, that is, in the year of our Lord 1604, or 171 years ago, there was an act of parliament for the confirmation of even a royal charter, which the king had a little before granted by his letters patent to the mayor,

The privileges of the town of Berwick upon Tweed were confirmed by an act of parliament in the year 1604.

bailiffs, and burgeſſes of Berwick, and of the franchiſes, liberties, and cuſtoms of the ſaid borough. So that it appears that even that king, (who was remarkably jealous and tenacious of the prerogative of the crown,) did not conceive himſelf to be poſſeſſed of a compleat legiſlative authority over the people of Berwick by virtue of the conqueſt of it by his predeceſſors on the throne of England: becauſe, if he had conceived ſo, he would not eaſily have been prevailed upon to diveſt himſelf of a part of that authority by exerciſing it in conjunction with the Engliſh parliament. This inſtance therefore, of Berwick upon Tweed is of very little weight with reſpect to the preſent inquiry.

An inference therefrom.

FRENCHMAN.

The next inſtances you mentioned, as having been cited by Lord Mansfield in ſupport of this legiſlative authority of the crown, were, if I remember right, the town of Calais in France, and the dutchy of Guienne, or Gaſcony, in the ſame country. Pray, what did Lord Mansfield ſay concerning theſe places?

Of the dutchy of Guienne, or Gaſcony, and the town of Calais in France.

ENG-

ENGLISHMAN.

His words upon theſe inſtances were nearly as follows. "Whatever changes were made in the laws of Gaſcony, or Guienne, and Calais, muſt have been under the king's authority. For, if they had been made by act of parliament, the acts would have been extant: becauſe they were conquered in the reign of king Edward the third; and all the acts from that reign to the preſent time are extant. And in ſome acts of parliament there are commercial regulations relative to each of the conqueſts which I have named: but there are none that make any change in their conſtitution and laws.

The words of Ld. Mansfield concerning them.

Yet, as to Calais, there was a great change made in their conſtitution. For they were ſummoned by writ to ſend burgeſſes to the Engliſh parliament. And, as this was not done by act of parliament, it muſt have been done by the ſole authority of the king." This is all that Lord Mansfield ſaid concerning Gaſcony and Calais.

FRENCHMAN.

Remarks on Lord Manſfield's words.

It is really very ſurprizing that that learned lord ſhould have ſpoken in this manner; ſince, if I remember any thing of the hiſtory of thoſe times, the facts were quite different from his ſtate of them. Neither Gaſcony nor Calais were poſſeſſed by the kings of England as conquered countries, or by the right of war and conqueſt, but by the peaceful titles of marriage and inheritance. This is more eſpecially true of Gaſcony, or Guienne. For that was acquired by the marriage of Henry earl of Anjou and Poitou and duke of Normandy, (who was afterwards king of England by the title of Henry the ſecond,) with Eleanor of Guienne, the heireſs of that great province, after ſhe had been divorced from the king of France. And it deſcended to the ſaid Henry's poſterity by the ſaid Eleanor, in her right, and was enjoyed by them by that title only for many generations, even till the latter part of the reign of king Henry the 6th, when the Engliſh loſt all their poſſeſſions in France of every kind, except Calais and a ſmall territory adjoining to it. The right of conqueſt was never thought of during

Gaſcony was not acquired by the kings of England by conqueſt, but by the marriage of king Henry the 2d with Eleanor the heireſs of it.

during all that time as the ground of the poſſeſſion of this province by the kings of England: for no conteſt had ever ariſen about it; but the kings of England had been always allowed to take and keep peaceable poſſeſſion of it by virtue of their hereditary title from the ſaid Eleanor. Whatever, therefore, was done by the kings of England who poſſeſſed this province, (that is, by king Henry the 2d and his ſucceſſors down to king Henry the 6th incluſively,) in the way of government, or legiſlation, in this province, or dutchy, of Guienne, or Gaſcony, has no more to do with their authority over conquered countries by virtue of their royal prerogative as kings of England, than the acts done by the kings of England of the preſent royal family in their German dominions of Hanover and Zell in their capacity of dukes of thoſe countries; which no one, I preſume, would ever think of alledging as proofs of the king's authority over conquered countries. And therefore this inſtance of Guienne, or Gaſcony, ought not, as I conceive, to have been mentioned on the ſubject we are now conſidering.

As

Calais was a part of king Edward the 3d's maternal inheritance, and not a part of the dominions of the crown of England.

As to Calais indeed, it is true that it was conquered by the arms of England in the reign of king Edward the 3d, as Lord Manſfield aſſerts. But it is alſo true, that it was not conquered *for* England, or by virtue of any right inherent in the crown of England. It was claimed and ſeized on by the ſaid king Edward, as a part of the kingdom of France; the whole of which that king claimed as his right by inheritance through his mother Iſabel, who was a daughter of one of the kings of France. This was a right that was no way connected with his poſſeſſion of the crown of England, but which would equally have belonged to him if he had not been king of England, as might eaſily have happened on the following ſuppoſition. Let us ſuppoſe that Edward the 2d, king of England, had married two wives; and that Iſabel of France had been his ſecond wife; and that he had had ſons by his firſt wife, as well as his ſon Edward (who was afterwards king of England by the title of Edward the 3d) by Iſabel, his ſecond wife. In ſuch a caſe it is evident that king Edward the 2d's eldeſt ſon by his firſt wife would have ſucceeded to the crown

of

of England, and Edward, his eldeſt ſon by his ſecond wife Iſabel, would have had the right of his mother to the crown of France, though he would not have been king of England: which ſhews that the title of king Edward the 3d to the crown of France was totally unconnected with his right to the crown of England. Conſequently, in whatever manner he governed the kingdom of France, his maternal inheritance, or the town of Calais, (which was, if I remember right, the only part of that inheritance which he was able to keep for any length of time,) it had nothing to do with the right, or prerogative, of a king of England over a mere conquered country, to which the king, who ſhould have conquered it, had no other claim at all but that of conqueſt.

ENGLISHMAN.

I intirely agree with you in thinking theſe two inſtances of Gaſcony and Calais quite foreign to the preſent queſtion; and for the reaſons you have given; they having been poſſeſſed by the kings of England by right of

of marriage and inheritance, and not by right of conqueſt. And, as to what Ld. Mansfield adds, that, when the burgeſſes of Calais were impowered to ſend members to the Engliſh parliament, this privilege was given them by the king alone, and not by act of parliament, it ſeems to me to afford no ſort of argument for ſuppoſing (as Ld. Mansfield ſeems to do) that, before this privilege was granted them, they had been governed by the authority of the Crown alone without the concurrence of parliament; becauſe, if this reaſoning were allowed, it would prove that many places in England itſelf had been ſubject to the ſole legiſlative authority of the Crown till the reigns of king Edward the 6th, queen Mary, queen Elizabeth, and king James the 1ſt; ſince it is well known that thoſe ſovereigns did, of their own authority, and without the interpoſition of parliament, authorize thoſe places to ſend members to the Engliſh parliament; though, (happily for the nation,) the power of granting ſuch a privilege to other boroughs, is now no longer underſtood to be a part of the royal prerogative. But indeed, as you have juſtly obſerved, if king

Of the privilege given to Calais to ſend members to the Engliſh parliament.

Edward

Edward the 3d and his ſucceſſors did govern Calais by their own authority only, and without the concurrence of parliament, until they permitted them to ſend members to the Engliſh parliament, (and whether they did or not, is more than Lord Mansfield has told us, and more than I can tell, not having particularly inquired into the matter;) it would only prove that he governed the kingdom of France, his maternal inheritance, that is, that little part of it of which he kept poſſeſſion, in a different manner from the kingdom of England, his paternal inheritance, with which the former kingdom had no connection but that of accidentally being ſubject to the ſame king.

The conduct of the kings of England with reſpect to Calais is rather adverſe to the doctrine of the ſole legiſlative power of the Crown over conquered countries.

But indeed the inſtance of Calais ſeems to me rather to furniſh a ground for a conjecture that is adverſe to the doctrine of the ſole legiſlative authority of the kings of England over countries obtained by conqueſt. What I mean is this. Calais was poſſeſſed by the kings of England by virtue of king Edward the 3d's hereditary claim to the whole kingdom of France. From the reign of king

Edward the 3d to that of king Edward the 4th the kings of England endeavoured to make good this claim by force of arms. And, even for ſome years after Edward the 4th's reign, the memory of the wars in France, (which had taken their riſe from this claim,) was freſh in the minds of the Engliſh nation, and the inclination to renew thoſe wars, and again endeavour to eſtabliſh that claim, was ſtill alive. At laſt this deſign ſeems to have been quite laid aſide, though the claim itſelf has never been formally given up even to the preſent day; but our kings ſtill ſtyle themſelves kings of France. The deſign of recovering the kingdom of France by force of arms ſeems, however, to have at laſt been laid aſide, but not before the reign of king Henry the 8th, who, we muſt obſerve, was the very king that gave the people of Calais the privilege of ſending members to the Engliſh parliament. So that juſt at the time when Calais might ſeem to be no longer poſſeſſed by the kings of England by virtue of their hereditary claim to the crown of France, that claim being no longer purſued;—and conſequently

juſt

juſt at the time when Calais might appear to be retained by the kings of England as a mere appendage of the crown of England, without regard to the former hereditary title ;——king Henry the 8th, (a prince who was by no means diſpoſed to leſſen his own royal prerogative,) thought fit to incorporate Calais with the kingdom of England, by impowering its inhabitants to ſend members to the Engliſh parliament, and conſequently to permit the parliament to partake with him in the power he had before enjoyed alone (if he did in truth enjoy the ſaid power) of making laws and impoſing taxes on them. From this proceeding I ſhould be inclined to draw this concluſion, that, whenever a country becomes an appendage to the crown of England, ſo as to be poſſeſſed by the kings of England *as* kings of England, or merely *becauſe* they are kings of England, the parliament of England ought to participate with the king in the exerciſe of the legiſlative authority over ſuch country. But I lay no great ſtreſs on this argument, which is certainly doubtful and conjectural. All I pretend to be clear in with reſpect to this

inſtance of Calais, is, that it affords no kind of ground for any inference in favour of the ſole legiſlation of the crown over conquered countries.

FRENCHMAN.

Of the province of New-York in North-America.

I think you mentioned New-York amongſt the inſtances which Lord Mansfield produced as proofs of the legiſlative authority of the crown alone, without the concurrence of parliament, over countries acquired by conqueſt. Pray, what did his lordſhip ſay with reſpect to this inſtance? For, if the province of New-York was conſidered as a conquered country, and was, upon that account, governed by the king's ſingle authority for any conſiderable length of time, without the interpoſition of the Engliſh parliament or an aſſembly of its own inhabitants, I ſhould eſteem it to be a much more reſpectable precedent in favour of the royal prerogative in queſtion, than either Gaſcony, or Calais, or Berwick, or even than Ireland and Wales, if thoſe countries and places had really been, (what we have ſufficiently ſeen they were not,) fair proofs of the exiſtence of ſuch a legiſlative

legiſlative power in the crown in former times: becauſe, as New York is a part of America, and was acquired by the crown of England but little above a hundred years ago, it bears a nearer reſemblance to the caſe of the iſland of Grenada, and the conſtitution of the Engliſh government at the time it was acquired by the crown of England (which, as I have heard, was in the reign of king Charles the ſecond,) bears a greater reſemblance to the conſtitution of England at this day, than is to be found in the caſe of thoſe old examples; and conſequently there would be a better ground for inferring from the exerciſe of ſuch a legiſlative authority by the crown alone over the ſaid province, after king Charles's acquiſition of it, a continuance of the ſame authority over the countries that have been lately acquired by the crown by conqueſt (ſuch as Canada and Grenada,) until his Majeſty thought fit to diveſt himſelf of it by his proclamation of the 7th of October, 1763. I am therefore very deſirous of knowing what Lord Manſfield ſaid concerning this important inſtance of New-York.

ENG-

ENGLISHMAN.

The caſe of New-York would indeed be a very important precedent, if it were true that that province had been a conquered country, and had been conſidered as ſuch by king Charles the 2d, who diſpoſſeſſed the Dutch commonwealth of it, and that, after having conquered it from the Dutch, king Charles had enjoyed and exerciſed a permanent legiſlative authority over it, without the interpoſition of either the Engliſh parliament, or an aſſembly of the freeholders of the province itſelf. But this was far from being the caſe, as you will preſently perceive, when you have heard a ſhort account of the taking of New-York from the Dutch, and the manner in which it was governed for the firſt twenty, or five and twenty, years after that event. As to what Lord Mansfield ſaid upon the ſubject, it was contained in theſe few words. " After the conqueſt of New-
" York, in which moſt of the old Dutch
" inhabitants remained, king Charles the 2d
" changed their conſtitution and political
" form of government, and granted it to the
" duke

Lord Manſfield's words concerningthe ſaid province.

" duke of York, to hold from his crown " under all the regulations contained in his " letters patent."

FRENCHMAN.

I perceive by theſe words, that Lord Manſfield ſuppoſes New-York to have been a conquered country, and to have been conſidered as ſuch, and grounds his argument in favour of the legiſlative authority of the crown upon that circumſtance. And, to confeſs the truth, I had always conceived the fact to be ſo; that is, that New-York had been originally a Dutch ſettlement, and had been conquered from that commonwealth by the arms of England in the reign of king Charles the 2d, and had been always conſidered by the crown of England in the light of a conquered country, and as belonging to it by no other title whatſoever. I ſhould therefore be glad to be ſet right, if this notion of the matter is a miſtaken one.

An inquiry whether, or no, New-York was a conquered country.

ENG-

ENGLISHMAN.

In the view of an impartial hiſtorian and philoſopher the firſt part of what you have conceived upon this ſubject may, perhaps, be true; that is, that New-York was really at firſt a Dutch ſettlement, juſtly belonging to the Dutch commonwealth, till it was conquered from them by the arms of England in the year 1664 in the beginning of the firſt Dutch war in the reign of king Charles the ſecond; though even this is not abſolutely certain. But it is not true that king Charles the ſecond, or the Engliſh nation in general, conſidered the matter in that light. For it is certain, on the contrary, that they conſidered the provinces of New-York and New-Jerſey (which then were both poſſeſſed by the Dutch, and known by the name of the *New Netherlands,) as a part of New-England*, and as having always belonged to the crown of England, ever ſince the planting of New-England, as much as the reſt of New England, in which the Engliſh had actually made ſettlements. And they accordingly conſidered the Dutch inhabitants of that country as having

This province was not conſidered by king Charles the ſecond as a conquered country, but as a part of the more antient Engliſh colony of New-England.

having ſettled themſelves upon Engliſh ground without authority and contrary to juſtice, and as being therefore juſtly liable to be expelled from their ſettlements whenever the Engliſh government ſhould think proper, unleſs they would ſurrender themſelves to the Engliſh government and conſider themſelves as ſubjects of England. This opinion had been entertained in England and in the Engliſh colonies in New-England before the reſtoration of king Charles the ſecond; and Richard Cromwell, (who had ſucceeded his father Oliver as protector of the commonwealth of England,) had even taken ſome ſteps towards accompliſhing a deſign that had been entered into for the reduction of that country to the obedience of the Engliſh government. How far theſe pretenſions of the Engliſh were well founded, I will not pretend to determine. But that theſe were their pretenſions, and that king Charles the ſecond claimed the country upon that ground, and upon that ground only, will appear beyond a doubt from the following extract of a letter, which colonel Nicholls, (the commander of the armament which king Charles ſent out, in

the ſummer of the year 1664, to recover the country from the hands of the Dutch commonwealth,) ſent the Dutch governours of the country (who reſided in the iſland of New-York, then called *Manhattans;)* in anſwer to a demand which they had made to him of the reaſon of his hoſtile approach towards them; which had very naturally ſeemed ſtrange to them, as the war between England and Holland was not yet begun.

Colonel Nicholls's letter to the Dutch governours of the ſaid province, requiring them to ſurrender it to king Charles the 2d. A. D. 1664.

" To the Honourable the Governours and
" Chief Council at the Manhattans.

" Right worthy Sirs,

" I Received a letter by ſome worthy perſons
" intruſted by you, bearing date the $\frac{19}{30}$ of
" Auguſt, deſiring to know the intent of
" the approach of the Engliſh frigates: in
" return of which, I think it fit to let you
" know, that his Majeſty of Great-Britain,
" *whoſe right and title to theſe parts of Ame-*
" *rica is unqueſtionable*, well knowing how
" much it derogates from his crown and
" dignity to ſuffer any foreigners, (how near
" ſoever they be allied) to uſurp a dominion,

" and,

" and, without his Majeſty's royal conſent,
" to inhabit in theſe or any other of his
" Majeſty's territories, hath commanded me,
" in his name, to require a ſurrender of all
" ſuch forts, towns, or places of ſtrength,
" which are now poſſeſſed by the Dutch
" under your commands. And, in his Ma-
" jeſty's name, I do demand the town ſituate
" on the iſland commonly known by the
" name of *Manhattoes*, with all the forts
" thereunto belonging, to be rendered unto
" his Majeſty's obedience and protection,
" into my hands, &c."

The city ſituated on the iſland of *Manhattoes*, or *Manhattans*, was then called *New-Amſterdam*, and ſince that time *New-York*.

The ſaid city and the country belonging to it were ſurrendered by the Dutch governours to colonel Nichols ſoon after this letter of ſummons.

The ſaid country was accordingly ſurrendered to Col. Nicholls.

You will allow, I believe, that it is plain from the foregoing letter that king Charles the ſecond did not conſider this country as the property of the Dutch commonwealth

Concluſion following from the ſaid letter and ſurrender.

and an object of conqueſt, properly ſo called, notwithſtanding the great number of Dutch inhabitants who continued in it, but as a part of his own dominions, of which the Dutch had ſurreptitiouſly and unjuſtly taken poſſeſſion, and from which it was therefore both juſt and neceſſary to expel them. And, accordingly, he had, before this expedition of colonel Nichols againſt this country, (which was deſtined to recover the poſſeſſion of it to the crown of England) made a grant of it, by letters patent under the great ſeal of England, to his brother the duke of York, (who was afterwards king of England by the title of James the 2d,) as being a tract of land that already belonged to him, before ever colonel Nichols ſailed from England. Surely, after this conduct of the crown with reſpect to this province, it can never be conſidered as a conquered country *to any legal view or purpoſe*, and conſequently cannot juſtly be alledged as an example, or precedent, of the prerogative of the crown of England with reſpect to conquered countries.

FRENCH-

FRENCHMAN.

It certainly cannot: and, whatever was the manner in which king Charles governed it after he had got poſſeſſion of it,--whether he made laws for it with, or without, the concurrence of his parliament, or an aſſembly of the people;---it can have no relation to the queſtion we are now diſcuſſing concerning the prerogative of the crown with reſpect to conquered countries. I therefore do not wiſh to know the further hiſtory of this province with any view to throw light upon that queſtion. But yet I ſhould be glad to be informed of it on another account; and that is, to ſee how far the kings of England have at any time aſſumed and exerciſed a legiſlative authority over any of the out-lying dominions of the crown, that have been ſettled, or planted, by colonies from England; which is certainly the true legal view in which New-York ought to be conſidered. For I think I have ſometimes been told, that the kings of England had, upon ſome occaſions, pretended to a greater degree of legiſlative power over the remote and diſtant dominions of

Of the legiſlative authority claimed by the crown over colonies planted by Engliſhmen.

of the crown, though ſettled by colonies from England, than over the kingdom of England itſelf. I ſhould therefore be glad to know in what manner the province of New-York was governed, after it had been ſurrendered to the crown of England upon the invaſion of colonel Nichols.

ENGLISHMAN.

The Crown has formerly claimed a compleat legiſlative authority over all the Engliſh colonies in the world.

I believe that ſome ſuch pretenſions, as you ſpeak of, to a higher degree of legiſlative power over diſtant colonies of Engliſhmen than over the inhabitants of England itſelf, may have been made by the crown in former reigns, and more eſpecially in the reigns of the Stuarts. And indeed there is extant a famous inſtrument of this kind in the reign of king Charles the 1ſt, by which that king appointed commiſſioners to make laws and ordinances for the government of all the Engliſh colonies all over the world. This inſtrument was paſſed under the great ſeal of England in the year 1636, which was the time of the moſt arbitrary government of that miſguided monarch. It appointed twelve

King Charles the 1ſt appointed commiſſioners to exerciſe this legiſlative authority over them all, in the year 1636.

perſons

persons of note, (who were, all of them, members of the king's privy council, and most of them great officers of state,) to be the king's commissioners for the following general purpose, to wit, *ad regimen et tutamen dictarum coloniarum deductarum, vel quæ gentis Anglicanæ in posterum fuerint in partibus hujusmodi deductæ*; and gave them a power of establishing *leges, constitutiones, et ordinationes, seu ad publicum coloniarum illarum statum, seu ad privatam singulorum utilitatem pertinentes, eorumque terras, bona, debita, et successionem in iisdem partibus concernentes;---ac qualiter invicem et ergà principes exteros eorumque populum;-nos etiàm et subditos nostros tàm in partibus exteris quibuscunque quàm in mari, in partes illas, vel retrò, navigando, se gerant;----vel quæ ad sustentationem cleri, exercentis regimen vel curam animarum populi in partibus illis degentis, congruas portiones in decimis, oblationibus, aliisque proventibus, designando, spectant;----juxtà sanas discretiones suas, et habito consilio duorum vel trium episcoporum (quos ad se convocandos duxerint necessarios) in ecclesiasticis;---et clero portiones designandi, condendi, faciendi, et edendi:---*

Extracts from the commission given to the said commissioners.

ac

ac in legum, conſtitutionum, et ordinationum illarum violatores pœnas et mulctas, impoſitionem, incarcerationem, et aliam quamlibet coertionem, etiam, (ſi oporteat, et delicti qualitas exegerit,) per membri vel vitæ privationem, infligendas providere ; &c. Here you ſee the crown undertook to delegate to its commiſſioners a compleat legiſlative power over all the Engliſh colonies in America. For it was a power of making laws and ordinances relating either to the publick condition of thoſe colonies or to the private advantage of the individuals who compoſed them ;----and to the behaviour of the colonies one to another, and to foreign ſtates ;----and to their behaviour towards the king and his other ſubjects, either in foreign countries, or on the high ſeas, in going to, or coming from, their ſettlements ;----and to the maintenance of the clergy who exerciſe the cure of ſouls in the ſaid ſettlements, by ordering the inhabitants of thoſe colonies to make them reaſonable allowances of tythes, or offerings, or ſome other competent revenue ;---it was a power of making laws upon all theſe ſubjects, and of inflicting ſuch puniſhments as they

Powers delegated by the ſaid commiſſion.

they ſhould think fit (not excepting even the loſs of life or limb, in caſes where they ſhould judge it neceſſary,) on thoſe who ſhould diſobey the ſaid laws and ordinances: which is as large and general a legiſlative power as can well be conceived. The next branch of the commiſſion gives the commiſſioners a power to place and diſplace the governours of the American colonies at their diſcretion, and to call them to account for their miſconduct in their government, and to puniſh them for the ſame either by fines, or mulcts, to be levied upon their property in the colonies of which they have been governours, or by removing them from their governments, or by other methods according to the degree of their guilt, *vel aliter, ſecundùm quantitatem delicti, caſtigare.* It alſo gives them a power to appoint judges in all ſorts of cauſes, and of erecting courts of juſtice of all kinds, for the determination of civil and criminal matters, and for the deciſion of eccleſiaſtical cauſes; and of appointing the modes of proceeding in the ſaid courts. And then follows a proviſoe, which ordains that the laws and ordinances which

A remarkable proviſoe in the ſaid commiſſion.

 theſe

theſe commiſſioners ſhall make in the ſaid colonies by virtue of the authority thereby given them, ſhall not take effect till they have received the king's own aſſent in writing, teſtified at leaſt under the royal ſignet, if not under the great, or privy, ſeal; but which declares that, after they have ſo received the ſaid royal aſſent, they ſhall have the full force of laws, and be obeyed by all the perſons whom they concern. This proviſoe is expreſſed in theſe words. *Proviſo tamen, quod leges, ordinationes, et conſtitutiones hujuſmodi executioni non mandentur quouſque aſſenſus noſter eiſdem adhibeatur regius in ſcriptis ſub ſignetto noſtro ſignatis ad minus. Et hujuſmodi aſſenſu adhibito, eiſque publicè promulgatis in provinciis in quibus ſint exequendæ, leges, ordinationes, et conſtitutiones illas plenariè juris firmitatem adipiſci, et ab omnibus, quorum intereſſe poterit, inviolabiliter obſervari, volumus et mandamus.* The remaining part of the commiſſion gives the commiſſioners a power to hear and determine complaints againſt particular colonies, or the governours of them, and diſputes between colony and colony concerning encroachments on each other's

other's territories, or other injuries, and, after having heard ſuch complaints, to order either the governours of any of the colonies, or the whole colonies themſelves, to come back to England or to remove to ſuch other places as the ſaid commiſſioners ſhall allot to them for their habitation: and laſtly, to inſpect and examine all the charters which the king, or any of his predeceſſors, may have granted to any of the ſaid Engliſh colonies; and, if they ſhall find either that they have been ſurreptitiouſly or unduly obtained, or that the privileges granted by them are prejudicial to the king and the rights of his crown, or to foreign princes, to revoke and annull them.

A remark on the aforeſaid commiſſion.

Theſe were the contents of this famous commiſſion of king Charles the 1ſt, by which we plainly ſee his notions of colony-government. But, I preſume, he was as much miſtaken in theſe notions as in his conceptions of the rights of his crown over his ſubjects in England itſelf, where his miſgovernment was attended with ſuch fatal conſequences. So that nothing ought to be

inferred from his opinions, or practices, in this bad part of his reign (when he governed England itſelf without a parliament,) concerning the juſt and legal prerogatives of the crown of England even at that time, and much leſs concerning thoſe which exist at this day, when the liberties of the people are both better known and aſcertained, and alſo extended further, and more firmly eſtabliſhed, than they were in the reign of that king.

Names of the perſons to whom the ſaid commiſſion was granted.

The perſons to whom the aforeſaid commiſſion was granted were theſe; Dr. William Laud, the cruel and miſchief-making archbiſhop of Canterbury, who was the adviſer of moſt of the unhappy meaſures that occaſioned the civil war that broke out a few years after between the king and parliament; the lord Coventry, lord keeper of the great ſeal; the archbiſhop of York; Dr. William Juxon, the biſhop of London, who was at that time lord treaſurer; Henry Montague, earl of Manchester, the keeper of the privy ſeal; Thomas Howard, earl of Arundel and Surrey, the earl-marſhall of England; Edward Pierpoint, earl of Dorcheſter, chamberlain to the queen;

Sir

Sir Francis Cottington, lord Cottington, chancellor and under-treaſurer of the Exchequer, and maſter of the court of Wards and Liveries; Sir Thomas Edmonds, knight, the treaſurer of the king's houſhold; Sir Henry Vane, (the elder,) knight, the comptroller of the king's houſhold; and Sir John Coke, knight, and Sir Francis Windebank, knight, the king's two principal ſecretaries of ſtate. Any five, or more, of them might execute the powers of the commiſſion. This mode of governing the colonies continued about ſix or ſeven years, that is, till the enſuing civil war, which begun in the year 1642. In the following year 1643 the parliament at Weſtminſter, who conducted the war againſt king Charles the 1ſt, took upon them to ſuperſede this commiſſion, and appointed, by one of their ordinances, (made without the king's concurrence) a committee of perſons of their own choice for regulating the plantations, and made Robert Rich, earl of Warwick, who acted as admiral of the Engliſh nation under the authority of the parliament, the governour in chief of them all; they conſidering the plantations as a proper appendage to the marine department. And

Of the government of the American colonies during the civil war.

Of the government of them in the time of the commonwealth of England.

by this committee the plantations ſeem to have been governed till the year 1650, when England was governed under the form of a commonwealth, without either king or houſe of lords, by a remnant of that famous houſe of commons which had made war againſt the king. The only civil authority then in being in England was veſted in the ſaid remnant of the houſe of commons, (which was then called *the Parliament of the Commonwealth of England*, and poſſeſſed the whole legiſlative authority of the ſtate;) and in a council of ſtate, appointed by the ſaid parliament, who were entruſted with all the executive power. And in this year, 1650, an act was paſſed by the ſaid republican parliament, which veſted the government of the plantations, in a great degree, in the ſaid council of ſtate. What further changes happened in the government during the uſurpation of Oliver Cromwell and his ſon Richard, (who were called *Protectors* of the commonwealth) and the ſubſequent year of anarchy and confuſion, before the return of king Charles the 2d in 1660, I do not exactly know, nor think it material to inquire.

quire. But after the ſaid return, (which is commonly called *the Reſtoration,)* there was no attempt made by the king to revive the aforeſaid legiſlative commiſſion, which had been granted by king Charles the 1ſt, nor, in any other form, to aſſume and exerciſe a legiſlative authority over the American colonies by virtue of the royal prerogative only, and without the concurrence of parliament: but the famous navigation-act, and many other acts of parliament were paſſed, after that period, concerning the ſaid colonies, by the king and parliament conjointly, in the ſame manner as with reſpect to the kingdom of England itſelf. It ſeems reaſonable therefore to conclude that, ever ſince the reſtoration in 1660, the kings of England themſelves, as well as their ſubjects, have been of opinion that they were not authorized by virtue of their royal prerogative alone, to make laws for their ſubjects in the American plantations, but that ſuch laws could only be made by them in concurrence with the parliament of England, or with the aſſemblies of the freeholders of the ſeveral plantations for which they were to be made.

Of the government of them after the Reſtoration.

Concluſion concerning the right of legiſlation over the American colonies ſince that time.

This

The kings of England ſeem, even after the Reſtoration, to have claimed a right of legiſlation over new colonies, in which no aſſemblies of the people had yet been eſtabliſhed.

This ſeems to have been the caſe with reſpect to the more antient American plantations, in which aſſemblies of the people had been eſtabliſhed, ſuch as the plantations of New-England, and Virginia, and Barbadoes, and the Leeward iſlands. For, with reſpect to ſuch plantations as had been lately acquired, or recovered, and in which aſſemblies had not yet been eſtabliſhed, the kings of England, after the reſtoration, ſeemed ſtill to claim a right of making laws for the inhabitants of them by their ſingle authority, or without the concurrence of parliament, with reſpect to their internal government and domeſtick concerns, though they acted in conjunction with the parliament in making ſuch laws as related to the regulation of their trade, in common with the trade of the other colonies in America. At leaſt king Charles the 2d ſeems to have claimed and exerciſed this prerogative. For, if I am rightly informed, he governed Jamaica in this manner from the year 1660 to the year 1681, that is, by a governour and council only, without an aſſembly of the freeholders of the iſland: which governour and council were nominated by

by the king, and exerciſed a legiſlative power over the inhabitants of Jamaica, though they were almoſt all Engliſh ſettlers, the Spaniards having, for the moſt part, abandoned the iſland ſoon after the conqueſt of it in the year 1655 during Oliver Cromwell's protectorſhip. All the firſt laws enacted in Jamaica were enacted, (as I have heard,) by the governour and council only: and, (as I ſuppoſe) there muſt likewiſe have been ſome taxes impoſed upon the inhabitants, for the ſupport of their internal government, by the ſame authority. But in the year 1681 an aſſembly of the people was called, who concurred with the governour and council in the exerciſe of the legiſlative power. And this mode of government has continued in that iſland ever ſince. This, I have been told, was the caſe in Jamaica from the year 1660, (in which king Charles the 2d took poſſeſſion of his father's throne,) to the year 1681; but I am not quite certain about it, not having met with any diſtinct account of it in any book of note. But, with reſpect to the province of New-York, I can ſpeak with greater certainty, from the authority of Mr. William Smith, the great lawyer

The iſland of Jamaica was governed by the king's ſingle authority, without an aſſembly of the people, from the year 1660 to the year 1681.

The province of New-York was governed in the ſame manner by the duke of York's deputies from the year 1664 to the year 1683.

of that province, who has publiſhed a faithful and inſtructive hiſtory of it. And here it appears that king Charles the 2d claimed a right to the ſame legiſlative authority, and delegated it to his brother, the duke of York. For in the grant the king made to the duke of the whole province, together with the adjoining country ſince called New-Jerſey, he included the powers of government as well as the property of the ſoil; and, in purſuance of this grant, the duke of York governed it for ſeveral years by his ſingle authority, without ſummoning an aſſembly of the freeholders. This authority he, for the moſt part, exerciſed by deputy, that is, by a governour and council, whom he appointed for the government of the province. Colonel Nichols, who recovered the country from the hands of the Dutch, was the firſt governour of it under the duke of York: and the title, under which he took upon himſelf the government of it, was that of *deputy-governour, under his royal highneſs the duke of York, of all his territories in America.*

Col. Nichols was the firſt governour of it under the duke of York.

This

This colonel Nichols was a man of great prudence and moderation, and governed his new-acquired territory of New-York for near a twelvemonth before he received the news of the declaration of the war that had broke out between England and Holland, the ſaid news not reaching him before the month of June, 1665: which I mention as a confirmation of what I before obſerved, that this province was not conſidered by the Engliſh nation as a country acquired by right of war, but as a country recovered from the unjuſt poſſeſſion, or uſurpation, of a foreign ſtate. This country remained in the poſſeſſion of the Engliſh all that firſt Dutch war, that is, till the peace of Breda in July, 1667, and was left in their poſſeſſion by that treaty. Colonel Nichols continued governour of it, under the duke of York, during the greateſt part of this period, namely, till the month of May, 1667, when he was ſucceeded in that office by colonel Francis Lovelace.

He was ſucceeded by colonel Lovelace in May, 1667.

This colonel Lovelace was likewiſe a man of great moderation; and the people lived peaceably under him till the country was

The province was conquer'd by the Dutch in the year 1673;

again reduced to the obedience of the States of Holland in the year 1673, which was the ſecond year of king Charles the 2d's ſecond Dutch war. But this Dutch dominion did not continue long, the country being reſtored to the crown of England by the treaty of peace, which was concluded between England and Holland in the following year, 1674.

but reſtored to the crown of England at the peace in 1674.

Upon the concluſion of this peace the duke of York, to remove all doubts that might be entertained concerning his property in this country, (which had thus been conquered by the Dutch, and reſtored to the crown of England,) obtained a new grant of it from king Charles, dated the 29th of June, 1674, and, two days after, commiſſioned *Major Edmund Andros* (who was afterwards better known by the title of *Sir Edmund Andros*) to be governour of his territories in America. He was a man of a tyrannical diſpoſition, and made himſelf odious to the people under his government. However, he continued in the office till the 27th of Auguſt, 1683, when he was ſucceeded in it by colonel Thomas

The king makes a new grant of it to the duke of York in June, 1674.

Maj. Andros is appointed governour of it under the duke.

He is ſucceeded by colonel Dongan in Auguſt, 1683.

Thomas Dongan, who had been appointed to it by the duke of York in the preceding month of September, 1682.

This colonel Dongan, Mr. Smith ſays, was a man of integrity, moderation, and genteel manners, and, though a profeſſed papiſt, may be claſſed among the beſt governours of that province. Mr. Smith then proceeds as follows. " The people, who " had been formerly ruled at the will of the " duke's deputies, began their firſt participa- " tion in the legiſlative power under colonel " Dongan: for ſhortly after his arrival, he " iſſued orders to the ſheriffs to ſummon the " free-holders for chuſing repreſentatives to " meet him in aſſembly on the 17th of " October, 1683. Nothing could be more " agreeable to the people, who, whether " Dutch or Engliſh, were born the ſubjects " of a free ſtate. Nor indeed was the change " of leſs advantage to the duke than to the " inhabitants. For ſuch a general diſguſt had " prevailed, and in particular in Long iſland, " againſt the old form which Col. Nichols " had introduced, as threatened the total " ſubverſion

Col. Dongan ſummons an aſſembly of the freeholders, in October, 1683.

" ſubverſion of the publick tranquillity. " Colonel Dongan ſaw the diſaffection of " the people at the eaſt end of Long iſland; " (for he landed there on his firſt arrival in " the country;) and, to extinguiſh the fire " of diſcontent, then impatient to burſt out, " gave them his promiſe *that no laws or rates* " *for the future ſhould be impoſed but by a* " *general aſſembly*. Doubtleſs this alteration " was agreeable to the duke's orders, (who " had been ſtrongly importuned for it,) as " well as acceptable to the people: for they " ſent him ſoon after an addreſs, expreſſing " the higheſt ſenſe of gratitude for ſo bene- " ficial a change in the government. It " would have been impoſſible for him much " longer to have maintained the old model " over free ſubjects, who had juſt before " formed themſelves into a colony for the " enjoyment of their liberties, and had even " ſollicited the protection of the colony of " Connecticut, from whence the greateſt " part of them came."

The petition to the duke of York, by which he had been ſtrongly importuned (as this author expreſſes it) to conſent to this alteration

tion of the government of the province, was made by the council of the province, the aldermen of New-York, and the juſtices of the peace at the court of aſſize on the 29th of June, 1681, and contains many ſevere reflections upon the tyranny of Sir Edmund Androſs.

From the year 1683 to the preſent time the legiſlative power of the province of New-York has been uniformly exerciſed by the governour, council, and aſſembly of the freeholders, without any attempt in the governour and council to exerciſe it without the aſſembly.

From the year 1683 the province has been governed by a governour, council, and aſſembly.

Upon the death of king Charles the 2d the duke of York, his brother, ſucceeded to the crown of England by the title of James the ſecond, and conſequently both the property, or immediate lordſhip, of the province of New-York and the powers of government over it, became again veſted in the crown, as they had been before the grant made of them by king Charles the 2d to the duke of York. And they have continued veſted in the crown ever

Since the acceſſion of K. James the 2d to the crown the ſaid province has been a royal government.

ever ſince; ſo that now, and ever ſince the acceſſion of James the ſecond to the crown, (which was in February, $168\frac{4}{5}$) the appointment of the governour and council, and other officers of government, in this province, has belonged to the crown, and the province has been a royal government.

Mr. Smith informs us farther concerning the government of the province from the firſt ſurrender of it to the meeting of the firſt aſſembly of the freeholders in the year 1683, in the words following.

Of the laws paſſed at New-York before the eſtabliſhment of an aſſembly of the people.

" From the ſurrender of the province to " the year 1683, the inhabitants were " ruled by the duke's governours and " their councils, who, from time to time, " made rules and orders, which were " eſteemed to be binding as laws. Theſe, " about the year 1674, were regularly " collected under alphabetical titles; and " a fair copy of them remains amongſt " our records to this day. They are com-

They were called *The Duke's Laws.*

" monly known by the name of *The*

" *Duke's*

" *Duke's Laws.* The title-page of the " book, written in the old court-hand, is " in theſe bald words:

JUS
NOVÆ EBORACENSIS,
VEL,
LEGES AB ILLUSTRISSIMO PRINCIPE JACOBO,
DUCE EBORACI ET ALBANIÆ, &c.
INSTITUTÆ ET ORDINATÆ,
AD OBSERVANDUM IN TERRITORIIS AMERICÆ;
TRANSCRIPTÆ
ANNO DOMINI
MDCLXXIV.

" Thoſe acts, which were made in 1683, " and after the duke of York's acceſſion to " the throne, when the people were admitted " to a participation of the legiſlative power, " are, for the moſt part, rotten, defaced, or " loſt. Few minutes relating to them remain " on the council-books, and none in the " journals of the houſe of aſſembly."

Of the laws paſſed in the province of New-York from the year 1683 to the Revolution in 1688.

Of the firſt aſſembly of New-York after the Revolution.

The firſt aſſembly after the great and happy revolution in England in 1688, was called by colonel Henry Sloughter, who was appointed governour of New-York by king William and queen Mary. It began on the 9th of April, 1691. And Mr. Smith tells us, that all laws made in the province of New-York antecedent to this period, are diſregarded both by the legiſlature and the courts of law. And that in the collection of the acts of the legiſlature of the province of New-York publiſhed in 1752, the compilers were directed to begin at that aſſembly. And he adds that the validity of the old grants of the powers of government, in ſeveral American colonies, is very much doubted in the province of New-York.

A remarkable reſolution of the ſaid aſſembly.

Mr. Smith alſo relates that in this important year 1691, the houſe of aſſembly of the province of New-York, before they proceeded to paſs any new acts, unanimouſly reſolved as follows; to wit, "That all the "laws conſented to by the general aſſembly "under James, duke of York, and the "liberties and privileges therein contained, "granted

" granted to the people, and declared to be " their rights, not being obſerved, nor ra- " tified and approved by his royal highneſs " nor the late king, are null and void, and " of none effect. AND ALSO, the ſeveral " ordinances made by the late governours " and councils, being contrary to the conſti- " tution of England and the practice of the " government of their Majeſties other plan- " tations in America, are likewiſe null and " void, and of no effect, or force, within " this province." The latter part of this reſolution ſhews plainly that it was the opinion of this aſſembly that the duke of York had not been legally poſſeſſed of the legiſlative authority which he had exerciſed over the province of New-York by his governours and councils before the year 1683.

Mr. Smith tells us further, that it has, more than once, been a ſubject of animated debate, whether the people of the province of New-York *had a right* to be repreſented in aſſembly, or whether it be a privilege enjoyed through the grace of the Crown; and that a memorable act of aſſembly was

A memorable act of the governour, council, and assembly of New-York in the year 1691, containing a declaration of their rights.

passed by the governour, council, and assembly of New-York in this famous session in the year 1691, which virtually declared in favour of the former opinion, and which contained several other declarations of the principal and distinguishing liberties of Englishmen, being intitled, "*An act declaring what are the rights and privileges of their Majesties subjects inhabiting within their province of New-York.*" But Mr. Smith adds that it must, nevertheless, be confessed that king William was afterwards pleased to repeal that law in the year 1697.

It was afterwards disallowed by K. William in the year 1697.

Conclusion drawn from the foregoing account of the government of the provinces of America.

It seems therefore to have been the opinion of the kings of England, even since the Revolution, that they were possessed of an original right of making laws and imposing taxes in all the dependant dominions of the Crown, those which were properly *colonies*, or *plantations*, settled by emigrants from England under the authority of the Crown, as well as those which were conquered from foreign states; and that this right continued in them till they had voluntarily divested themselves of it by charters, or proclamations, or other sufficient

ſufficient inſtruments under the great ſeal, communicating a portion of it to the inhabitants of ſuch dependant dominions, to be exerciſed by aſſemblies of their repreſentatives. This, I ſay, ſeems to have been the opinion of the kings of England: but it does not ſeem ever to have been recognized by their ſubjects either in thoſe dependant dominions, or in England. For in king James the 1ſt's time the parliament of England conceived themſelves to have a right to cooperate with the king in making laws concerning Virginia, though that king, and his ſecretary of ſtate, Sir John Cooke, and other miniſters, denied that they had any right to intermeddle with it. And we have juſt now ſeen that in the province of New-York, (which is almoſt the only province of America which was governed for any length of time without an aſſembly, at leaſt ſince the reſtoration) the inhabitants never thoroughly acquieſced under the government of the governours and councils appointed by the duke of York, though they ſubmitted to it for a few years. This doctrine, therefore, of a ſole right of making laws for the dependant

pendant dominions of the crown of England being originally veſted in the crown and continuing in it till the crown ſhall have voluntarily parted with it by an act under the great ſeal of England, may be juſtly conſidered as, at leaſt, a doubtful doctrine, if not a falſe one, ſince it has never been freely recognized by all the parties whom it concerns, which alone can make a doctrine concerning political authority quite clear and certain. But the claim made to this power of legiſlation by the Crown (whether well or ill founded) ſeems to have been extended as well to colonies, or plantations, ſettled by emigrants from England, as to countries obtained by conqueſt. For the province of New-York was conſidered in the former light by king Charles the 2d, and claimed and ſeized by colonel Nichols upon that ground before the declaration of war againſt the States of Holland, as we have already obſerved: and yet it was governed by a governour and council only, by virtue of the king's grant of the powers of government over it to the duke of York, for the ſpace of eighteen years, as well as Jamaica, which was conquered from

the

the Spaniards during the uſurpation of Oliver Cromwell. And, if it ſhould be alledged that Jamaica, though conquered from the Spaniards, was nevertheleſs conſidered by king Charles the 2d as a *colony*, or *planted* country, and not as a conqueſt, becauſe of the almoſt total abandonment of it by its old Spaniſh inhabitants ſoon after the conqueſt of it, we ſhall then have two examples, inſtead of one, of the exerciſe of legiſlative authority over Engliſh colonies by the Crown alone, though in neither caſe, as I believe, with the perfect ſatisfaction of the inhabitants ſo governed.

FRENCHMAN.

I am much obliged to you for this account of the claims of the Crown upon this ſubject, which I perceive to be one of thoſe diſputable queſtions upon which the friends of power and the advocates of liberty may have plauſibly maintained contrary opinions. However, I ſhould incline to think that the declaratory act of the year 1766 ought to be conſidered as having ſettled this matter againſt the pretenſion of the Crown, at leaſt with reſpect

Concluſion drawn from the declaratory act in 1766 againſt the ſole legiſlative authority of the Crown over the American colonies.

reſpect to its American dominions; ſince it declares that in all thoſe dominions, the province of Quebeck not excepted, in which no aſſembly of the freeholders had been then, or has been yet, eſtabliſhed, the king and parliament conjointly had the power of making laws to bind the inhabitants in all caſes whatſoever. This ſeems to imply that ſuch a government as was eſtabliſhed in Charles the 2d's reign in the province of New-York and the iſland of Jamaica by only a governour and council appointed by the Crown, could not now be legally eſtabliſhed in the province of Quebeck, (though no aſſembly has yet been called there) without an act of parliament for the purpoſe.

ENGLISHMAN.

The ſaid concluſion is confirmed by the late Quebeck act.

I think there is much weight in your obſervation. And it is confirmed by what we have ſeen done with reſpect to this province by the late act of parliament, which has given you ſo much uneaſineſs. For we learn from it that his Majeſty's miniſters of ſtate, having determined within themſelves that no aſſembly of the people ought to be eſtabliſhed

eſtabliſhed in this province, but that it ought to be governed by a governour and council only, (as the province of New-York was during thoſe eighteen years above-mentioned,) did not, in the year 1774, think proper to eſtabliſh ſuch a mode of government here by the king's ſingle authority by granting the governour a new commiſſion under the great ſeal of Great-Britain containing a delegation of the power of making laws for the province, to be exerciſed by the governour and council only, without an aſſembly of the people, but called in the aſſiſtance of parliament for that purpoſe. Surely this was an acknowledgement on the part of the Crown of a want of ſufficient legal authority in itſelf alone to delegate theſe powers of legiſlation to a governour and council only, without the concurrence of an aſſembly of the people!

FRENCHMAN.

This argument ſeems to be juſt and ſtrong. Yet there are two objections to it which I beg leave to ſtate to you, which ſeem ſomewhat to diminiſh its force. If theſe can be removed, I ſhall look upon it as quite concluſive.

ENGLISHMAN.

Pray, what are thoſe objections?

FRENCHMAN.

An objection to the foregoing concluſion, drawn from the king's proclamation of October, 1763.

The firſt of them is as follows. You know that our gracious ſovereign was pleaſed, ſoon after the ceſſion of this province to the crown of Great-Britain by the laſt treaty of peace, to publiſh a proclamation under the great ſeal of Great-Britain, dated on the 7th of October, 1763, in which he promiſed the inhabitants of this province the *immediate* enjoyment of the benefit of the laws of England, and that they ſhould be governed as to matters of legiſlation by a governour, council, and aſſembly of the freeholders and planters of the province, as ſoon as the ſituation and circumſtances of the province would admit thereof. Now it may be ſaid perhaps, that by this proclamation the king had diveſted himſelf of the power he before poſſeſſed, of making laws for this province by his ſingle authority, or of delegating the power of doing ſo to a governour and council only,

only, without an aſſembly, becauſe ſuch a mode of government would be different from that which he had, by his proclamation, promiſed to eſtabliſh here: and that therefore an act of parliament became neceſſary to revoke and aboliſh that proclamation. This, I conceive, may be ſaid by the advocates for this legiſlative power in the Crown, in order to get rid of the inference you have drawn againſt it from the application made to the parliament for the purpoſe of delegating the legiſlative authority in this province to the governour and council only. I don't know whether I make myſelf rightly underſtood. But, I imagine, an objection of this kind may be formed againſt your inference; and I ſhould be glad to know what you would alledge in anſwer to it.

ENGLISHMAN.

I underſtand your objection very well; but do not think it of much weight. For, though the proclamation you allude to gives the people of this province an immediate right to the benefit of the Engliſh laws, yet

An anſwer to the ſaid objection.

The proclamation did not promiſe the immediate eſtabliſhment of an aſſembly, but only that one ſhould be ſummoned as ſoon as the circumſtances of the province would permit.

it does not give them an immediate right to be governed by an aſſembly, but only a right to be ſo governed *as ſoon as the ſituation and circumſtances of the province will admit thereof.* Until that period of *fitneſs* arrives (which, in the opinion of the king and parliament of Great-Britain, is not yet come,) there is nothing in the proclamation that precludes the king from making laws for the province by his ſingle authority, without the concurrence of the parliament, and conſequently from delegating to a governour and council only, without an aſſembly, the ſaid power of making laws for it, ſuppoſing that he was legally poſſeſſed of ſuch a legiſlative power before the proclamation was publiſhed. If therefore the king was legally poſſeſſed of ſuch a legiſlative power before he publiſhed his proclamation, he continued to be poſſeſſed of it after the proclamation until the ſaid ſeaſon of *fitneſs* for eſtabliſhing an aſſembly in the province ſhould be arrived, of which, I preſume, his Majeſty, when he publiſhed his ſaid proclamation, meant that himſelf ſhould be the judge. He might therefore, until the ſaid ſeaſon of fitneſs, have exerciſed the

It therefore did not preclude the king from making laws for the province before an aſſembly was eſtabliſhed in it, if he had a right to do ſo before the proclamation.

ſaid

ſaid legiſlative authority over this province either in his own perſon by making laws for it by his own edicts, or proclamations under the great ſeal of Great-Britain, or by his deputies in this province, to wit, the governour and council, without any breach of the aforeſaid proclamation. But he did not think proper to exerciſe or delegate his ſaid authority in that manner, but called in the aſſiſtance of his parliament to enable him to make ſuch a delegation of legiſlative authority to the governour and council of this province. Therefore it may juſtly be concluded that he did not conceive himſelf to be legally poſſeſſed of ſuch a legiſlative authority over this province either before or after his ſaid proclamation.

Therefore the foregoing conclu[illegible]on remains in the ſame degree of force as if there had been no proclamation.

It is true indeed that there is one branch of the late Quebeck-act which his Majeſty's ſingle authority would not have been competent to eſtabliſh in the province, either before or ſince the proclamation of October, 1763, even according to the doctrine laid down by Lord Mansfield of the legiſlative power of the Crown over conquered countries, except that which eſtabliſhes the Roman Catholick religion.

There is no proviſion in the Quebeck-act which might not have been eſtabliſhed by the ſingle authority of the Crown according to the doctrine of its ſole legiſlative power over conquered

tries, and which other crown-lawyers have extended to *colonies*, or *planted* countries as well as *conquered* ones; I mean that branch of the ſaid act which relates to the eſtabliſhment of the Roman-Catholick religion in the ſaid province, or which gives the prieſts a legal right to their eccleſiaſtical benefices and tythes, and laymen a right to hold places of truſt and profit, without taking the oath of ſupremacy, and requires them to take a certain new oath of allegiance in its ſtead. For this branch of the ſaid act is contrary to the ſtatute of the 1ſt of queen Elizabeth, which expreſsly relates to the future dominions of the crown of England as well as thoſe which at that time belonged to it: and Lord Mansfield allowed that the king's legiſlative authority over conquered countries was reſtrained by all ſuch antecedent acts of parliament as were expreſsly declared to extend to them. It would therefore have been neceſſary, when his Majeſty's miniſters conceived it to be proper to exempt the Canadians in the caſes above-mentioned from taking the oath of ſupremacy, to procure an act of parliament for this purpoſe. But this neceſſity

That proviſion could not have been made without an act of parliament, becauſe it is contrary to the ſtatute of ſupremacy in the 1ſt of Q. Elizabeth.

neceſſity did not ariſe from the proclamation, and did not extend to any other ſubject contained in the Quebeck-act, beſides this of the abolition of the oath of ſupremacy, there being no other proviſion in it that is contrary to any antecedent act of the Engliſh parliament that expreſsly relates to that province. If therefore the king had poſſeſſed a legal right of making laws for that province in all other reſpects, and upon all other ſubjects but that of the abolition of the oath of ſupremacy, it would have been ſufficient to make an act of parliament for the regulation of that ſingle ſubject; and there would have been no occaſion to inſert in it all the other clauſes it contains, and more eſpecially that which delegates to the governour and council of the province, without an aſſembly, the power of making laws to bind its inhabitants; but theſe things might have been left to be ſettled by his Majeſty's ſingle authority by his edict, or proclamation, or other ſufficient inſtrument under the great ſeal. But it was thought proper on that occaſion to inſert theſe clauſes in the ſaid act of parliament, and, amongſt them, the clauſe

But the other proviſions of the Quebeck-act might, according to the aforeſaid doctrine, have been made by the ſingle authority of the Crown.

Nevertheleſs it was thought proper to inſert them in the ſaid act of parliament.

clauſe for veſting a legiſlative authority in the governour and council only. We may therefore conclude that it was the opinion of his Majeſty's miniſters of ſtate and adviſers in the buſineſs of the ſaid Quebeck-act, that his Majeſty was not poſſeſſed of a legal right to regulate all thoſe matters by his ſingle authority, and, more eſpecially, to delegate to his governour and council only, without an aſſembly, a power to make laws to bind the province. And I have above endeavoured to prove that this want of ſuch a legiſlative authority could not ariſe from the promiſe contained in the proclamation of October, 1763, of eſtabliſhing an aſſembly in the province; becauſe this promiſe was not to be immediately accompliſhed, but only *as ſoon as the ſituation and circumſtances of the province would admit thereof*; until which ſeaſon of ripeneſs for ſuch a meaſure, we muſt preſume that the new laws and regulations, that might become neceſſary for the good government of the province, were intended to be made by that perſon, or perſons, who had a legal authority to make them before the ſaid proclamation iſſued.

Therefore the king's miniſters muſt have thought that the ſaid doctrine was not true.

iſſued. It follows therefore that this want of legiſlative authority muſt have been deemed by the adviſers of the Quebeck-act to have been originally inherent in the Crown before the proclamation of October, 1763. This, I hope, is a ſufficient anſwer to the objection you have ſtated to my above-mentioned inference, on the ground of the royal proclamation of October, 1763.

FRENCHMAN.

I am pretty well ſatisfied with this anſwer, ſo far as I depend upon my own judgement only. For it certainly does ſeem reaſonable to ſuppoſe that during the interval that ſhould elapſe between the iſſuing of the proclamation of October, 1763, and the time at which his Majeſty ſhould be of opinion that the ſituation and circumſtances of the province did admit of the eſtabliſhment of an aſſembly, it might become neceſſary to make ſome new laws and regulations in the province; and conſequently we muſt preſume that his Majeſty foreſaw this neceſſity, and meant that ſuch laws ſhould be made. The only remaining queſtion ſeems to be, *by whom* he

intended ſuch laws ſhould be made? and the natural anſwer to this queſtion, (ſo far as it can be collected from the bare peruſal of the proclamation itſelf,) ſeems to be, that he intended that they ſhould be made by that perſon, or perſons, (whoever they may be,) that had the legal right to make them before the ſaid proclamation was publiſhed: becauſe the proclamation makes no alteration in the matter during the aforeſaid interval. And this lays a foundation for your inference, that, ſince the king's miniſters thought proper to make uſe of the authority of parliament for the purpoſe of veſting the powers of legiſlation in this province in the governour and council only, notwithſtanding the ſituation and circumſtances of the province did not yet admit of the eſtabliſhment of an aſſembly in it, they were conſcious that the king alone was not poſſeſſed of a legal right to do ſo. But what ſtaggers me a little on this occaſion is, that it ſeems to me, from what you related to me of the judgement of the court of King's Bench in England in that caſe of *Campbell* and *Hall* relating to the duty of four and a half per cent. that had been

The judges of the Court of King's Bench in England were of opinion, in the caſe of Campbell and Hall, that the royal proclamation of October, 1763, operated as an immediate bar to the exerciſe of the powers of legiſlation in the four new governments by the ſingle authority of the Crown.

been illegally collected in the iſland of *Grenada*; I ſay, it ſeems to me from your account of that caſe, that Lord Mansfield and all the other judges of the court of King's Bench were of a different opinion from us with reſpect to the time at which the proclamation of October, 1763, began to operate as a bar to the exerciſe of the king's ſole legiſlative authority, ſuppoſing him antecedently to have been poſſeſſed of ſuch authority. For, if I remember rightly the dates of the publick inſtruments relating to the iſland of Grenada, the letters patent impoſing the duty of four and a half per cent. were publiſhed in July, 1764; and the commiſſion of governour Melvil, to be captain general and governour in chief of that iſland, (whereby, amongſt other things, he was impowered to ſummon an aſſembly of the freeholders and planters of it,) had paſſed the great ſeal in the preceding month of April, of the ſame year, 1764; but the firſt aſſembly of the province did not meet till about December, 1765, that is, till near a year and a half after the iſſuing of the letters patent that impoſed the ſaid duty of

four and a half per cent. and more than two years after the publication of the proclamation of October, 1763, which promiſed the people of Grenada, (as well as thoſe of the province of Quebeck and the two Floridas,) a government by an aſſembly, (not immediately, but) *as ſoon as the ſituation and circumſtances of the ſaid new governments would admit thereof.* Here, therefore, was an interval of more than two years after the publication of the proclamation in October, 1763, before the aſſembly of Grenada met, during which, according to your way of reaſoning, the king was not precluded by his proclamation of October, 1763, from exerciſing his legiſlative authority in the iſland of Grenada, in the ſame manner as before the ſaid proclamation was made, ſuppoſing he had, before that act, been legally poſſeſſed of ſuch authority: and in the former half of this interval, namely, in July, 1764, his Majeſty did exerciſe this legiſlative authority by iſſuing thoſe letters patent which impoſed the ſaid duty of four and a half per cent. Theſe letters patent therefore, according to your doctrine, muſt have

have been legal, when they were iſſued, if they would have been ſo before the ſaid proclamation of October, 1763. But the judges of the court of King's Bench in England have declared juſt the contrary, to wit, that thoſe letters patent were illegal at that time, becauſe they were poſterior to the ſaid proclamation, though they would have been, or, perhaps, might have been, legal, if they had been iſſued before it. Have you any way of reconciling this opinion of thoſe learned judges concerning the *immediate* operation of the king's proclamation of October, 1763, as a bar to the exerciſe of his antecedent legiſlative authority, with your own method of reaſoning upon it in the caſe of this province of Quebeck? or am I reduced to the neceſſity of adopting one of theſe opinions in direct oppoſition to the other?

ENGLISHMAN.

Truly your difficulty ſeems to be very well founded: nor do I know how to reconcile theſe contrary opinions concerning the time at which the proclamation of October, 1763, ought to be conſidered as a bar to the exerciſe of

of the king's legiſlative authority. I cannot therefore expect that you ſhould adopt my manner of interpreting that proclamation in oppoſition to that of thoſe learned judges. But, as to myſelf, I muſt ſtill retain my own opinion, notwithſtanding it is different from theirs; becauſe the judgements we form upon ſubjects that lie within the reach of our underſtandings, and which we have fully conſidered, do not depend upon our choice, but are the neceſſary effects of the impreſſions which the reaſons that have been offered to our conſideration concerning them, have made upon our minds; and I do not recollect that any reaſon was given by thoſe learned judges to ſhew why the king muſt be underſtood to be precluded by that proclamation from the exerciſe of his antecedent legiſlative authority over the iſland of Grenada during the interval that ſhould elapſe between the time of iſſuing it and the time at which his Majeſty, in his royal wiſdom, ſhould think the ſituation and circumſtances of the iſland to be ſuch as to admit of the meaſure of ſummoning an aſſembly of the people; I ſay, I do not recollect that any reaſon was given

to

to ſhew this, except the ſingle circumſtance of the want of an expreſs clauſe in the ſaid proclamation of October, 1763, to reſerve the legiſlative authority over the ſaid new governments to the Crown in the ſaid interval before the intended aſſemblies of the people could be eſtabliſhed, which I muſt confeſs I did not think a ſufficient reaſon to warrant that concluſion. However, I will confeſs that this difference of the opinion of thoſe learned judges from my own upon this ſubject, (which, in truth, I was not aware of till you mentioned it,) makes me diffident of the juſtneſs of my own way of conſidering it, though it has not intirely made me a convert to their opinion: and I therefore lay much leſs ſtreſs than I did at firſt, on the inference I drew from the application made to the parliament by the king's miniſters, when they recommended the paſſing the Quebeck-act, for the purpoſe of veſting a legiſlative authority over the province of Quebeck in the governour and council only.——But, I think, you ſaid you had another objection to that inference, which you wiſhed me to conſider. Pray, what was it?

This opinion of the judges of the King's Bench renders the foregoing anſwer to the ſaid firſt objection very doubtful.

FRENCH-

FRENCHMAN.

A ſecond objection to the aforeſaid inference.

That other objection to your inference was grounded on the government that had *in fact* been eſtabliſhed in the province ever ſince the laſt peace to the 1ſt of laſt May, 1775, when the preſent Quebeck-act took place. For during all that time this province was governed by a governour and council only, without an aſſembly of the people, by virtue of the king's ſingle authority, and without an act of parliament to authorize that mode of government: and the governour and council exerciſed a legiſlative authority in the province in various inſtances, as you well know, many ordinances having been made by them during that interval. Now the conduct of the Crown in thus eſtabliſhing in this province a government by a governour and council only, without an aſſembly, for the ſpace of between 10 and 11 years, (namely, from Auguſt, 1764, when general Murray's commiſſion of captain-general and governour in chief of this province was firſt publiſhed in the province, to the 1ſt of laſt May, when the Quebeck-act became of force

in

in it,) ſeems to preclude the inference, which you have drawn from the clauſe in the ſaid Quebeck-act which eſtabliſhes this kind of government, of a conſciouſneſs in his Majeſty's miniſters of ſtate of a want of a legal right in the Crown alone to eſtabliſh this mode of government. For, if they were conſcious of ſuch a want of legal authority in the Crown, why did they adviſe his Majeſty to exert ſuch an authority before the paſſing of the Quebeck-act by delegating to the governour and council only, without an aſſembly of the people, the power of making laws to bind the province? or was no ſuch power delegated to them by the Crown, though they took upon them to act as if it had been ſo? in which caſe the ſeveral ordinances made by them before the operation of the Quebeck-act muſt have had no legal validity.

ENGLISHMAN.

This is a very fair and natural objection to the inference I had drawn from the Quebeck-act, and well deſerves to be conſidered. But I believe I ſhall be able to anſwer it in a manner that will perfectly ſatisfy you, by

explaining to you the true ſtate of the fact upon this ſubject during the ten or eleven years you ſpeak of, which I perceive you are not fully acquainted with. The fact is as follows.

An anſwer to the ſaid ſecond objection.

In the commiſſion of captain-general and governour in chief of this province granted by his Majeſty, under the great ſeal of Great-Britain, to General Murray in the year 1764, there is a clauſe impowering the General to ſummon an aſſembly of the freeholders and planters of the province as ſoon as the ſituation and circumſtances of the province will admit thereof, and, with the conſent of ſuch aſſembly and of the council of the province, to make laws, ſtatutes, and ordinances for the peace, welfare, and good government of the ſame. But, though it is certain that his Majeſty was not then, and, as it ſince appears, is not yet, of opinion that the ſituation and circumſtances of this province were ſuch as to admit of the meaſure of ſummoning ſuch an aſſembly, yet it was not thought proper to inſert a clauſe in the ſaid commiſſion to impower the governour, *in the mean*

mean while and until ſuch aſſembly ſhould be ſummoned, to make ſuch laws and ordinances by the advice and conſent of the council of the province only. And yet it muſt be allowed that *that* would have been the legal and proper way of delegating ſuch a legiſlative authority to the governour and council only, if the Crown was legally poſſeſſed of a right to make ſuch a delegation, ſuch high powers being incapable of being legally transferred from the ſovereign to any of his ſubjects in any other manner than by an inſtrument under the great ſeal. This omiſſion, therefore, of a clauſe for this purpoſe in the governour's grand commiſſion under the great ſeal, (which was the only legal foundation of the government of this province,) though his Majeſty's miniſters had at the ſame time no intention of ſpeedily calling an aſſembly, and conſequently ſuch a clauſe would have been ſingularly expedient, if it had been lawful, did not look like a claim on the part of the Crown to a legal right of delegating ſuch legiſlative powers to the governour and council only, but rather like a tacit acknowledgement of the want of ſuch a right.

Of the legiſlative authority exerciſed in the province of Quebeck before the late Quebeck-act.

What then, you will aſk, could be the deſign and intention of his Majeſty's miniſters on this occaſion? Did they imagine that the province might be governed for ſome conſiderable time, (namely, until it ſhould be expedient to ſummon an aſſembly,) without paſſing any laws or ordinances at all?—Or, if they did not think this practicable, but intended that ſome ordinances ſhould, from time to time, be paſſed in it, as occaſions might require, by whom did they intend that ſuch ordinances ſhould be made?—— The proper anſwers to theſe queſtions I take to be as follows. His Majeſty's miniſters did not ſuppoſe that it would be poſſible to govern the province without paſſing any new ordinances *at all* in it, as occaſions might require, before an aſſembly ſhould be ſummoned in it; but they imagined that it might be ſufficient for its temporary welfare during that interval, to paſs only a few ordinances upon ſubjects of ſmall importance, ſuch as what you Frenchmen call *reglements de police*, or regulations relating to publick conveniency and decorum, without meddling with the criminal law in its higher branches,

ſo

ſo as to affect the lives or limbs of his Majeſty's ſubjects in the province, or their right to perſonal liberty, and without making free with their property by the impoſition of any duties or taxes. And with this view his Majeſty thought fit to delegate to general Murray, the governour of the province, by a private inſtruction under his ſignet and ſign-manual, the following very limited legiſlative authority, to be exerciſed by the advice and with the conſent of the council of the province only, and without the concurrence of an aſſembly, to wit, *an authority to make ſuch rules and regulations as ſhould appear to be neceſſary for the peace, order, and good government of the ſaid province; taking care that nothing be paſſed or done that ſhall any ways tend to affect the life, limb, or liberty of the ſubject, or to the impoſing any duties or taxes.* This legiſlative authority, you plainly ſee, was very ſhort of that which had been communicated to the governour by his commiſſion under the great ſeal, to be exerciſed in conjunction with an aſſembly of the freeholders; which was *to make laws, ſtatutes, and ordinances for the publick peace, welfare,*

A certain very limited legiſlative authority was delegated to the governour and council, without an aſſembly, by an inſtruction under the king's ſignet and ſign-manual.

welfare, and good government of the ſaid province, and this without any ſuch reſtrictions as thoſe above-mentioned with reſpect to the impoſition of duties or taxes, or to the paſſing ſuch laws as might affect the lives, or limbs, or liberty of his Majeſty's ſubjects. Yet, limited as this authority was, it was all the legiſlative authority that had either been delegated, or ſuppoſed to be delegated, to the governour and council of this province before the late Quebeck-act. And, if you reflect on the ſmall extent of this authority, and the private, imperfect, manner in which it was delegated, you will hardly, I imagine, be diſpoſed to conſider it as a fair and open exertion of an authority in the Crown to make laws for this province, or to delegate the power of doing ſo to the governour and council only.

FRENCHMAN.

Concluſion drawn from the conduct of the Crown in delegating the ſaid legiſlative authority by an inſtruction.

I certainly cannot conſider it in that light, but muſt rather look upon it as a kind of acknowledgement of a want of ſuch a legal authority in the Crown, and an expedient to make a ſhift without it for a ſhort time, by a tender and cautious uſe of a very limited legiſlative

legiſlative power of a doubtful nature, and which could be juſtified only by a kind of ſeeming temporary neceſſity of having recourſe to it during the interval of time that might elapſe before his Majeſty ſhould judge the ſituation and circumſtances of the province to be ſuch as to admit of the ſummoning an aſſembly. I therefore am ſatisfied that it ought not to operate in any degree as a bar to the inference you are diſpoſed to draw from the uſe made by his Majeſty's miniſters of ſtate of the authority of the Britiſh parliament, on the occaſion of the late Quebeck-act, for the purpoſe of veſting in the governour and council of the province a more ample power of making laws and ordinances for its government, to wit, that the Crown was conſcious of the want of a legal right to delegate ſuch a legiſlative power to them without the concurrence of the parliament. But that inference will, in my opinion, remain juſt and unimpeached, ſuppoſing the proclamation of October, 1763, did not operate as an immediate bar to the exerciſe of any legiſlative authority in the province without the concurrence of an

aſſembly,

aſſembly, but left the Crown at liberty to act according to the powers it had legally poſſeſſed before, during the interval that ſhould elapſe before the ſituation and circumſtances of the province ſhould, in his Majeſty's opinion, admit of the eſtabliſhment of an aſſembly. But this, we muſt remember, the judges of the King's Bench in England have unanimouſly determined againſt us.

Of the nature of inſtructions to governours of provinces under the king's ſignet and ſign-manual.

But, before we take leave of the ſubject we have been juſt now conſidering, I mean, the political ſituation of this province before the late Quebeck-act, I muſt trouble you with a queſtion that occurs to me concerning the king's inſtructions to his governours of his American provinces. Pray, is it underſtood that any powers whatſoever, even ſuch as are legally veſted in the Crown and are capable of being legally delegated by it, can be legally delegated by an inſtruction? For it ſeems ſtrange to me that they ſhould be ſo, ſeeing that inſtructions are things of a private nature, that ſeem intended to regulate the conduct of governours in the uſe of the high powers that are veſted in them by their publick

publick commiſſions, rather than to be the inſtruments by which ſuch powers are conveyed to them.

ENGLISHMAN.

Your conception of this matter ſeems to me to be perfectly juſt. Inſtructions to governours can convey no powers to them whatſoever, but are only to be conſidered as directions to them how to uſe the powers which are conveyed to them by their commiſſions, and are intimations of his Majeſty's reſolution to remove them from their governments and appoint other perſons in their room, in caſe they ſhall uſe thoſe powers in a different manner from that which is pointed out by their inſtructions. In ſhort, they are inſtruments of a private nature: and, accordingly, we are informed by Mr. Smith in his excellent hiſtory of New-York, that in that province the governour's inſtructions, (though they are in number above an hundred, and regulate the governour's conduct on almoſt every common contingency,) are never recorded. And the ſame thing may be ſaid, as I believe, with reſpect to the inſtructions given

No written inſtrument can legally convey any powers of government, unleſs it be made publick.

to the governours of other provinces. Now no inſtrument can, (as I conceive,) convey powers of government in any country, or according to any ſyſtem of laws, except it be of a publick nature, and the contents of it be made known to the perſons over whom thoſe powers are to be exerciſed, and who are to be bound to pay obedience to the acts that are to be done in purſuance of them. For how elſe ſhall the ſubjects over whom the perſon intruſted with ſuch powers is to preſide, know that he is to be their governour, or in what reſpects, and to what degree, they are bound to obey his orders? If a man of rank comes into a province, and tells the people of it, by word of mouth only, that the king has appointed him their governour, that ſurely will not be ſufficient to intitle him to their obedience; but they not only *may*, but *ought* to refuſe to obey him till he produces ſome regular inſtrument in writing, properly authenticated, or proved to proceed from the king's authority, by which it appears that he is ſo appointed. And the proper inſtrument for this purpoſe in the Engliſh government is a commiſſion under the great ſeal of Great-Britain,

The proper inſtruments for this purpoſe in the Engliſh government are commiſſions under the great ſeal.

Britain, the authority and importance of which ſeal is ſo highly protected by the law of England that it is the crime of high treaſon, and puniſhable with loſs of life and forfeiture of lands and goods to the Crown, to counterfeit it. It is only therefore by the production of a commiſſion ſo authenticated that a governour of a province can intitle himſelf to the obedience of its inhabitants.

Governours of provinces have a legal right to exerciſe only thoſe powers of government which are ſpecified in their commiſſions:

And further, when ſuch a commiſſion is produced and publiſhed in a province, ſo as to give the people of it a ſatisfactory aſſurance that the perſon who produces it has been appointed by the king to be their governour, they are only bound to obey him in the exerciſe of ſuch powers as are conveyed to him by the commiſſion, and not in other matters that are not mentioned in it, or that do not fall under the powers that are ſpecified in it. I mention this, becauſe I have known ſome perſons imagine a governour of a province to be *the full and general* repreſentative of the king's majeſty, and to be legally capable of exerciſing all the acts of authority in the province which

the king himſelf might lawfully exerciſe, if he were preſent there in his own perſon. But this is, undoubtedly, a very miſtaken notion, becauſe the king never delegates to any of his governours of provinces the whole of his royal authority, but ſpecifies in their commiſſions the powers he intends they ſhould exerciſe. It is true indeed that he might, if he pleaſed, make ſuch a delegation of his whole royal authority, by expreſsly declaring in his commiſſions to his governours, "that he gave them full power to act in their reſpective provinces in his place and ſtead, as his vice-roys and lieutenants, and to exerciſe every power of government in the ſame which he himſelf might lawfully exerciſe if he were there perſonally preſent:" at leaſt I know of nothing that could hinder him from ſo delegating his whole authority, if he thought fit. But it is certain that he never does ſo delegate it in his commiſſions to his governours of provinces, but, on the contrary, ſpecifies, at conſiderable length, in thoſe commiſſions, the particular powers he intends they ſhould exerciſe in their reſpective provinces,

And are not the full and general repreſentatives of the king.

provinces, and, with reſpect to ſome of thoſe powers, expreſsly reſtrains his governours from exerciſing them in the ſame extent as he himſelf might do; as, for inſtance, in the power of granting pardons to criminals, they being uſually reſtrained by the words of their commiſſions from granting pardons to perſons guilty of treaſon or wilful murder. Since therefore the king uſually thinks fit to delegate to his governours of provinces ſome portions of his royal authority, and not others, there is no way of knowing what portions of it he has ſo delegated, and what he has not, but by examining the commiſſions he has granted: and thoſe powers that are ſpecified in the commiſſions muſt be allowed to belong to the governours to whom the commiſſions are granted; and the acts done by the governours in the execution of thoſe powers muſt be ſubmitted to as legal: and all other branches of the royal authority beſides thoſe which are ſo ſpecified, muſt be ſuppoſed to have been reſerved by his Majeſty to his own perſon, and not to have been delegated to his governours.

If the king were to make his governours of provinces his full and general representatives, it would be attended with great inconveniences.

And indeed it is a moſt prudent and judicious practice thus to expreſs in the commiſſions of the governours of provinces the particular powers which his Majeſty intends to delegate to them, inſtead of delegating to them the whole royal authority by ſuch general and comprehenſive words as are above mentioned, or making them the *general repreſentatives* of their ſovereign, (as I have known ſome people conſider them,) with all the power which the king himſelf would lawfully poſſeſs, if he were preſent there in his own perſon: becauſe, if this were done, it would give occaſion to numberleſs diſputes and difficulties concerning the limits of the powers which the king himſelf might lawfully exerciſe in the provinces, if he were ſo perſonally preſent in them, which, it is probable, the governours of provinces would often conceive to be more various and extenſive than the people under their government would be willing to allow; all which diſputes are happily avoided by the prudent practice of ſpecifying in the commiſſions themſelves the powers which are intended to be delegated to the governours to whom the commiſſions are granted.

It

It ſeems reaſonable therefore to conclude upon the whole, that a governour of a province has a right to exerciſe juſt ſo much of his ſovereign's royal authority as is ſpecifically delegated to him by the words of his commiſſion under the great ſeal, and no more; and that every other delegation of the royal authority to him by any inſtrument not under the great ſeal, is illegal and void, even though the power ſo delegated ſhould be ſuch as the Crown has indiſputably a legal right to; and much more, therefore, in all other caſes.

FRENCHMAN.

This way of reaſoning on the nature of a governour's authority appears to me to be very clear and juſt. But I have been told that it has not been always adopted by the king's governours in America. For, according to this doctrine, the king's inſtructions to his governours, being under his ſignet and ſign-manual, can convey no powers to them whatſoever, nor even create any legal reſtraint upon them in the uſe of the powers which are legally delegated to them in their commiſſions

The king's inſtructions under the ſignet and ſign-manual cannot legally operate ſo as either to enlarge or reſtrain the powers of government contained in the governour's commiſſion.

commiſſions under the great ſeal, ſo as to make thoſe acts become illegal and void, which are done agreeably to ſuch powers given in the commiſſions but in oppoſition to the ſaid inſtructions. Thus, if the king, in his commiſſion under the great ſeal, gives his governour a general power to grant any lands in the province upon the uſual conditions; and, in his private inſtructions under his ſignet and ſign-manual, directs him to forbear making grants of ſuch and ſuch particular tracts of land, which his Majeſty chuſes to reſerve to himſelf; and the governour, notwithſtanding ſuch inſtruction, makes a grant of land in the ſaid excepted tracts; ſuch a grant will be valid by virtue of the general power of granting lands contained in the commiſſion under the great ſeal, notwithſtanding the exception of thoſe particular tracts of lands contained in the private inſtruction. And, in like manner, an act done in purſuance of a power contained in an inſtruction, but not in the commiſſion under the great ſeal, muſt be conſidered as illegal and void. This, if I underſtand you right, is your opinion upon this ſubject.

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ENGLISHMAN.

It is exactly ſo.

FRENCHMAN.

Of a clauſe in the commiſſions of governours of provinces, which refers to their inſtructions.

But I have been told that an opinion has prevailed amongſt ſome governours of provinces and other ſervants of the Crown, that the inſtructions given to governours under the king's ſignet and ſign-manual are of equal authority with the commiſſions under the great ſeal, and that there is a clauſe in almoſt every governour's commiſſion which refers to the inſtructions, and, as it were, adopts them into the commiſſion, and makes them partake of its high legal anthority derived from the great ſeal. Pray, do you know of any ſuch clauſe in the commiſſions uſually given to governours of provinces? and do you conceive that ſuch a clauſe can have the effect aſcribed to it? For to me it appears a very indirect and whimſical way of proceeding.

ENGLISHMAN.

There is in ſome of the commiſſions to governours of provinces, and perhaps in all of them, ſuch a clauſe as you ſpeak of. In the commiſſion to Sir Danvers Oſborne to be governour of New-York in the year 1754 it is expreſſed in theſe words. " Know you " that We, repoſing eſpecial truſt and con- " fidence in the prudence, courage, and " loyalty of you, the ſaid Sir Danvers " Oſborne, of our eſpecial grace, certain " knowledge, and meer motion, have " thought fit to conſtitute and appoint you, " the ſaid Sir Danvers Oſborne, to be our " captain-general and governour in chief in " and over our province of New-York and " the territories depending thereon in Ame- " rica: and we do hereby require and " command you to do and execute all " things in due manner that ſhall belong " unto your ſaid command and the truſt " we have repoſed in you, according to the " ſeveral powers and directions granted or " appointed you by this preſent commiſſion " and

The words of the ſaid clauſe.

" and inſtructions herewith given you, or " *by ſuch further powers, inſtructions, and* " *authorities, as ſhall at any time hereafter* " *be granted or appointed you under our ſignet* " *and ſign-manual*, or by our order in our " privy council, and according to ſuch rea- " ſonable laws and ſtatutes as now are in " force, or hereafter ſhall be made and " agreed upon by you, with the advice and " conſent of our council and the aſſembly " of our ſaid province under your govern- " ment, in ſuch manner and form as is " herein after expreſſed." And there is a clauſe of the ſame import, and expreſſed in almoſt the ſame words, in the commiſ- ſion given to general Murray to be governour of this province of Quebeck in November, 1763, and likewiſe in the two commiſſions given to general Carleton, in the years 1768 and 1774 to be governour of the ſame pro- vince. In this clauſe the words, " *by ſuch further powers, inſtructions, and authorities, as ſhall at any time hereafter be granted or appointed you under our ſignet and ſign-manual*," are thoſe to which you allude, and which have been ſometimes alledged as a proof that

The words of reference to the inſtruc- tions.

An inference that has been ſometimes drawn from theſaid clauſe.

the inſtructions given to a governour under the king's ſignet and ſign-manual are of equal weight and authority with the powers contained in his commiſſion under the great ſeal, (or, as the perſons who argue in this manner ſeem to conceive,) partake of the authority of the commiſſion under the great ſeal by being thus referred to by it. But this is in my opinion a very abſurd and pernicious way of reaſoning, and has a tendency to undermine and deſtroy the authority of the king's great ſeal, which is the peculiar inſtrument by which the law of England has appointed that, in all great and ſolemn acts, the regal power ſhall be exerciſed. For, if *ſome* additional powers, beyond thoſe which are expreſſed in the commiſſion, may thus be delegated to a governour of a province by a private inſtruction under the king's ſignet and ſign-manual, by virtue of a previous reference to them inſerted in the commiſſion, why may they not *all* be ſo delegated, and the commiſſion be reduced to this one ſentence, " We do appoint you our captain-general and governour in chief of ſuch a province, with ſuch powers as we

Tendency of the ſaid inference to undermine the authority of the great ſeal.

ſhall

ſhall hereafter inveſt you with by our inſtructions under our ſignet and ſign-manual?" But, if this were done, it is evident that the commiſſion under the great ſeal would no longer be a real and effectual commiſſion, delegating powers of government to the governour to whom it was given, but would be a mere nominal commiſſion, which could only operate as a grant of the title of governour of ſuch a province, as a title of honour; and the inſtructions would in truth be the commiſſion, or important inſtrument by which the powers of government would be communicated to the governour; that is, an inſtrument under the king's ſignet and ſign-manual would be the means of conveying thoſe high powers to the governour which, it is univerſally allowed, can be legally delegated only under the great ſeal. It is certain therefore that *all* the powers uſually veſted in a governour of a province cannot legally be delegated to him in this manner by an inſtrument under the king's ſignet and ſign-manual: and conſequently, ſince the ſame reaſon holds againſt the delegation of any one power of government in this manner as againſt

that

Concluſion againſt the ſaid inference.

that of any other power, we may conclude that no one power of government can be legally ſo communicated, but that all the attempts to delegate any powers of government by the king's inſtructions under his ſignet and ſign-manual, and likewiſe all attempts to reſtrain by ſuch inſtructions the full exerciſe of the powers legally delegated to a governour in his commiſſion under the great ſeal, are illegal and void. This, at leaſt, is my opinion beyond all manner of doubt; and therefore I look upon thoſe words to which you alluded in the commiſſions of many governours of provinces, to wit, "*by ſuch further powers, inſtructions, and authorities, as ſhall at any time hereafter be granted or appointed you under our ſignet and ſign manual*," as idle and unoperative in a legal way, but yet at the ſame time as tending to undermine and elude the authority of the great ſeal, and introduce a practice of exerciſing and delegating the great powers of the Crown by inſtruments under the king's ſignet and ſign-manual, inſtead of inſtruments under that more ſolemn, important, and antient ſeal which the law has always recognized as

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the true teſtimony of the full and deliberate exertion of the royal authority, and has accordingly protected by the ſanction of the higheſt penalties. And therefore I moſt heartily wiſh that theſe words, or, at leaſt, the two words *powers* and *authorities*, and the word *granted*, which refers to them, were to be left out of all the commiſſions which ſhall hereafter be granted to his Majeſty's American governours.

It would be right to leave out the ſaid words of reference to inſtructions in all future commiſſions to governours of provinces.

FRENCHMAN.

I intirely agree with you in thinking that they ought to be left out of the commiſſions, and cannot but wonder that they have ever been inſerted in them. For I cannot conceive what objection the kings of Great-Britain, or their miniſters, can ever have had to the ſpecifying in the moſt ample manner in the commiſſions given to the governours of provinces under the great ſeal, all the powers they intended the ſaid governours ſhould exerciſe. This would have at once removed all doubts and difficulties that might ariſe concerning the legality of the delegation of thoſe powers, and would have been

It ſeems ſtrange that they were ever inſerted in the commiſſions.

as

as ſhort and eaſy a method of conveying them as the other by the ſignet and ſign-manual, and, in my apprehenſion, more ſuitable to the dignity of the royal character; becauſe, the higher is the degree of authenticity with which the king's acts of ſtate are tranſacted, and the more ſolemn and formal the manner of tranſacting them, the greater will be the reverence with which they will be received by the people, and the more willing and ready the obedience that will be paid to them. It ſeems therefore ſurprizing to me that it ſhould ever have entered into the heads of the king's miniſters of ſtate to adviſe his Majeſty to attempt to delegate any powers of government to his ſubjects in any other way than under the great ſeal: and I beg you would let me know what you think may have been the motive that has given occaſion to ſuch a proceeding.

ENGLISHMAN.

A conjecture concerning the reaſons that may have been the occaſion of inſerting them in the commiſſions.

Truly I have been as much ſurprized at this practice as you can be: nor do I know any certain way of accounting for it. But I conjecture that the reaſon of it may have been

been as follows. The great ſeal of Great-Britain is kept by a great officer of ſtate called *the Lord Chancellor*, or *Lord keeper of the great ſeal*, (for they are preciſely the ſame officer under different titles;) who is generally ſome very eminent and learned lawyer, bred to the profeſſion of the law from his youth, and much ſkilled in the practice of it, and deeply verſed alſo in the civil hiſtory of England and the conſtitution of its government, or that part of the law of the kingdom which relates to the diſtribution of the ſeveral powers by which it ought to be governed, and the forms and ſolemnities with which thoſe powers ought to be adminiſtered. And it is underſtood to be his duty to examine the contents of every inſtrument to which he is commanded by the king to put the great ſeal, and to ſatisfy himſelf that it contains nothing but what is agreeable to law and juſtice before he puts the ſeal to it. And, if he puts the ſeal to any inſtrument that is contrary to law, or which, though agreeable to law, is manifeſtly contrary to the welfare of the kingdom, he is liable to be puniſhed for ſo doing by the judgement

Of the uſual character and qualifications of the lords chancellors, or lords keepers of the great ſeal, of Great-Britain.

of the Houſe of Lords in conſequence of an impeachment, or accuſation, preferred againſt him before them by the Houſe of Commons, and alſo, I believe, in the firſt caſe, or where he puts the ſeal to an inſtrument that is contrary to law, to an action at law at the ſuit of the perſon who is injured by means of ſuch illegal inſtrument. Theſe dangers, attending the abuſe of the great ſeal, make it difficult for the Crown to do illegal acts under that ſanction: becauſe the lord chancellor, from his knowledge of law and hiſtory, his habits of examining matters of ſtate with care and caution, and ſurveying all their relations and conſequences, will not eaſily be brought to uſe the great ſeal for ſuch purpoſes. But the caſe is otherwiſe with reſpect to the king's ſignet. The inſtruments executed under the king's ſignet are counter-ſigned by the king's ſecretaries of ſtate, without ever under-going the lord chancellor's examination, or that of the privy-council, or even of the attorney-general, or any other perſon who, from his education and ſtation in life, may be ſuppoſed to be acquainted with the law. For, as to the

Of the different temper and ſpirit that prevails amongſt the king's ſecretaries of ſtate.

ſecretaries

ſecretaries of ſtate, you certainly muſt know as well as I do, that they are uſually men of high rank, born to titles and great eſtates, and bred in habits of eaſe and luxury, and but little acquainted, or inclined to become acquainted, with ſo dry a ſubject as the law. Perſons of this deſcription, when they are placed in ſtations of authority, are much more likely to adviſe their ſovereign to do acts of an irregular, or doubtful, nature, without inquiring how far the law allows of them, than a learned and grave lord chancellor, if it were but through mere ignorance, and though their intentions were very pure: but it often happens that to this ignorance of the law they add a contempt for it and a diſpoſition to diſregard its reſtraints, and overleap the limits it preſcribes to their authority, which they are apt to conſider as narrow pedantick rules which it is below their dignity to ſubmit to, and, like Achilles in the character given of him by Horace, *Jura negant ſibi nata, nihil non arrogant armis.* They are therefore fond of the doctrines of *reaſon of ſtate*, and *ſtate neceſſity*, and *the impoſſibility of providing for great emergencies*

and extraordinary caſes, without a diſcretionary power in the Crown to proceed ſometimes by uncommon methods not agreeable to the known forms of law, and the like dangerous and deteſtable poſitions, which have ever been the pretence and foundation for arbitrary power. I do not mean that all ſecretaries of ſtate are of this way of thinking: for undoubtedly ſome of thoſe miniſters have been men of a different character: but there have been, 'as I believe, enough of that diſpoſition to warrant me in ſaying that it is the general ſpirit and complexion of the office. Nor would it be difficult to find proofs of this *extra-legal*, or rather *ſupra-legal*, diſpoſition in the powers they have aſſumed to themſelves without any clear warrant of law for ſo doing, and in the manner they have exerciſed thoſe powers thus unwarrantably aſſumed: of which I will mention to you one remarkable inſtance, which, in the caſe of the celebrated Mr. Wilkes, ſome years ago engaged the attention of all England. That gentleman had written, (or I ſhould rather ſay, was ſuppoſed to have written; for it was never proved

An account of the arreſting and impriſoning Mr. Wilkes in April, 1763, by a general warrant iſſued by the Earl of Halifax, one of the king's ſecretaries of ſtate.

proved upon him;) a political paper called the North-Briton, N°. 45, in the month of April, 1763, ſoon after the concluſion of the late definitive treaty of peace, by which this province of Canada was ceded to the crown of Great-Britain: in which paper there was a paſſage that gave offence to the Court and was conſidered as in a high degree ſeditious. Upon this a reſolution was taken by the king's miniſters of ſtate to arreſt Mr. Wilkes and proſecute him in the court of King's-Bench for writing and publiſhing the ſaid ſeditious paper, or libel; and he was accordingly arreſted, and all his papers of every kind were ſeized, by virtue of a warrant iſſued to one of the king's meſſengers by the late earl of Halifax, who was at that time one of his Majeſty's ſecretaries of ſtate. And this warrant was a *general warrant*, which did not mention Mr. Wilkes's name, but impowered the meſſenger to arreſt the perſons (whoever they might be) who had been concerned in writing and publiſhing the ſaid ſeditious paper, called the North-Briton, Number 45. This omiſſion of Mr. Wilkes's name made the warrant utterly illegal,

The ſaid warrant was illegal.

illegal, becauſe it required the king's meſſenger (who was a mere miniſterial officer, or rather who acted as ſuch) to do that which was the buſineſs of a judicial officer, or magiſtrate, that is, to exerciſe an act of judgement of an high nature by determining who were, and who were not, concerned in the commiſſion of the offence in queſtion. This was an act of judgement of ſo important a kind that even a magiſtrate ought not, according to the maxims of the Engliſh law, to have ventured to do it without having received an information upon oath from ſome credible witneſs, that ſuch, or ſuch, a perſon had committed the offence in queſtion, to be a ground for his ordering him to be arreſted; becauſe, if magiſtrates had a power of arreſting men without ſuch previous information, and merely upon their own ſuſpicions, or pretended ſuſpicions, they might cauſe any perſon, how innocent ſoever, to be thrown into priſon whenever they thought fit. And much leſs can a magiſtrate delegate ſuch a power of determining who is the perſon that has committed a particular offence, to a mere miniſterial officer of juſtice, ſuch as the

the king's meſſenger; which is done whenever a general warrant is iſſued. This general warrant therefore iſſued by Lord Halifax was clearly illegal, and conſequently the arreſt and impriſonment of Mr. Wilkes in purſuance of it were illegal likewiſe, and became a juſt ground for an action at law at the ſuit of Mr. Wilkes againſt Lord Halifax, the ſecretary of ſtate, for a falſe, or wrongful, impriſonment of him: and Mr. Wilkes did afterwards accordingly bring ſuch an action againſt him in the court of Common-Pleas in England, and did recover, by the verdict of a jury, a large ſum of money as a compenſation for the damage he had wrongfully ſuſtained by ſuch impriſonment. It muſt nevertheleſs be acknowledged, in juſtice to the late Lord Halifax, that, though he iſſued the ſaid general warrant, he was not incited to do ſo by the haughty ſpirit which I have been juſt now deſcribing as too apt to influence the great men who fill thoſe offices, but was himſelf rather inclined, (from his own natural good ſenſe, and, as we may ſuppoſe, the moderation of his temper,) to inſert Mr. Wilkes's name in the warrant, but

Mr. Wilkes afterwards brought an action of falſe impriſonment againſt Lord Halifax on account of this arreſt, and recovered a large ſum of money as a compenſation for it.

was

was over-perſuaded to the contrary by Mr. Philip Carteret Webb, who was at that time ſollicitor to the Treaſury and who urged him to make the warrant *general*, becauſe, he ſaid, it had been the conſtant uſage of former ſecretaries of ſtate to frame their warrants in that manner, as indeed he afterwards proved to the world that it had been, by publiſhing a collection of warrants iſſued by different ſecretaries of ſtate on various occaſions in almoſt every reign for the preceding hundred years, or from the year 1662, if my memory does not deceive me, of which the greater part were drawn up in that vague and general manner. This may, perhaps, be ſufficient to exculpate the late Lord Halifax; but it ſerves ſtrongly to prove the violent ſpirit which has uſually prevailed in the perſons who have held the office of ſecretary of ſtate, ſince it ſhews that for a hundred years together they have taken upon them to act, in the buſineſs of arreſting ſtate-offenders, in a manner that bids open defiance to the firſt principles of law and juſtice. And this they have done too without ever having

Theſe general warrants, (though manifeſtly illegal,) had been uſually iſſued by ſecretaries of ſtate for an hundred years before.

The ſaid practice ſhews the ſpirit of violence and arbitrary power that has uſually prevailed in the ſecretary of ſtate's office.

having been clearly inveſted by any ſtatute of the kingdom with any power of arreſting men at all, even by warrants that name, or deſcribe exactly, the perſons who are to be arreſted by them, and that are grounded upon previous informations of credible witneſſes upon oath; and certainly without having any ſuch authority by virtue of the old common law, or general uſage of England from time immemorial, becauſe the office of ſecretary of ſtate itſelf has not exiſted long enough for that purpoſe, being no older than the reign of Henry the 8th, which began in the year 1509, whereas, in order to be poſſeſſed of ſuch an authority by antient cuſtom from time immemorial, it ought to have been poſſeſſed of it before the time of king Richard the 1ſt, or about the year 1189. But the truth is, that the king's ſecretaries of ſtate are his clerks, or letter-writers, whoſe buſineſs it is to make known his Majeſty's pleaſure to his ambaſſadors in foreign courts, or to the ambaſſadors of foreign courts at his Majeſty's court, or to his Majeſty's ſubjects in his own dominions on various occaſions, but are not, or, at leaſt, were not originally,

The ſecretaries of ſtate have never been clearly inveſted with a power of arreſting men *at all*, even by regular warrants.

his Majeſty's magiſtrates, or the delegates of his judicial power for the purpoſe of adminiſtering juſtice in his name and behalf in any reſpect, and therefore ought not to arreſt ſtate-offenders any more than any other offenders, or any more than they ought to try them for their offences and condemn them to puniſhment, as is done by real magiſtrates. For the arreſting, trying, and condemning men for offences againſt the laws are, all of them, branches of the judicial power of the Crown, and ought therefore to be exerciſed only by the known magiſtrates of the kingdom, to wit, the judges and juſtices of oyer and terminer, and juſtices of the peace, who are regularly inveſted with competent authority for that purpoſe by commiſſions under the great ſeal. And, as to the king's meſſengers, they are not the proper miniſterial officers of juſtice, like ſheriffs and conſtables, but are only (as their name imports) ſervants kept in the king's pay for the purpoſe of carrying meſſages for him with fidelity and expedition, either within the kingdom or without, as, for inſtance, to carry diſpatches to his Majeſty's ambaſſadors in foreign countries;

Nor are the king's meſſengers proper officers to execute ſuch warrants.

tries: ſo that it ſeems doubtful whether even a legal warrant to arreſt a man, iſſued by a known magiſtrate, as a juſtice of the peace or a judge of the court of King's Bench, can be legally executed by one of theſe meſſengers, unleſs it be in thoſe caſes, (if there are ſuch,) in which it may be executed by any perſon whatſoever as well as by a ſheriff or conſtable, or other known miniſterial officer of juſtice. You ſee therefore that there is a threefold irregularity grown up in the ſecretary of ſtate's office with reſpect to this practice of arreſting men for ſtate-offences. In the firſt place they have erected themſelves into judicial officers, or magiſtrates, for this purpoſe; in the ſecond place they have made uſe of king's meſſengers, inſtead of ſheriffs, or conſtables, or other known miniſterial officers of juſtice, to execute their warrants; and in the third place they have framed their warrants in a *general* manner, without naming the particular perſons they meant to have arreſted, and confining the warrants to them only, but leaving a liberty to the meſſengers, who are to execute the warrants, to arreſt any perſons whom they,

A threefold irregularity has grown up in the ſecretary of ſtate's office.

the meſſengers, ſhall think, or ſay that they think, to have been guilty of the offences in queſtion. Theſe are ſtrange licences that have crept into the practice of the ſecretary of ſtate's office, and they ſufficiently ſhew the violent ſpirit that has prevailed in it. For, if a ſpirit of moderation and legal caution had prevailed in it, their method of proceeding would undoubtedly have been as follows. When any offence againſt the ſtate had been committed, (whether it were high treaſon or any leſſer offence, ſuch as a ſeditious libel,) they would have received and procured all the information they could get at concerning both the offence itſelf and the perſons who had committed it; and, if they had thought that information ſufficient to ſupport a proſecution and produce the conviction and puniſhment of the offenders, or even, if they had thought it ſufficient to juſtify the arreſting and impriſoning them for a time, in order to prevent the execution of their dangerous deſigns, and in expectation of further proof againſt them before their trials ſhould come on; they would have laid it before the chief juſtice of the King's Bench, or before ſome diſcreet

The manner in which a prudent and moderate ſecretary of ſtate ought to proceed in the buſineſs of arreſting ſtate-offenders.

diſcreet and truſty juſtice of the peace, and have deſired him, (if he thought the information ſufficient, in point of law, to juſtify the arreſting and impriſoning the offenders,) to ſend for the witneſſes who had given the information, and to examine them himſelf upon their oaths, ſo as to take their information from their own mouths and upon oath, and then to iſſue his warrant in due form of law to ſome conſtable, or other fit miniſterial officer of juſtice, to arreſt the offenders and commit them to the proper priſons. This would have been the conduct of prudent and moderate men in the office of ſecretary of ſtate, who had had a tender regard for the laws and liberties of their country; and it would have contributed full as much as the other way of proceeding, to the diſcovery and puniſhment of real offenders, without endangering the ſafety of innocent perſons, or gradually tending to introduce a practice of arbitrary impriſonment at the pleaſure of the king's miniſters of ſtate. And accordingly we find in a very able argument of Sir Bartholomew Shower, (who was an eminent lawyer in king William's reign,)

reign,) upon this ſubject of the pretended power of ſecretaries of ſtate to commit offenders to priſon, that Mr. Henry Coventry, a gentleman of great prudence and ability, who was ſecretary of ſtate about the middle of king Charles the 2d's reign, did ſcruple to exerciſe this power, of committing offenders to priſon, by virtue of his office of ſecretary of ſtate alone, and, by the advice of Sir William Jones, the moſt learned lawyer of his time, procured himſelf to be made a juſtice of the peace, and took the neceſſary oath to qualify himſelf to act as ſuch, in order that he might be enabled to make ſuch commitments legally, when the buſineſs of his office of ſecretary of ſtate ſhould give him occaſion to do ſo. And Sir Bartholomew ſays further in the ſame argument, that ſo lately as in the year 1678, (which was within his own memory,) when the popiſh plot had increaſed the number of priſoners to a wonderful degree, it was notoriouſly known that Sir William Scroggs, who was at that time chief juſtice of the court of King's Bench, was often ſent for to Whitehall (that is, to the king's palace, where the privy council met,) to examine, and

The cautious conduct of Sec. Coventry on thoſe occaſions.

In the year 1678 the chief juſtice of the King's Bench was applied to for the purpoſe of arreſting ſtate-offenders.

and commit, and grant warrants: and that of late years, (that is, for ſome years before the year 1695, when this argument was delivered,) the principal ſecretaries of ſtate had thrown that burthen, of examining and committing offenders to priſon, off from themſelves upon their under-ſecretaries, who had been ſworn juſtices of the peace; and that Mr. Bridgeman, (who was at that time one of the under-ſecretaries of ſtate,) had accordingly very often executed the office of a juſtice of the peace at Whitehall. There are many other things in that argument of Sir Bartholomew Shower upon this ſubject, that are extreamly curious and intereſting, and that prove very clearly, in my apprehenſion, that a ſecretary of ſtate, in his capacity of ſecretary of ſtate alone, or without being a juſtice of the peace, had no legal authority to commit any man to priſon for any crime, however great and however poſitively charged, by any warrant, however particular and exact; and much leſs by a general warrant. But for theſe matters I muſt refer you to the argument itſelf, which is to be found in the fourth

fourth volume of the State Trials, page 554, &c. in the report of the proceedings between the King and Kendal and Roe, who had been committed to prison for high treason.—— But, I believe, I have said enough upon this subject to convince you, that, notwithstanding the prudence and moderation of Secretary Coventry, and, perhaps, some other gentlemen who have held the office of secretary of state in England, there has, upon the whole, been a propensity in those officers to enlarge the powers of their office, and to disregard, in the conduct of publick business, the strict restraints with which the law has circumscribed, and, as they would call it, fettered, the exercise of the royal authority.

Conclusion concerning the general temper and spirit that has prevailed in the secretary of state's office.

FRENCHMAN.

I see very plainly the spirit by which they have been governed. It is not unlike a maxim that has prevailed, (as I have heard) in the French government, to which I was formerly subject; though, fortunately for Great-Britain, it has not been carried in that kingdom to near so great an extent as in France.

Resemblance of the said spirit to a maxim that has prevailed in the French government.

This

This maxim is, that the king of France acts in the government of his kingdom, on different occaſions, in two diſtinct capacities, his ordinary capacity and his extraordinary capacity. In his ordinary capacity he exerciſes his power by certain known rules and certain known magiſtrates, ſuch as the officers of his parliaments and other courts of juſtice, and other ordinary magiſtrates, whoſe juriſdictions are known and circumſcribed by the known laws of the kingdom. But in his extra-ordinary capacity he exerciſes his power in ſuch manner, and by the intervention of ſuch perſons, as he thinks proper;—ſometimes ſtopping the regular proceedings of courts of juſtice, even in civil cauſes, by ſpecial orders ſent to the courts for that purpoſe, which they dare not diſobey;——at other times appointing new and ſpecial juriſdictions, or perſons, to try particular cauſes or perſons, who would otherwiſe be tried in the ordinary courts of juſtice;——and very frequently impriſoning perſons, by letters *de cachet*, that is, by letters, or orders, under his ſignet and ſign-manual, and which are executed oftentimes by officers of his army,

Of the French king's ordinary and extraordinary capacities.

for ſuch length of time, and in ſuch places, as he thinks fit, when, perhaps, by the ordinary courſe of juſtice, as it is adminiſtered by the ordinary magiſtrates of the kingdom, the perſons ſo treated would not be liable to be impriſoned at all. This doctrine of a double capacity, in which the king of France may act, has been the ſource of great hardſhips and oppreſſions in that kingdom, and indeed, one may ſay, of all the oppreſſions that have been practiſed in it againſt *particular men* that have been obnoxious to the court or miniſters, though *bodies of men* have ſometimes been unjuſtly treated by means of ſevere publick edicts formally promulged by the kings of France in their character of legiſlators of that kingdom. It is true indeed that this latter character has been uſurped by them, or aſſumed without the conſent of the people, within the two or three laſt centuries, and that in former times they exerciſed their legiſlative authority in conjunction with the States-General of France, aſſembled for the purpoſe, in the ſame manner as our own gracious ſovereign exerciſes the like authority in conjunction with the parliament of

His power of acting in his extraordinary capacity has been productive of more miſchief to the people of France than his exerciſe of the whole legiſlative authority by his public edicts.

of Great-Britain. But, however, the exerciſe of this uſurped power of legiſlation is a much more *tolerable* ſpecies of oppreſſion than *that other*, which ariſes from the doctrine of the king's having a right to act in his extra-ordinary capacity, and to employ extra-ordinary inſtruments of his royal will, whenever he thinks fit; becauſe in all publick edicts that concern whole bodies of men, it is probable that, though they may be ſometimes very detrimental to the publick welfare, yet ſome degree of decency, at leaſt, and ſome appearance of reaſon and juſtice, will be preſerved, in order to preſerve, in ſome degree, the good opinion and reverence of the people, without which no government can be long ſecure. It would therefore be a prodigious improvement of the condition of the ſubjects of the king of France, if he would give up his power of acting in his extra-ordinary capacity and by the aſſiſtance of extra-ordinary inſtruments, though he ſhould retain the full power of making ſuch new laws, and impoſing ſuch taxes, as he thought fit, by his ſingle authority by means of his publick edicts. But this is ſtill more

to be inſiſted on in a country, which, like Great-Britain, can boaſt of a free government. For in ſuch a country the ſmalleſt attempt in the ſervants of the Crown to introduce this doctrine of a power in the king to act in an extra-ordinary capacity, or by extra-ordinary inſtruments of his royal pleaſure inſtead of the ordinary magiſtrates and officers of juſtice, ought to be univerſally dreaded and deteſted, and oppoſed with the utmoſt vigour that the laws will allow. And upon this account I am ſorry to hear that the ſecretaries of ſtate in England have been tamely permitted to aſſume to themſelves the power of iſſuing warrants to commit offenders to priſon, and to employ the king's meſſengers, inſtead of the ſheriffs and conſtables, in the execution of them, without being authorized to do ſo by ſome act of parliament. It is a practice of a ſuſpicious and dangerous tendency.—— But now I beg you would come back to the ſubject we were before conſidering, to wit, the king's inſtructions to his governours of provinces, and let me know by what reaſon you ſuppoſe the miniſters of ſtate in England have ſometimes been induced to adviſe their

Every attempt of the Crown to act in an extraordinary capacity ought, in a free country like England, to be oppoſed with vigour.

ſovereigns

ſovereigns to delegate ſome powers of government to their governours of provinces by ſuch inſtructions under the ſignet and ſign-manual, rather than by their publick commiſſions, or letters patent, under the great ſeal.

ENGLISHMAN.

The only way that I can account for this practice is by ſuppoſing that miniſters of ſtate, when they have been diſpoſed to engage in meaſures reſpecting his Majeſty's American provinces, that were not perfectly, or manifeſtly, agreeable to law, or that, though agreeable to law, were nevertheleſs of an offenſive or alarming nature, have thought it a ſafer and quieter way of proceeding to give the governours of thoſe provinces the neceſſary powers and directions for ſuch purpoſes by private inſtructions under the king's ſignet and ſign-manual than by the more ſolemn and publick method of letters patent under the great ſeal. By this means they have avoided the objections to them which might have ariſen from thoſe two great law-officers, the lord chancellor and the king's attorney-general, by whom all letters patent under

A conjecture concerning the motives that may have given riſe to the practice of delegating ſome of the powers of government to governours of provinces by inſtructions under the ſignet and ſign-manual.

under the great ſeal are inſpected and examined before they paſs, but who have nothing to do with inſtructions under the ſignet and ſign-manual: and by this means alſo the powers ſo given to governours may be kept from the knowledge of the people of their reſpective provinces, if not wholly, yet at leaſt for a time, namely, till the governours find occaſion to make uſe of them; whereas, if they were inſerted in the commiſſions to the governours under the great ſeal, which are publickly read to the people at large immediately upon every governour's arrival in his province, and are afterwards recorded in the office of the regiſter, or clerk of the enrollments, of the province, to be there inſpected by every perſon that is deſirous of reading them, they would immediately become the object of the people's attention, and might give them ſome uneaſineſs and ſpread an alarm amongſt them. Accordingly we ſee in the caſe of our own province of Quebeck, that, ſo long as the delegating the powers of legiſlation to the governour and council only, without an aſſembly of the people, was a matter of a doubtful and delicate

The conduct of the Crown in the delegation of a limited degree of legiſlative power to the governour and council of the province of Quebeck, without an aſſembly, by an inſtruction under the ſignet and ſign manual, is a confirmation of the laid conjecture.

delicate nature, not clearly and manifeſtly within the compaſs of the king's legal prerogative, (which was the caſe until the late Quebeck-act,) his Majeſty's miniſters of ſtate thought fit to adviſe his Majeſty to delegate theſe powers to his ſucceſſive governours of this province, General Carleton and General Murray, only by an inſtruction under his ſignet and ſign-manual, which accompanied their reſpective commiſſions in the years 1763 and 1768, but not to mention them in the commiſſions themſelves under the great ſeal, which contained only the common clauſe for delegating the powers of legiſlation to the governour, council, and aſſembly. And this precaution was thought neceſſary to be uſed, notwithſtanding the power of legiſlation thus delegated by a private inſtruction, to the governour and council only, was of a much narrower extent, (as we have already obſerved,) than that which was delegated to the governour, council, and aſſembly, by the commiſſion, not being (as that was) a general *power to make laws, ſtatutes, and ordinances for the peace, welfare, and good government of the province*, but only *an authority to make*

make ſuch rules and regulations as ſhould appear to be neceſſary for the peace, order, and good government of the ſaid province; taking care that nothing be paſſed, or done, that ſhall any ways tend to affect the life, limb, or liberty of the ſubject, or to the impoſing any duties or taxes. This was an authority of ſo very narrow an extent that it could hardly be made to anſwer the purpoſes of good government in the province; becauſe it is almoſt impoſſible to make an effectual regulation upon any ſubject without in ſome degree affecting, if not the lives and limbs, yet at leaſt the liberty of the perſons who are to be bound by it. Yet, narrow as this authority is, you ſee that his Majeſty did not think proper to delegate it to the governour and council of the province by his letters patent under the great ſeal, but only by a private inſtruction. But, when the act of parliament for the government of the province of Quebeck had clearly and poſitively enabled his Majeſty to appoint a council in the province, who ſhould have *power* (as the act expreſſes it) *to make ordinances for the peace, welfare, and good government of the ſaid province,*

When the Quebeck-act was paſſed, a greater degree of legiſlative power was delegated to the governour and council by a clauſe in the governour's commiſſion under the great ſeal.

province, with the consent of his Majesty's governour, or, in his absence, of the lieutenant-governour, or commander in chief for the time being, and a new commission was to be given to general Carleton, grounded on the said act, this legislative authority was delegated to the governour and council in a plain, and express, and ample, manner by a clause in the commission under the great seal, just as in the former commissions the same authority had been delegated to the governours, councils, and assemblies. This, I think, is sufficient to shew that, when recourse has been had to the signet and sign-manual for the delegation of any powers of government to the governours of provinces, it has been in cases in which doubts have probably been entertained by the king's ministers concerning the legal right of the Crown to delegate them at all, or in which, at least, it was apprehended that the open delegation of them by the commissions under the great seal was likely to give offence, or create uneasiness, in the provinces in which they were to be exercised. And, as for the words of reference to instructions under the signet and

ſign-manual, which we have before obſerved to be inſerted in the commiſſions of governours, they ſeem to be put there in order to give to the inſtructions, ſo referred to, an appearance of partaking of the authority of the commiſſion under the great ſeal, in which the ſaid reference is made; and conſequently they ſeem to imply a kind of acknowledgement of the legal inſufficiency of the ſignet and ſign-manual alone to convey a delegation of the powers contained in the inſtructions. But theſe appear to me to be poor ſhifts and unhandſome arts of government, and ſuch as tend to no good purpoſe. It would, ſurely, be better to proceed in a plain and open way; that is, for his Majeſty, in thoſe caſes in which he, in his royal wiſdom, ſhould think fit to delegate to his governours of provinces any uncommon powers of government in their reſpective provinces, to conſider firſt, whether, or no, the Crown was legally intitled to exerciſe thoſe powers itſelf and to delegate them to any other perſon; and, if it had a clear legal right to do ſo, in ſuch caſe to delegate ſuch powers to the ſaid governours by expreſs clauſes

A conjecture concerning the reaſon of inſerting in the commiſſions of governours of provinces under the great ſeal a clauſe of reference to powers to be delegated to them by inſtructions under the ſignet and ſign-manual.

It would be more juſt and prudent to delegate no powers of government any other way than by an inſtrument under the great ſeal.

clauſes in his letters patent to them under the great ſeal; but, if doubts could be entertained concerning the right of the Crown to exerciſe or delegate ſuch powers, to have recourſe to the ſupream and indiſputable authority of parliament to cauſe the ſaid governours to be inveſted with the ſaid neceſſary powers, as has been done with reſpect to this province by the late Quebeck-act. For nobody, I preſume, will deny that, if it were fit *at all* to inveſt the governour and council of this province, without an aſſembly of the people, with a power of making laws for it, the proper method of doing this was by an act of parliament. The juſtice and utility of that, and many other of the proviſions of that act, are what, indeed, we cannot eaſily be perſuaded of: but, if they had been juſt and uſeful to us, the meaſure itſelf of eſtabliſhing them by the authority of parliament muſt be acknowledged to be right. And the ſame thing ought to be done in every other caſe in which the king thinks any meaſures to be neceſſary to be taken in a province, which are not clearly, (beyond even the ſhadow of a doubt,) within the

And, if doubts are entertained concerning the legal right of the Crown to delegate the intended powers, recourſe ſhould be had to the authority of parliament for the purpoſe.

compaſs of the king's legal prerogative. And, as for inſtructions under the king's ſignet and ſign-manual, they ſhould be employed for their original and proper purpoſe, which is that of conveying to his Majeſty's governours the directions he thinks fit to give them concerning the manner in which he would have them uſe the powers of government which he has before legally delegated to them under the great ſeal; and for no other purpoſe whatſoever.

Theſe are the beſt conjectures I can make, (for, I acknowledge, they are but conjectures,) concerning the reaſons that may have induced the miniſters of ſtate on ſome occaſions to adviſe the Crown to delegate the powers of government to governours of provinces, by inſtructions under the ſignet and ſign-manual, inſtead of the commiſſions, or letters patent under the great ſeal.

FRENCHMAN.

They ſeem, however, to be plauſible conjectures, and will account tolerably well for this irregular and unjuſtifiable practice. And,

as

as to thoſe words in the governour's commiſſion which refer to the inſtructions under the ſignet and ſign-manual, and ſeem to be intended to communicate to them in an indirect manner the authority of the great ſeal, they enable me to account for a difficulty which had before occurred to me relating to the ordinances of this province paſſed by the governour and council during the adminiſtration of General Murray. For I had obſerved that in the pre-ambles to ſeveral of thoſe ordinances it is ſtated that they are made by the ſaid governour, by the advice, and with the conſent of his Majeſty's council of the province, and *by virtue of the power and authority to him given by his Majeſty's letters patent under the great ſeal of Great-Britain*, notwithſtanding (as you ſome time ſince obſerved) there was no clauſe in his commiſſion under the great ſeal that expreſsly gave him ſuch a power. This ſeemed to me extreamly ſtrange; and I did not know how to account for it. But now I ſuppoſe that the perſons who framed and paſſed thoſe ordinances, muſt have alluded to thoſe words in the commiſſion under the great ſeal which refer to

Of the ordinances paſſed by the governour and council of Quebeck before the late Quebeck-act.

to the powers contained in the inſtructions, amongſt which there was a power to exerciſe a certain limited legiſlative authority by the advice and conſent of the council only, and muſt have conſidered thoſe powers in the inſtructions as being, in a manner, *adopted*, by ſuch reference, into the commiſſion, and made to partake of its authority.

ENGLISHMAN.

There can be no other way of reconciling with truth the aſſertion you mention as having been made in the pre-ambles of governour Murray's ordinances. But, pray, is this aſſertion to be found in the pre-ambles of *all* thoſe ordinances, or only of *ſome* of them? for I had imagined that in ſome of thoſe ordinances the governour had fairly ſtated in the pre-amble that his power of making laws with the conſent of the council of the province only, had been delegated to him only by his inſtructions. I beg you would therefore take down that little thin folio volume of our provincial ordinances, and examine the pre-ambles of them, and tell me how this is.

FRENCH-

FRENCHMAN.

I will do ſo with pleaſure: but I am confident that in many of them the preambles will be found to be as I have ſtated them. But the book will determine.—— The firſt ordinance is expreſſed in the manner you have ſuppoſed, and ſtates the legiſlative authority of the governour and council of the province to have been communicated by the king's inſtructions. It is intitled, "*An ordinance for regulating and eſtabliſhing the currency of the province:*" and the preamble of it is as follows; *Whereas his moſt Sacred Majeſty, by his inſtructions to his Excellency, bearing date at Saint James's the ſeventh day of December, one thouſand, ſeven hundred, and ſixty-three, hath been pleaſed to authorize and impower his ſaid Excellency, with the advice and aſſiſtance of his Majeſty's council, to make rules and regulations and ordinances, for the better ordering and well governing of this his province of Quebeck, &c.* This ordinance is dated September the 14th, 1764.

The

The next ordinance that occurs is the great ordinance of Sept. 17, 1764, for eſtabliſhing courts of judicature in the province. In the pre-amble to this ordinance there are theſe words. *His Excellency, the governour, by and with, the advice, conſent, and aſſiſtance of his Majeſty's council, and by virtue of the power and authority to him given by his Majeſty's letters patent under the great ſeal of Great-Britain, hath thought fit to ordain and declare, &c.* Here, you ſee, the governour affirms, that he acts by virtue of a power given him under the great ſeal, as I had ſuppoſed. For I had this ordinance principally in my mind, when I ſaid that ſuch an aſſertion was contained in ſome of the pre-ambles to the provincial ordinances; this ordinance, from its great importance and our frequent occaſion to refer to it, having made a deeper impreſſion on my memory than any other.

ENGLISHMAN.

I muſt, however, obſerve that the governour had more reaſon for aſſerting that he acted by virtue of an authority under the great ſeal in paſſing this ordinance than in paſſing any other ordinance;

ordinance; becauſe there was a clauſe in his commiſſion of governour under the great ſeal which expreſsly authorized him to erect courts of judicature in the province with the advice and conſent of the council only. This clauſe was in theſe words. *And we do by theſe preſents give and grant unto you, the ſaid James Murray, full power and authority, with the advice and conſent of our ſaid council, to erect, conſtitute, and eſtabliſh ſuch and ſo many courts of judicature and publick juſtice within our ſaid province under your government as you and they ſhall think fit and neceſſary for the hearing and determining of all cauſes, as well criminal as civil, according to law and equity, and for awarding execution thereupon, with all reaſonable and neceſſary powers, authorities, fees, and privileges, belonging thereunto; as alſo to appoint and commiſſionate fit perſons in the ſeveral parts of your government to adminiſter the oaths mentioned in the aforeſaid act, intitled,* "*An act* "*for the further ſecurity of his Majeſty's* "*perſon and government, and the ſucceſſion* "*of the crown in the heirs of the late princeſs* "*Sophia, being Proteſtants, and extinguiſhing*

" *the hopes of the pretended prince of Wales,* " *and his open and ſecret abettors;*" *as alſo to tender and adminiſter the aforeſaid declaration to ſuch perſons belonging to the ſaid courts as ſhall be obliged to take the ſame.* By this clauſe in the governour's commiſſion it appears, that, ſo far as the ſaid ordinance is employed in the erection of courts of juſtice in the province, it may truely be ſaid to have been paſſed by virtue of an authority communicated for that purpoſe to the governour by his letters patent under the great ſeal. But, if I remember right, it does more than eſtabliſh courts of juſtice: and, if it does, it cannot in thoſe further particulars be ſaid to be paſſed by virtue of ſuch an authority.—But I beg you would go on to the preambles of the following ordinances.

FRENCHMAN.

The next, or third, ordinance in the book is an ordinance for declaring what ſhall be deemed a due publication of the ordinances of the province of Quebeck. In this ordinance there are theſe words. *His Excellency the governour, by and with the advice, conſent,*

ſent, and aſſiſtance of his Majeſty's council, and by virtue of the power and authority to him given by his Majeſty's letters patent under the great ſeal of Great-Britain, hath thought fit to ordain and declare, &c.

The ſame words are uſed alſo in the fourth ordinance, which relates to the aſſize of bread and the aſcertaining the ſtandard of weights and meaſures in the province of Quebeck; and in the fifth ordinance, which was made to ratify and confirm the decrees of the ſeveral courts of juſtice eſtabliſhed in the province in the time of the military government of it; and in another ordinance made to prevent foreſtalling the market, and frauds by butchers, and dated on the 3d day of November in the ſame year 1764; and in another ordinance made on the 6th day of the ſame month of November, to prevent the diſorderly riding of horſes, and driving carts or other carriages within the towns of the province of Quebeck. In all the other ordinances in the book the words, " *and by virtue of the power and authority to him given by his Majeſty's letters patent*

under the great ſeal," are omitted. Here are therefore four ordinances, beſides that for eſtabliſhing courts of judicature in the province, in which it is aſſerted by the governour and council of this province, that they were authorized to make them by his Majeſty's letters patent under the great ſeal. And conſequently, as there is no clauſe in the governour's commiſſion under the great ſeal which impowers him to make ordinances with the conſent of the council only, without an aſſembly of the people, we muſt ſuppoſe that the gentlemen who made this aſſertion, grounded it on thoſe words in the commiſſion, which we have already ſpoken of, and which refer to the powers of government which then were, or afterwards ſhould be, delegated to the governour by his inſtructions.---

End of the remarks on the nature of inſtructions to governours of provinces under the king's ſignet and ſign-manual, begun in page 224.

But I am now ſatisfied with what you have ſaid concerning the nature of a governour's commiſſion under the great ſeal of Great-Britain and his inſtructions under the king's ſignet and ſign-manual, and am fully confirmed in my former opinion of the proper difference between them, namely, that the commiſſion alone is the inſtrument by which the powers

of

of government can be legally delegated to a governour of a province, and that the inſtructions under the ſignet and ſign-manual ought only to contain directions to his Majeſty's governours in what manner, and under what reſtrictions, his Majeſty would have them exerciſe the ſaid powers that are legally delegated to them under the great ſeal. I therefore deſire you would now proceed to ſtate to me what Lord Mansfield ſaid concerning the remaining hiſtorical examples he adduced of the king's exerciſing the powers of legiſlation over conquered countries belonging to the crown of Great-Britain; which were, if I remember right, thoſe of the iſland of Minorca and the town of Gibraltar in Spain. I do not recollect that you mentioned any other places as having been cited by him on this occaſion, beſides thoſe which we have already conſidered.

Examination of the remaining examples cited by Lord Mansfield, in ſupport of the king's ſole legiſlative authority over conquered countries.

ENGLISHMAN.

Your memory does not deceive you. Theſe were the only remaining inſtances his lordſhip mentioned in this hiſtorical part of his opinion, though in the ſubſequent part of it, which

which recites the opinions of learned lawyers in ſupport of the king's legiſlative authority over conquered countries, he touches upon the caſe of Jamaica. What he ſays of Gibraltar is in theſe words. " With regard to " the inhabitants of Gibraltar, their pro- " perty and trade, the king has, ever ſince " that conqueſt, made orders and regula- " tions ſuitable to the condition of thoſe who " live, or trade, or enjoy property in that " garriſoned town."

Lord Manſfield's words concerning Gibraltar.

And with reſpect to Minorca his words are as follows. " Mr. Attorney-General " alluded to a variety of inſtances, and " ſeveral very lately, that is, within theſe " twenty years, or thereabouts, in which " the king had exerciſed legiſlation in Mi- " norca. In Minorca it is ſaid there are a " great number of inhabitants of worth; " and that a great trade is carried on. If " the king does it as coming into the place " of the king of Spain, becauſe their old " conſtitution continues, the ſame argument " holds here: for before the 7th of Octo- " ber, 1763, the conſtitution of Grenada " continued,

His words concerning Minorca.

" continued, and the king ſtood in the place " of their former ſovereign." This is all that was ſaid by Lord Mansfield concerning Gibraltar and Minorca.

FRENCHMAN.

Pray, is the fact as it is here ſtated? Have the kings of Great-Britain, ſince the conqueſt of Gibraltar and Minorca, made laws for the inhabitants of them by their own ſingle authority, or without the concurrence of parliament?

Of the legiſlative power that has been exerciſed by the Crown over theſe places.

ENGLISHMAN.

I believe it is true that they have made ſome ſort of laws for them on particular occaſions, by their orders in their privy-councils. But the laws ſo made have not been, as far as I can find, of a very important or intereſting nature. And, I believe, they have never impoſed taxes on them. But, in truth, thoſe places have always been conſidered as mere garriſon-towns, or fortreſſes built for the defence of the harbours of Gibraltar and Port Mahon, which have been retained by Great-Britain ſince the peace of Utrecht

Utrecht for the ſake of her trade to the Mediterranean; and little, or no, attention has been paid by the people of England to the civil government of them. Indeed Gibraltar is a mere town, without an inch of territory belonging to it without the walls; and its inhabitants, (excluſive of the Britiſh garriſon,) amount to no more than two or three thouſand ſouls: and the garriſon uſually conſiſts of three thouſand, five hundred, men. The other inhabitants therefore may be conſidered;—and, I believe, they uſually have been conſidered;—as a ſort of appendage to the garriſon, which is governed by the ſyſtem of martial law eſtabliſhed every year by the Britiſh parliament by the act for preventing mutiny and deſertion. However, I believe it is true, as Lord Mansfield ſtated in the words above-cited, that the kings of Great-Britain have, ever ſince the conqueſt of Gibraltar, made orders and regulations ſuitable to the condition of thoſe who live, or trade, or enjoy property in that town. And I further believe that theſe orders have been made by them in their privy-council. But I am not perfectly informed upon this ſubject.

Of Gibraltar.

As

As to Minorca, that is an example of somewhat greater importance than Gibraltar, becauſe it is a place of much greater extent, and contains a much greater number of inhabitants. For it is a tolerably fruitful iſland, of about thirty-three miles in length, and ten miles in breadth, and contains about twenty thouſand inhabitants, beſides the Britiſh garriſon of fort St. Philip's, which defends the harbour of Mahon. Yet even this country has been almoſt intirely neglected by Great-Britain as to its internal cultivation and government, and conſidered (like Gibraltar) as an appendage to St. Philip's caſtle, which defends the harbour of Mahon; and no civil governour has been ever appointed over it by the king. The Spaniſh laws, both criminal and civil, have been permitted to continue in it, and no attempt has been made by the Engliſh government to introduce gently and gradually, and with the conſent of the inhabitants of the iſland, any of the Engliſh laws amongſt them, nor the profeſſion of the proteſtant religion. The conſequence has been that they have continued bigotted Roman-Catholicks ever ſince they

Of Minorca.

The internal cultivation and civil government of this iſland have been much neglected by Great Britain.

Ill conſequences of the ſaid neglect.

have been ſubjects of Great-Britain, and have been ill-diſpoſed to the Engliſh government upon the ground of religion and from an averſion to hereticks, which has been conſtantly cheriſhed in them by their prieſts and by the biſhop of the neighbouring Spaniſh iſland of Majorca, who (though a ſubject of the king of Spain) has been permitted to come into the iſland of Minorca, and exerciſe his epiſcopal juriſdiction over its inhabitants. And in the beginning of the laſt war with France, I remember, it was ſaid we found the ill effects of the aforeſaid prejudices againſt our religion and government in the general diſinclination of the natives to aſſiſt the Britiſh garriſon in defending St. Philip's caſtle againſt the French army that inveſted it: inſomuch that the ill policy of the Britiſh miniſtry, with reſpect to the government of the iſland of Minorca, both before and ſince the late war, (for, notwithſtanding the experience they had in the late war of the diſaffection of the inhabitants ariſing from the aforeſaid prejudices, they have not altered their manner of governing it;) has been the object of general cenſure amongſt ſuch perſons as have had

had occaſion to conſider it. This example, therefore, of a country ſo much neglected as Minorca has been by the Britiſh government, I muſt needs conſider as having but little weight in determining the preſent queſtion concerning the legiſlative authority of the crown of Great-Britain over conquered countries.

This neglect renders this iſland an example of leſs weight & authority than it would otherwiſe be, with reſpect to the preſent queſtion.

I muſt alſo obſerve that the legiſlative authority which the kings of Great-Britain have exerciſed over the people of Minorca by their orders in their privy-councils, (for that is the way in which this authority has been exerciſed;) has been only on ſubjects of ſmall importance. At leaſt I have never heard of any others; though it is probable that, if there had been any greater exertions of legiſlative authority by the Crown, they would have been mentioned on the late trial of the action of Fabrigas, an inhabitant of the ſuburbs of St. Philip's caſtle in Minorca, againſt Lieutenant-general Moſtyn, the governour of the iſland, for impriſoning him and baniſhing him from the iſland; becauſe in that trial the unlimited power of the king

Of the ſubjects on which the Crown has exerciſed a legiſlative authority in this iſland.

and his delegate, the governour, were much inſiſted on as a ground of juſtification for General Moſtyn. Yet it did not appear that the king had ever either impoſed taxes on the inhabitants of Minorca by his proclamations, (as he did in July, 1764, on the inhabitants of the iſland of Grenada,) or created any new felonies, or capital crimes amongſt them, or made any other laws of great importance. The only inſtance of the exerciſe of the king's legiſlative authority over that iſland that was mentioned in the courſe of that trial, was a certain order made by our late ſovereign, king George the 2d, in his privy-council, in the year 1752, for regulating the price at which the inhabitants ſhould be permitted to ſell their wines; which was done by veſting a power in a certain publick officer, called *a Jurat*, in each of the four *terminos*, or diſtricts, into which the whole iſland is divided, of fixing the price of them in his reſpective diſtrict. But, I preſume, there have been many other orders of the king in council upon ſubjects of a ſimilar nature, that is, relating to the police, or good order and publick convenience,

nience, of the iſland, becauſe Mr. Wright, (who had reſided in the iſland in the capacity of ſecretary to General Moſtyn, the governour,) teſtified on that trial, " that, though the Minorquins are, in general, governed by the Spaniſh laws, yet the king in council, upon all occaſions of application to him, iſſues out ſuch orders as the caſe requires, and that the ſaid orders are recorded in the Royal court there, or *the court of royal government*, (which is the great criminal and civil court of the iſland,) and are as binding as any laws in the iſland." This is all that I could ever diſcover concerning the legiſlative authority exerciſed by the Crown over the inhabitants of the iſland of Minorca. And it ſeems, I think, upon the whole to be but a limited and imperfect kind of legiſlative authority, and by no means ſufficient to ſupport the doctrine laid down by Lord Manſfield of a compleat legiſlative authority over conquered countries in the Crown alone, except on ſuch ſubjects as have been already ſettled by acts of the Britiſh parliament antecedent to the conqueſt of them.—And to this I muſt add, as a further proof of the

obſcure

Of the uncertain ſtate of the laws in the ſaid iſland.

obſcure and unſettled ſtate in which matters relating to the laws and government of that iſland are permitted to continue, the teſtimony that was given by another witneſs on the ſame trial, who had reſided a great number of years in the ſaid iſland, and muſt therefore be ſuppoſed to have been well acquainted with it. This was Col. Patrick MacCullock, who ſaid he had gone firſt to Minorca in the year 1736, and left it in the year 1750, and had gone to it again in May, 1763, and continued in it till May, 1773. This gentleman teſtified on that occaſion, " that the Minorquins moſt commonly pleaded the Spaniſh laws, which had been allowed them after the peace of Utrecht, but that, when the laws of England were convenient for them, they pleaded the laws of England;---that however the law which moſt prevailed there was the Spaniſh law;---that, when the iſland was reſtored to Great-Britain by the French after the late peace in 1763, he believed nothing at all was ſettled with relation to the laws by which Minorca was to be governed, and that therefore the crown of Great-Britain was ſuppoſed to have received the

the Minorquins under its government upon the ſame footing as the French had held the dominion over them during the late war; but that ſince that time the Minorquins had made intereſt with the king's miniſters in England to have the ſame laws and privileges reſtored to them which had taken place before the iſland had been conquered by the French, that is, the Spaniſh laws; and that the ſaid Spaniſh laws had been accordingly reſtored." This was the ſubſtance of colonel MacCullock's teſtimony. Now in a country in which it is cuſtomary for the people ſometimes to plead the Engliſh laws and ſometimes the Spaniſh, as the one or the other ſyſtem happens beſt to ſuit their temporary convenience, I muſt needs think the ſtate of the government too uncertain and confuſed to be made a ſolid ground of argument in a queſtion of ſuch importance as this we are now examining, concerning the legiſlative authority of the Crown alone over countries acquired by conqueſt.

Concluſion from thence as to the preſent queſtion.

FRENCH-

FRENCHMAN.

Indeed this example ſeems too weak a foundation to ſupport ſo weighty a ſuperſtructure as that of a general and compleat legiſlative authority in the king alone over all the countries acquired to the crown of Great-Britain by conqueſt and ceſſion, without any other reſtrictions than thoſe which ariſe from antecedent acts of parliament, in the manner Lord Mansfield has aſſerted. And therefore I muſt conclude that the whole of the hiſtorical part of his argument in favour of this legiſlative authority of the Crown is inſufficient for the purpoſe, all the former inſtances he had adduced of the exerciſe of this authority, except theſe two laſt of Gibraltar and Minorca, (to wit, thoſe of Ireland, Wales, Berwick upon Tweed, Calais, Gaſcony, and New-York,) having been before ſhewn to be totally incapable of ſupporting this propoſition, and ſome of them to be even adverſe to it. We have therefore now got rid (at leaſt, to my ſatisfaction,) of two of Lord Mansfield's grounds of argument in ſupport of this doctrine, out of three, namely, of the

End of the examination of the precedents, or hiſtorical examples, adduced by Ld Manſfield as proofs of the ſole legiſlative authority of the Crown over conquered countries.

the ground of reaſon and general principles of law, and the ground of hiſtorical examples. It remains that we examine his third ground of argument, which, you ſaid, (if I remember right,) was the authority of judges and other learned lawyers, who have occaſionally declared themſelves to be of opinion that the Crown was poſſeſſed of this power of making laws, without the parliament, for the government of conquered countries. I therefore now deſire you would inform me what my Lord Mansfield ſaid upon this head.

Of the opinions of judges and other learned lawyers, cited by Ld. Mansfield in ſupport of the king's ſole legiſlative authority over conquered countries.

ENGLISHMAN.

His words were as follows. " It is not " to be wondered at that an adjudged caſe " in point is not to be found. No diſpute " ever was ſtarted before upon the king's " legiſlative right over a conqueſt. It never " was denied in Weſtminſter Hall; it never " was queſtioned in parliament.

Lord Manſfield's words upon this ſubject.

" Lord Coke's report of the arguments " and reſolutions of the judges in Calvin's " caſe lays it down as clear, that, if a king " come to a kingdom by conqueſt—— (I

The opinion of the judges, as reported in Lord Coke's report of Calvin's caſe, in the 7th book of his reports.

" omit the diſtinction between a Chriſtian " and Infidel kingdom; which as to this " purpoſe is wholly groundleſs, and moſt " deſervedly exploded: but that ſtrange " extra-judicial opinion of his as to a conqueſt " over a Pagan country will not make reaſon " not to be reaſon, and law not to be law, " as to the reſt.) I ſay, Lord Coke in that " caſe lays it down as clear, "" that, if a "" king come to a kingdom by conqueſt, "" he may, at his pleaſure, alter and change "" the laws of that kingdom: but, until "" he doth make an alteration, the antient "" laws of that kingdom remain. But, if "" a king hath a kingdom by deſcent, there, "" (ſeeing by the laws of the kingdom he "" doth inherit the kingdom,) he cannot "" change the laws of himſelf, without con- "" ſent of parliament:"" " In which words " it is plain that Lord Coke means to ſpeak " of his own country, in which there is a " parliament." Lord Coke then goes on as " follows. "" Alſo, if a king hath a king- "" dom by conqueſt, as king Henry the "" ſecond had Ireland, after king John had "" given to them, (being under his obedi-

"" ence and ſubjection) the laws of England
"" for the government of their native coun-
"" try, no ſucceeding king could alter the
"" ſame without parliament."" " Which is
" very juſt, and neceſſarily implies that king
" John himſelf could not alter the grant of
" the laws of England.

" Beſides this opinion of the judges in
" Calvin's caſe, the authority of two great
" lawyers has been cited, who took the
" propoſition for granted. And, though the
" opinions of counſel, (whether acting offi-
" cially in a publick employment or in the
" capacity of private lawyers,) are not pro-
" perly authority to found a deciſion upon,
" yet I ſhall cite them on this occaſion, not
" to eſtabliſh ſo clear a point, but to ſhew
" that, when it has been matter of legal
" inquiry, the anſwer which it has received
" from gentlemen of eminent character and
" abilities in the profeſſion, has been *imme-*
" *diate and without heſitation*, and agreeable
" to theſe principles. That opinion was as
" follows. In the year 1722 the aſſembly
" of the iſland of Jamaica having refuſed to

The opinion of Sir Philip Yorke and Sir Clement Wearg, (attorney and ſollicitor general to king George the 1ſt,) in the year 1722.

" grant the uſual ſupplies, it was referred to
" Sir Philip Yorke and Sir Clement Wearg
" (who were at that time the king's attorney
" and ſollicitor general) to conſider what
" could be done if the aſſembly ſhould per-
" ſiſt in their refuſal. They returned for
" anſwer, "' That, if Jamaica was ſtill to
"' be conſidered as a conquered country, the
"' king had a right to lay taxes upon the
"' inhabitants: but, if it was to be conſidered
"' in the ſame light as the other colonies,
"' no tax could be impoſed upon the inha-
"' bitants but by an aſſembly of the iſland
"' or by an act of parliament.'" By this
" opinion of thoſe able lawyers it appears,
" that they held the diſtinction, in point of
" law, between a conquered country and a
" colony to be clear and indiſputable: but
" that the queſtion, whether the iſland of
" Jamaica, (to which the caſe before them
" related) had remained in the ſtate of a
" conquered country, or had ſince become
" a colony, was a matter which they had
" not examined.——I have myſelf, upon
" former occaſions, traced out the conſtitu-
" tion of Jamaica, as far as there are books

" or

" or papers in the publick offices, to enable " one to do ſo. And I could not find that " any Spaniard remained upon the iſland ſo " late as the Reſtoration: if there were any, " they were very few. A gentleman who " is well acquainted with the ſtate of that " iſland, and of whom (upon hearing this " iſland mentioned in one of the arguments " in this cauſe,) I aſked the queſtion, in- " formed me, "" that he knew of no Spaniſh "" names among the white inhabitants of "" Jamaica; but that there were ſome a- "" mongſt the Negroes."" " The method of " proceeding taken by the Crown with re- " ſpect to the government of that iſland was " this. King Charles the ſecond, ſoon after " the Reſtoration, invited people, by his pro- " clamation, to go and ſettle there, promiſing " them his protection;——he made grants " of land there; and, for the government " of it, he appointed at firſt a governour " and council only, but afterwards he granted " a commiſſion to the governour to call an " aſſembly. The conſtitution of every pro- " vince in America that is immediately under " the king, (or is governed only by his com-

" miſſion,

A ſhort account of the ſettlement of the iſland of Jamaica.

" miſſion, without a charter,) has ariſen in
" the ſame manner,----not by the grants,
" but by the commiſſions to call aſſemblies.
" And therefore, all the Spaniards having
" left the iſland of Jamaica, or been driven
" out of it, before the Reſtoration, the firſt
" ſettling of it after that period was by an
" Engliſh colony, who, under the authority
" of the king, planted a vacant iſland which
" belonged to him in right of his crown;
" as was the caſe with the iſlands of St.
" Helena and St. John's, which were men-
" tioned by the attorney general in his argu-
" ment in this cauſe.——To conclude there-
" fore; A maxim of conſtitutional law ſup-
" ported by the opinions of all the judges in
" Calvin's caſe and of two ſuch eminent men,
" in modern times, as Sir Philip Yorke and
" Sir Clement Wearg, will, I make no
" doubt, acquire ſome authority, even if
" there were any thing which otherwiſe
" made it doubtful. But, on the other ſide,
" no book, no ſaying of a judge, no opinion
" of any counſel, publick or private, has
" been cited; no inſtance has been found
" in any period of our hiſtory, where a
" doubt

Lord Manſfield's concluſion from theſe opinions.

" doubt has been raiſed concerning it.—
" The counſel for the plaintiff in this action,
" therefore, when they laboured this firſt
" point for their client, muſt be ſuppoſed to
" have done ſo only from a diffidence, or
" uncertainty, concerning the opinion we
" might entertain upon the ſecond point, or
" the effect of the king's proclamation of
" October, 1763, by which he promiſed the
" people of Grenada that he would cauſe
" an aſſembly of the freeholders to be ſum-
" moned in that iſland. But, with reſpect
" to this ſecond point, we are, after full
" conſideration of the ſubject, of opinion
" with the plaintiff, to wit, That before the
" twentieth day of July, 1764, when the
" letters patent eſtabliſhing the duty of four
" and a half per cent. were iſſued, the king
" had, by his ſaid proclamation of October,
" 1763, precluded himſelf from the exer-
" ciſe of a legiſlative authority over the iſland
" of Grenada."

The opinion of the court of King's Bench with reſpect to the operation of the king's proclamation of Oct. 1763.

This is the whole of what Lord Mansfield ſaid in ſupport of this legiſlative authority of the Crown over conquered countries upon the ground of the opinions of judges and other

other learned lawyers, in delivering that important judgement. How far it is concluſive, or ſatisfactory, upon the matter, I leave you to judge.

FRENCHMAN.

Why, truly, I cannot think that there is ſo much weight in theſe authorities as my Lord Mansfield aſcribes to them. For, as to the firſt of them, if I underſtand it right, it ſeems rather to make againſt the ſuppoſed right of the Crown to make laws for conquered countries, than to be favourable to it; becauſe in the latter of the two paſſages which he cited from Calvin's caſe in Lord Coke's Reports, it is expreſsly declared, "that, when once king John had given the "conquered people of Ireland the laws of "England for the government of their na-"tive country, no ſucceeding king could "alter the ſame without parliament." Now, if that be true, it ſeems evident that the kings of England did not, in Lord Coke's opinion and that of the other judges who determined that caſe of Calvin, acquire, by the conqueſt of Ireland, *a permanent right of legiſlation*

A remark upon the opinion of the judges cited from Calvin's caſe.

legiſlation over it, ſo as to be able to make and unmake, and alter, the laws of it whenever, and in what manner ſoever, they ſhould think fit, (as the king and parliament of Ireland do conjointly,) but only a temporary right of abrogating the antient laws of Ireland and introducing, once for all, the laws of England in their ſtead, which (as we have already * obſerved) is a very different thing from the aforeſaid proper and permanent legiſlative authority. And, as to the other authority mentioned by Lord Mansfield, and ſo much relied upon by him as of deciſive importance on this queſtion, to wit, the opinion of Sir Philip Yorke and Sir Clement Wearg, (the king's atttorney and ſollicitor general,) in the year 1722, it muſt indeed be allowed to be an authority in point to the queſtion, becauſe thoſe two learned gentlemen ſeem to have meant to aſcribe to the Crown the ſame perfect and permanent ſort of legiſlative authority over Jamaica, in caſe it was ſtill to be conſidered as a conquered country, as Lord Mansfield has aſcribed to it with reſpect to the iſland of Grenada before the proclamation of October, 1763: but yet I

A remark on the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722.

* See above, page 67.

cannot think it a very reſpectable authority, notwithſtanding the great learning and eminence of thoſe gentlemen; partly, becauſe it ſeems to have been rather a haſty opinion, upon which they had beſtowed very little conſideration, ſince they did not take the pains to inquire whether Jamaica was to be ſtill conſidered as a conquered country, or whether, by events ſubſequent to the conqueſt of it, it was become a colony; and partly, becauſe it may well be ſuppoſed that perſons who ſerve the Crown in the offices of attorney and ſolliciter general, have, in all doubtful matters relating to the royal prerogative, a byaſs on their minds in favour of it. This opinion therefore ought to be conſidered as the haſty and ill-digeſted teſtimony of intereſted witneſſes, and, as ſuch, to be but little regarded.

ENGLISHMAN.

I look upon theſe two authorities in much the ſame light as you do; and I more eſpecially agree with you in what you have remarked concerning the latter of them, or the opinion of Sir Philip Yorke and Sir Clement

Clement Wearg in the year 1722. Perſons in their then ſtations muſt always be liable to the ſuſpicion of inclining a little to favour the prerogative of the Crown: and, as you well obſerved, this opinion of theirs ſeems to have been given very haſtily and with very little attention to the ſubject, ſince they did not take care to inform themſelves concerning the then preſent condition of Jamaica, ſo as to determine whether it ought to be conſidered as a conqueſt or a colony, though this was abſolutely neceſſary to make their opinion of any uſe to the miniſters of ſtate who had conſulted them. It muſt however be confeſſed that, crude and haſty as this opinion ſeems to have been, it ſerves to ſhew that thoſe two great lawyers had a general, looſe, floating, idea of the king's being the abſolute legiſlator of all countries acquired by conqueſt, which, (as I obſerved to you in the beginning of our converſation,) was an opinion that had been adopted by a great many private lawyers, though I never could ſee any ſufficient foundation for it.

Further remarks on the opinion of the judges cited from Calvin's caſe.

But, as to the other authority cited from Calvin's caſe, you would think it of ſtill leſs conſequence than you now do, if you knew all the circumſtances that accompany it in Lord Coke's report of that caſe. For it is one of the moſt vague and deſultory and extra-judicial declarations upon a ſubject of law that is any where to be met with in the Engliſh law-books; and this in a caſe in which the main deciſion of the point itſelf, that was then in queſtion before the court, was generally complained of as contrary to law and made with a view to gratify the humour of king James the 1ſt, who was then upon the throne.

FRENCHMAN.

You raiſe my curioſity concerning this caſe of Calvin, which Lord Mansfield has quoted with ſo much reſpect. I therefore beg you would give me a ſhort account of it, and of the manner in which the paſſage quoted by Lord Mansfield is introduced in it.

ENG-

ENGLISHMAN.

I will endeavour to ſatisfy you upon this ſubject as well as I am able, that we may thereby compleat our examination of Lord Mansfield's argument, in favour of this ſuppoſed legiſlative authority of the Crown over conquered countries, in as impartial and as ample a manner as poſſible.

Of the law of England with reſpect to aliens, or foreigners.

You muſt know then, in the firſt place, that it is a maxim of the Engliſh law, that no alien, or foreigner, or perſon born out of the dominions of the crown of England, though he ſhould chuſe to come and ſettle in England, is capable of purchaſing land there. This maxim has indeed a few natural exceptions, ſuch as thoſe of the children of Engliſhmen employed in foreign embaſſies and born in the countries in which their parents are ſo employed during the continuance of their employments, and of the children of Engliſh merchants ſettled, for the purpoſes of trade, in ſome Engliſh factory that has been eſtabliſhed by the king's authority in the territories of ſome foreign

foreign prince, or ſtate, by the permiſſion of ſuch prince or ſtate. Children born abroad under theſe circumſtances, and, perhaps, under ſome other circumſtances of a ſimilar nature, are conſidered as natural-born Engliſhmen to all intents and purpoſes, and may purchaſe land in England as well as if they had been born in it. But other perſons born abroad cannot do ſo. Thus the great numbers of people who fled into England from Flanders and the other provinces of the Netherlands, in the time of the duke of Alva's perſecution, (which was in the firſt part of the reign of queen Elizabeth,) though they and their families ſettled themſelves in England with queen Elizabeth's permiſſion and approbation, and introduced ſome valuable manufactures into the kingdom, yet were not capable of becoming purchaſers of land in it. And the caſe was the ſame with reſpect to Frenchmen and all other foreigners, and, among the reſt, with reſpect to the natives of Scotland, while that was a kingdom independant of, and ſeparate from, the kingdom of England. But, if a foreigner, ſettled in England, had children born in England,

England, thoſe children were natural-born Engliſhmen and might purchaſe land as well as thoſe whoſe anceſtors had been ſettled in England from time immemorial. And even a foreigner might be rendered capable of purchaſing land in England by the favour of the Crown, by means of the king's letters patent of denization under the great ſeal; which letters patent are ſo called from the French word *donaiſon*, a donation or gift, becauſe they contain a gift, or donation, to the foreigner to whom they are granted, of the rights and privileges of a natural-born Engliſhman. What the preſent form of theſe letters patent is, I do not know: and, indeed, I believe it is not uſual at this day for our kings to make any ſuch grants; but foreigners who have deſired to ſettle and make purchaſes of land in England, and obtain, as far as might be, the privileges of native Engliſhmen, have, for many years paſt, procured private acts of parliament for that purpoſe, which confer thoſe privileges in a more ample manner than the king's letters patent of denization. But in queen Elizabeth's time ſuch patents uſed to be granted:

Of the denization of foreigners by the king's letters patent.

and

and mention is made of ſuch a grant in Lord Coke's fifth book of Reports, folio 52, in Page's caſe, where it is ſtated that one Indy, who was owner of certain houſes in the town of Lynn Regis in the county of Norfolk, which he held to him and his heirs for ever, by ſocage tenure, had deviſed them by his laſt will to his wife, who was an alien, or foreigner, but who had, before the death of her ſaid huſband, been made a denizen by queen Elizabeth by her letters patent under the great ſeal; and that the ſaid woman, after the death of Indy, had married a man of the name of Page, who thereby became poſſeſſed of the ſaid houſes in her right; which gave occaſion to the law-ſuit there reported by Lord Coke. This cauſe was determined in the 30th year of queen Elizabeth's reign, that is, in the year 1588. But Lord Coke has not inſerted in his report of this caſe the form of the ſaid letters patent of denization. Nor do I know of any copy of ſuch letters patent in any law-book (though one would think there ſhould be ſeveral,) of a later date than the reign of king Henry the 6th, who was driven from the throne by king

king Edward the 4th in the year 1460. I will therefore exhibit to you that antient copy of ſuch letters patent, which, I dare ſay, you will join with me in conſidering as a matter of curioſity well worth our attention before we proceed further in the view of Calvin's caſe, which turns upon the doctrine of alienage and the diſtinction to be made between foreigners and natural-born ſubjects. It is contained in the old collection of reports of law-caſes called the Year-books, in the reports of the caſes in the 9th year of the reign of king Edward the 4th, in Trinity term, page 8. In that year of king Edward the 4th, two perſons, whoſe names were William Swirenden and John Bagot, brought an action at law called an aſſiſe, againſt one Thomas Ive for diſſeiſing them (or turning them out of the poſſeſſion) of the office of clerk of the crown in Chancery, which they ſtated to have been granted to them by letters patent of king Edward the 4th, the then reigning king. In anſwer to this complaint Thomas Ive pleads two different pleas with reſpect to his two adverſaries; namely, as to John Bagot, he alledges that the ſaid

The caſe of *Bagot* and *Ive*; in the 9th year of the reign of K. Edw. 4.

John Bagot ought not to be allowed to maintain his writ of aſſiſe againſt him, becauſe the ſaid John Bagot is a foreigner, born out of the ligeance, (or obedience) of the king of England; and, as to William Swirenden, the other plaintiff, he alledges that he never had been ſeiſed (or poſſeſſed) of the ſaid office of clerk of the crown in ſuch a manner as to be capable of being diſſeiſed of it, and that, if he had been ſo ſeiſed of the ſaid office, he, the ſaid Thomas Ive, had not diſſeiſed him of it, or moleſted him in the enjoyment of it. The words of his plea with reſpect to John Bagot are theſe; *Quod idem Johannes Bigot eſt alienigena, genitus et natus extrà ligeantiam domini regis Angliæ, videlicet, apud Ponuteys infrà regnum Franciæ ſub obedientiâ Caroli nuncupantis ſe regem Franciæ, adverſarii et magni inimici domini regis Angliæ. Et hoc paratus eſt verificare. Unde, quoad prædictum Johannem Bigot, petit judicium de brevi prædicto.* In reply to this plea, of which he does not deny the truth, John Bagot ſays that the late king Henry the 6th by his letters patent under the great ſeal of England, bearing date at Weſtminſter

Plea of alienage, uſed by the defendant Ive in abatement of the writ of aſſize brought by the plaintiff Bagot.

on

on the 3d day of November, in the 37th year of his reign, did, out of his ſpecial favour, and as a reward for the good ſervice which the ſaid John Bagot had rendered him, grant, for himſelf and his heirs, to the ſaid John Bagot, that he, the ſaid John Bagot, and the heirs of his body, ſhould be, for the future, natural-born ſubjects and liegemen of the ſaid king and his heirs for ever, and ſhould be ſo allowed, treated, and conſidered on all occaſions. And in proof of this allegation of ſuch a grant of king Henry the 6th, the ſaid John Bagot produced before the court the ſaid letters patent themſelves, which were in the words following.

Letters patent of denization, granted to John Bagot by K. Henry the 6th in the 37th year of his reign.

Henricus, Dei gratiâ, rex Angliæ et Franciæ, et dominus Hiberniæ, omnibus ad quos præſentes literæ pervenerint, ſalutem.

Sciatis, quòd de gratiâ noſtrâ ſpeciali, et pro bono ſervitio quod dilectus ſervitor noſter, Johannes Bagot, in ducatu noſtro Normanniæ oriundus, nobis impendit et impendet in futurum, conceſſimus, pro nobis et hæredibus noſtris, quantum in nobis eſt, præfato Johanni, Quod ipſe de cætero et omnes hæredes ſui, de corpore

To be considered and treated as a natural-born subject of the king, born within the kingdom of England.

ſuo procreati et procreandi, ſint indigenæ et ligei noſtri, et quilibet eorum ſit indigena et ligeus noſter, et hæredum noſtrorum; et quod ipſi in omnibus tractentur, reputentur, habeantur, tencantur, et gubernentur, ſicut fideles ligei noſtri infrà regnum Angliæ oriundi, et quilibet eorum in omnibus tractetur, reputetur, habeatur, teneatur, et gubernetur tanquam ligeus noſter infrà dictum regnum noſtrum Angliæ oriundus, et non aliter nec alio modo.—

Power to bring actions of all ſorts in the king's courts of juſtice.

Quódque idem Johannes et omnes hujuſmodi hæredes ſui, et eorum quilibet, omnimodas actiones, reales, perſonales, et mixtas, in omnibus curiis, locis, et juriſdictionibus, noſtris habere et exercere, eiſque gaudere, ac eas in eiſdem placitare, et implacitari, reſpondere et reſponderi, defendere et defendi, poſſint et poſſit, in omnibus et per omnia, ſicut fideles ligei noſtri in dicto regno noſtro Angliæ oriundi.——

Power to purchaſe lands.

Et ulteriùs, quod dictus Johannes et hæredes ſui prædicti terras, tenementa, redditus, ſervitia, reverſiones, poſſeſſiones, quæcunque, infrà regnum noſtrum Angliæ et alia dominia noſtra, perquirere, capere, recipere, habere, tenere, et poſſidere, ac eis uti et gaudere ſibi et hæredibus ſuis, imperpetuum, vel alio modo; et ea dare,

dare, vendere, alienare, ac ligare, cuicunque perſonæ ſeu quibuſcunque perſonis ſibi placuerit, licitè et impunè debeant, poſſint, et valeant, et quilibet eorum debeat, poſſit, et valeat, ad libitum ſuum, imperpetuum, adeò liberè et quietè, intcgrè, et pacificè, ſicut debeat, poſſit, et valeat aliquis ligeorum noſtrorum infrà regnum noſtrum Angliæ oriundorum.——Et quod præfatus Johannes et omnes hujuſmodi hæredes ſui, de cætero in futurum, colore, ſeu vigore, alicujus ſtatuti, ordinationis, ſeu conceſſionis factæ vel faciendæ, non arctentur, teneantur, ſeu compellantur, nec aliquis eorum arctetur, teneatur, ſeu compellatur, ad ſolvendum, dandum, vel faciendum, aut ſupportandum, nobis vel alicui hæredum noſtrorum, ſeu cuicunque, aliqua alia cuſtomas, ſubſidia, taxas, tallagia, ſeu alia onera quæcunque, pro bonis, marchandiſis, terris, ſeu tenementis, vel perſonis eorum, aut alicujus eorum, præterquam talia et tanta qualia et quanta alii fideles noſtri, infrà dictum regnum noſtrum Angliæ oriundi, pro bonis, marchandiſis, terris, tenementis, ſeu perſonis ſuis propriis, ſolvunt, dant, faciunt vel ſupportant, aut ſolvere, dare, facere, et ſupportare conſueverunt et tenentur;

Exemption from the duties payable by aliens, or foreigners.

ſed

ſed quod præfatus Johannes et hæredes ſui prædicti habere et poſſidere valeant, et quilibet eorum habere et poſſidere valeat, ac habeant et poſſideant, omnes et omnimodas libertates, franchesias, ac privilegia quæcunque, et eis uti et gaudere poſſint et poſſit, infrà dictum regnum noſtrum Angliæ et juriſdictiones [ejuſdem], adeò liberè, et quietè, integrè et pacificè, ſicut cæteri fideles ligei noſtri infrà regnum noſtrum Angliæ oriundi, habere et poſſidere, uti et gaudere debeant, abſque perturbatione, moleſtatione, inquietatione, impetitione, impedimento, vexatione, calumniâ, ſeu gravamine quocunque noſtri vel hæredum noſtrorum, juſtitiariorum, eſchaetorum, vicecomitum, aut aliorum officiariorum, ſeu miniſtrorum noſtrorum, vel hæredum noſtrorum, quorumcunque; et abſque fine et feodo inde quoviſmodo ad opus noſtrum capiendo ſeu ſolvendo:——

Clauſe of *Non obſtante*, to all ſtatutes, &c. to the contrary.

Aliquibus ſtatutis, ordinationibus, actibus, proviſionibus, ſeu proclamationibus, in contrarium ante hæc tempora factis, editis, ordinatis, proviſis, ſeu proclamatis, aut impoſterum faciendis, aut quod prædictus Johannes Bagot in dicto ducatu noſtro Normanniæ fuit oriundus, aut aliquâ [aliâ] cauſâ,

cauſâ, vel materiâ, quâcunque, non obſtantibus.- In cujus rei teſtimonium has literas noſtras fieri fecimus patentes.

Teſte Me ipſo, apud Weſtmonaſterium, tertio die Novembris, anno regni noſtri triceſimo ſeptimo.

Theſe letters patent are exceedingly verboſe and full of tedious expreſſions that are almoſt ſynonymous to each other. But the purport of them is to grant to the ſaid John Bagot the four following privileges; to wit, 1ſt, In general terms, that he and his children ſhall be treated and conſidered on all occaſions as natural-born Engliſhmen; 2dly, That he and his children ſhall have a right to bring actions of every kind in all the Engliſh courts of juſtice; 3dly, That he and his children ſhall be at liberty to purchaſe, or acquire, land in England, in the ſame manner as if they had been born in England; and 4thly, That he and his children ſhall be exempted from paying the extraordinary duties paid by aliens upon the importation of goods into England, and all other payments to the Crown of every kind, to which foreigners

The purport of the foregoing letters patent.

reigners residing in England were liable; of which four privileges the three last are contained in the first, and are only specifications of the principal subjects to which it might be applied.

These letters patent are called in the Year-book *letters patent of legitimation.*

I must also observe that in the report of that case of *Bagot* and *Ive* in the Year-books, these letters patent are called letters patent of *legitimation*, though the more modern name for them is that of letters patent of *denization*.

Having premised thus much concerning the law of alienage, and the necessity of letters patent of denization in order to enable an alien, or foreigner, to purchase land in England, I will now endeavour to state to you a short abstract of Calvin's case, which relates singly to this doctrine.

An abstract of Calvin's case, in the 7th book of Lord Coke's Reports.

In the 6th year of the reign of king James the first an action at law, called an assise, was brought by the guardians of an infant of three years of age whose name was Robert Calvin, in the name of the said infant, against two persons named Richard and Nicholas

Nicholas Smith, for a freehold houſe in the pariſh of St. Leonard, Shoreditch, near London, of which it was ſaid they had diſſeiſed (or diſpoſſeſſed) the ſaid Robert Calvin. To this complaint the ſaid Richard and Nicholas Smith ſay, that the ſaid Calvin has no right to bring the ſaid action, and that they are not bound in law to anſwer his complaint, becauſe he is *an alien born*, having been born at Edenborough in Scotland on the 4th day of November in the 39th year of the reign of the then reigning king, James, over his kingdom of Scotland, and in the 3d year of his reign over his kingdoms of England and Ireland; which birth of the plaintiff at Edenborough they alledge to be within the king's allegiance of his kingdom of Scotland, but without his allegiance of his kingdom of England; and they alledge further that at the time of the birth of the ſaid plaintiff, and before and ſince, Scotland was governed by its own peculiar laws, and not by the laws of England. To this it is replied for the ſaid Robert Calvin, that this plea is not ſufficient in law to bar him from having an anſwer to his ſaid action. And this is the

Plea of alienage, in abatement of the writ of aſſize brought by the plaintiff Calvin; becauſe of his birth in Scotland ſince the acceſſion of king James to the crown of England.

Allegation that Scotland and England are governed by different laws.

Replication of the plaintiff Calvin.

The queſtion reſulting therefrom, for the deciſion of the judges.

qneſtion which is left to the deciſion of the judges; which is, in other words, whether, or no, perſons born in Scotland ſince the acceſſion of the king of Scotland to the crown of England, (who were, upon that occaſion, called *poſtnati,)* could maintain actions for lands in England, which it was confeſſed on all hands that perſons that were born aliens, and under the allegiance of a foreign king, could not do.

This caſe was argued very fully, firſt, by the moſt able and learned counſel at the bar, and afterwards by all the judges, (in number fourteen,) and the lord chancellor; and it was at laſt determined by the lord chancellor and twelve of the judges in favour of Calvin, the plaintiff, to wit, that he was *not* to be conſidered as an alien born, but as a natural-born ſubject of England, and might poſſeſs land in England, and maintain an action for the recovery of it.

Of the different kinds of allegiance to the ſame king, mentioned in the plea of the defendants.

In the courſe of the arguments delivered in this cauſe there was a great deal ſaid upon the doctrine of allegiance, and whether or no there could be two kinds of allegiance to the ſame king,

king, an allegiance to him as king of one of his kingdoms and a different allegiance to him as king of another kingdom, according to the diſtinction ſuggeſted in the defendant's plea. And it was determined that there could not; and, conſequently, that the being born under the king's allegiance, as king of Scotland, was equivalent to the being born under his allegiance as king of England, with reſpect to the privileges that belonged to the latter birth in the kingdom of England. But the reaſons alledged by Lord Coke as the grounds of this opinion do not appear to me very ſatisfactory, and were not eſteemed ſo by many of the lawyers of that time. However, as this matter is not much connected with the ſubject of our preſent inquiry, which is the power of the crown of England over countries acquired by conqueſt, I ſhall ſay nothing further about it.

After diſcuſſing the queſtion concerning the two ſorts of allegiance due to king James in his two capacities of king of England and king of Scotland, which is the firſt ground

of argument ſuggeſted in the defendants plea, the judges proceed to conſider the other ground of argument ſuggeſted in the ſaid plea by the allegation that the kingdom of Scotland is governed by a different ſyſtem of laws from that which takes place in England.

Of the conſequences that reſult from the difference of the laws that prevail in the two kingdoms of England and Scotland.

Upon this matter they reaſon ſtrangely, and affirm that allegiance is due from ſubjects to their king, not by the laws of the land, but by the law of nature; and therefore that, as the law of nature (which is the foundation of allegiance,) is the ſame in both kingdoms, the diverſity of the laws of the two kingdoms in other reſpects is of no importance with reſpect to the doctrine of allegiance, and to the privileges of a natural-born ſubject which reſult from it.

Of the points in which the two kingdoms were become united, and thoſe in which they ſtill continued ſeparate.

They then, in the 3d place, conſider in what points the two kingdoms of England and Scotland were become one by the acceſſion of king James to the crown of England, and in what points they ſtill continued ſeparate; and determine that they continued ſeparate with reſpect to their laws, their parliaments, and their bodies of peerage or nobility.

They

They then, in the 4th place, consider the nature of *alienage*, and lay down the rules of law upon this subject; as, who is to be considered as *alienigena*, or an *alien born*; and how many kinds of *aliens* there are, as *alien amys*, or *alien friends*, namely, the subjects of princes in alliance, or amity, with the king of England; and *alien enemies*, namely, the subjects of princes at war, or at enmity, with the king of England; and the privileges and incidents belonging to these several sorts of aliens. And under this head it is that Lord Coke introduces what he says concerning conquered countries, from which Lord Mansfield cited the passage above-mentioned. And here, that you may the better judge of the drift and meaning of the said passage, I will recite to you the whole paragraph, or head of argument, of which it makes a part; whichh is as follows.

Of the different sorts of aliens.

" Every man is either *alienigena*, an alien-born, or *subditus*, a subject-born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for

The whole passage of Ld. Coke upon this subject.

for a time, or *perpetuus*, perpetual, or *ſpecialiter permiſſus*, permitted eſpecially. Every ſubject is either *natus*, born, or *datus*, given or made: and of theſe briefly in their order.

Of alien friends.

An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the kings and princes in Chriſtendom being now in league with our ſovereign; but a Scot being a ſubject, cannot be ſaid to be a friend, nor Scotland to be *ſolum amici)* may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treaſure, or perſonal goods whatſoever, as well as an Engliſhman, and may maintain any action for the ſame: but lands within this realm, or houſes (but for their neceſſary habitation only) alien friends cannot acquire, or get, nor maintain any action real or perſonal, for any land or houſe, unleſs the houſe be for their neceſſary habitation. For, if they ſhould be diſabled to acquire and maintain theſe things, it were in effect to deny unto them trade and traffick. which is the life of every iſland. But if this alien become an enemy (as all alien friends may) then is he utterly diſabled to maintain any action,

Of aliens. that are temporary enemies.

or

or get any thing within this realm. And this is to be underſtood of a temporary alien, that, being an enemy, may be a friend, or, being a friend, may be an enemy. But a perpetual enemy (though there be no wars by fire and ſword between them,) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui inimici*, perpetual enemies (for the law preſumes not that they will be converted, that being *remota potentia*, a remote poſſibility): for between them, as with the devils, (whoſe ſubjects they be,) and the Chriſtian, there is perpetual hoſtility, and can be no peace; for, as the apoſtle ſaith, 2 Cor. vi. 15. *Quæ autem conventio Chriſti ad Belial, aut quæ pars fideli cum infideli?* and the law ſaith, *Judæo Chriſtianum nullum ſerviat mancipium: neſas enim eſt quem Chriſtus redemit, blaſphemum Chriſti in ſervitutis vinculis detinere. Regiſter* 282. *Infideles ſunt Chriſti & Chriſtianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all. [*Quære.*]

Of aliens, that are perpetual enemies.

Of Infidels.

And

Of the laws of conquered countries.

Of a Chriſtian country that is conquered.

Of an Infidel country that is conquered.

Of the laws of a kingdom that accrues to a king by deſcent.

" And upon this ground there is a diverſity between a conqueſt of a kingdom of a Chriſtian king, and the conqueſt of a kingdom of an Infidel. For, if a king come to a Chriſtian kingdom by conqueſt, ſeeing that he hath *vitæ & necis poteſtatem*, he may at his pleaſure alter and change the laws of that kingdom; but, until he doth make an alteration of thoſe laws, the ancient laws of that kingdom remain. But, if a Chriſtian king ſhould conquer a kingdom of an Infidel, and bring them under his ſubjection, there *ipſo facto* the laws of the Infidel kingdom are abrogated, for that they be not only againſt Chriſtianity, but againſt the law of God and of nature, contained in the Decalogue; and in that caſe, until certain laws be eſtabliſhed amongſt them, the king, by himſelf, and ſuch judges as he ſhall appoint, ſhall judge them and their cauſes according to natural equity, in ſuch ſort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been ſaid. But, if a king hath a kingdom by title of deſcent, there, ſeeing that by the laws of that kingdom he doth inherit the kingdom, he cannot change

change thoſe laws of himſelf, without conſent of parliament. Alſo if a king hath a Chriſtian kingdom by conqueſt, as king Henry the ſecond had Ireland, after king John had given unto them, being under his obedience and ſubjection, the laws of England for the government of that country, no ſucceeding king could alter the ſame without parliament. And in that caſe, while the realm of England, and that of Ireland, were governed by ſeveral laws, any that was born in Ireland was no alien to the realm of England. In which precedent of Ireland three things are to be obſerved: 1. That then there had been two deſcents, one from king Henry the 2d to king Richard the 1ſt, and another from king Richard to king John, before the alteration of the laws. 2. That albeit Ireland was a diſtinct dominion, yet the title thereof being by conqueſt, the ſame by judgement of law might by expreſs words be bound by act of the parliament of England. 3. That albeit no reſervation were in king John's charter, yet by judgement of law a writ of *error* did lie in the King's Bench in England of an erroneous judgement in the

Of the legiſlative authority over Ireland.

King's Bench of Ireland. Furthermore, in the caſe of a conqueſt of a Chriſtian kingdom, as well thoſe that ſerved in wars at the conqueſt, as thoſe that remained at home for the ſafety and peace of their country, and other the king's ſubjects, as well *antenati* as *poſtnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in England."

End of the paragraph cited from Calvin's caſe.

Remarks on the ſaid paragraph.

You ſee that the principal deſign of Lord Coke in this whole paragraph is to ſettle the proper diſtinctions between alien friends and alien enemies, and between alien enemies of a temporary kind, and aliens that are perpetual enemies, which he ſays is the caſe with all Pagans, or unbelievers in the Chriſtian religion; and that the introduction of the doctrine of the ſubjection of conquered countries to the Crown is foreign to the ſubject under conſideration, and ariſes merely from the mention of the diſtinction between alien enemies that are Chriſtians and aliens that are unbelievers in Chriſtianity, and is intended merely

merely to confirm that diſtinction by ſhewing that a like diſtinction takes place with reſpect to the laws of a Pagan and a Chriſtian country upon a conqueſt of them. The author's view is not to ſhew that the king of England alone (in contradiſtinction to the king and parliament conjointly) has the power of altering the laws of a conquered country in either caſe; but to declare that, upon the conqueſt of a Pagan country by the crown of England, all the laws of the country are inſtantaneouſly aboliſhed by the mere conqueſt itſelf, without any declaration of the Crown for the purpoſe; whereas, upon the conqueſt of a Chriſtian country, the old laws continue in force until they are expreſsly aboliſhed by the conqueror. This is the main propoſition here laid down by Lord Coke: and this propoſition is juſtly ridiculed and rejected by Lord Mansfield, as illiberal and extra-judicial, and as having been moſt deſervedly exploded. Now it is certain that, if this main propoſition, concerning the different fates of the laws of Chriſtian and Pagan countries upon a conqueſt by the crown of England, is extra-judicial, the incidental declaration contained in it, concerning the

The principal object of Lord Coke in the ſaid paragraph.

The main propoſition of Lord Coke in thisparagraph is extra judicial.

So likewiſe is the incidental declaration contained in it, concerning the legiſlative authority over conquered countries.

king's power of making new laws in the ſaid conquered countries, is no leſs ſo, having not the ſmalleſt connection with the only queſtion in the cauſe then under conſideration, which was, whether a perſon born under the king's allegiance in Scotland ſince the king's acceſſion to the crown of England, was to be conſidered as intitled to the ſame privileges of purchaſing land, &c. in England as if he had been born in England. Upon this ground, therefore, of its being extra-judicial, it ought to be treated with little regard, as well as the other opinion concerning the laws of Pagan and Chriſtian countries, which Lord Mansfield treats with ſo much contempt.

And therefore it deſerves but little regard.

But, beſides the circumſtance of its being extra-judicial, we may obſerve that the words of this declaration ſeem to relate only to the power of ſettling the laws of a conquered country *once for all*, immediately upon the conqueſt of it, and *not to the permanent legiſlative authority* over it, or the perpetual power of making and altering its laws whenever the Crown ſhall think it neceſſary. For theſe

But, ſuch as it is, it does not favour the opinion of the permanent authority of the Crown to make laws for conquered countries.

theſe words (omitting what is ſaid about the conqueſt of Pagan countries) are as follows. " If a king come to a Chriſtian kingdom by conqueſt, ſeeing that he hath *vitæ et necis poteſtatem*, [that is, the power of life and death,] he may at his pleaſure alter and change the laws of that kingdom: but, until he doth make an alteration of thoſe laws, the antient laws of that kingdom remain."—" Alſo, if a king hath a Chriſtian kingdom by conqueſt, as king Henry the 2d had Ireland, after king John had given unto them, being under his obedience and ſubjection, the laws of England for the government of that country, no ſucceeding king could alter the ſame without parliament."——" In which precedent of Ireland it is to be obſerved, that, albeit Ireland was a diſtinct dominion, yet, the title thereof being by conqueſt, the ſame by judgement of law might by expreſs words be bound by act of the parliament of England." Theſe three ſhort paſſages are all that relate to the legiſlative authority to be exerciſed over conquered countries. And they ſeem to me to contain theſe two propoſitions; to wit, 1ſt, That immediately after the conqueſt, the king

A repetition of the words that contain the ſaid incidental declaration.

Two propoſitions that are contained in the ſaid words.

king alone, without conſent of parliament, having the power of life and death over the conquered people, may chuſe whether he will permit the old laws of the conquered country to continue in force, or whether he will aboliſh them and introduce the laws of England in their ſtead; and 2dly, That, if he takes the latter courſe and gives the conquered people the laws of England, he cannot afterwards make any alteration in them without conſent of parliament; and conſequently that the king and parliament conjointly, and not the king alone, becomes poſſeſſed of the permanent right of legiſlation over ſuch countries; which is a concluſion directly contrary to that which Lord Mansfield deduces from theſe celebrated and much-agitated paſſages.

The latter of the ſaid two propoſitions is contrary to Lord Manſfield's opinion.

I am ſenſible this obſervation of mine is but a repetition of that which you made ſome time ago upon your firſt hearing the foregoing paſſages from Lord Coke's report of Calvin's caſe, as they were quoted in Lord Mansfield's judgement. But I thought it was worth while to mention it a ſecond time after the

the account I have been giving of that caſe, and the recital of the whole paragraph and head of argument in which thoſe paſſages occur, which has enabled us to judge better than we could at firſt of the true drift and meaning of thoſe paſſages, and of the ſtreſs it is reaſonable for us to lay upon them. We may now therefore conclude, from ſufficient grounds and premiſſes, that this extra-judicial opinion of the judges in Calvin's caſe is not a very weighty authority upon this ſubject, and that, ſuch as it is, it makes rather *againſt* than *for* the doctrine of the ſole legiſlative authority of the Crown over conquered countries, which Lord Mansfield has adduced it to ſupport.

Concluſions concerning the opinion of the judges contained in the foregoing paſſage of Ld. Coke's report of Calvin's caſe.

FRENCHMAN.

I am obliged to you for this account of that famous caſe, in the report of which theſe paſſages concerning conquered countries are contained. For it has not only been matter of amuſement to me, but has enabled me to form a more poſitive and better-grounded opinion concerning the meaning of them than I could have done without it. And the reſult is, that I am confirmed in the opinion

opinion I originally formed concerning them, when you firſt mentioned them as cited by Lord Mansfield, and which, I am pleaſed to ſee, agrees perfectly with your manner of underſtanding them. I have nothing, therefore, further to ſay concerning them but that I am extreamly ſurprized that Lord Manſfield, or any body elſe, ſhould ever have cited theſe paſſages of Calvin's caſe as a proof of the permanent legiſlative authority of the Crown over conquered countries, when, in truth, they contain a plain denial of it, in thoſe words which declare, that, when once king John had granted to the conquered people of Ireland the laws of England for the government of that country, no ſucceeding king could alter the ſame without parliament. This is a matter which, I confeſs, ſurprizes me, and which I cannot eaſily account for.

ENGLISHMAN.

A conjecture concerning the cauſe of Lord Manſfield's having cited the aforeſaid paſſage from Calvin's caſe in ſupport of the king's ſole legiſlative authority over conquered countries, though in truth it makes againſt the ſaid authority.

Nor can I with any degree of certainty. But it ſeems to have ariſen chiefly from the want of the neceſſary diſtinction, which we made ſome time ago when we were conſidering what Lord Mansfield had ſaid concerning

ing Ireland, between the power of introducing into the conquered country, by a ſingle act of authority, immediately upon the conqueſt, the laws of the conquering country, and the proper and permanent power of legiſlation over it, or the power of making, and unmaking, and altering, the laws of it at pleaſure, at any time after. For Lord Coke certainly does aſcribe the former power to the Crown alone, but the latter to the king and parliament conjointly.—But I think we have dwelt long enough upon the conſideration of this famous authority:—unleſs you have ſtill ſomething further to offer concerning it.

FRENCHMAN.

I have nothing further to offer concerning this authority, with reſpect to which I am perfectly ſatisfied. But I have one hiſtorical queſtion to propoſe to you concerning the caſe itſelf in which this authority occurs; I mean, Calvin's caſe.——I think you ſaid that the deciſion of that caſe had given offence to many people in England, and been conſidered as an effect of the ſervility of the

judges who decided it, and their diſpoſition to fall in with the wiſhes and humour of the court. Now I ſhould be glad to know what intereſt king James the 1ſt could have in the deciſion of that cauſe, and why he ſhould be ſuppoſed to have taken any concern in it.

ENGLISHMAN.

Of the concern ſhewn by K. James the 1ſt to have his Scotch ſubjects, born after his acceſſion to the crown of England, conſidered as natural-born Engliſhmen.

King James the 1ſt, almoſt immediately after his acceſſion to the crown of England, (which was on the 24th of March, 1602, or, according to our preſent ſtyle, 1603,) endeavoured with the utmoſt eagerneſs and anxiety to bring about an union between his old and new ſubjects, the people of Scotland and the people of England, in as many points as poſſible. In compliance with this ſtrong deſire of the king, an act of parliament was paſſed in England in the firſt year of the king's reign, by which certain commiſſioners of England were appointed to meet with commiſſioners of Scotland, and to treat with them upon this ſubject; and in the end the commiſſioners were directed to prepare three ſchedules, or copies in writing, of ſuch pro-

Commiſſioners are appointed by the two kingdoms to treat about an union of the ſame, In 1603.

poſitions

poſitions as they ſhould agree upon for the furtherance of this good deſign; of which copies one was to be delivered to the king, another to the parliament of England, and the third to the parliament of Scotland. The commiſſioners of both nations accordingly met in the king's palace at Weſtminſter, in a large room there, called *the painted chamber*, in the ſecond year of the king's reign, that is, in the year 1604, and treated long together upon this ſubject; and, in the end, they made written ſchedules of the propoſitions they had agreed upon, and delivered them to the king and the two parliaments of England and Scotland, agreeably to the directions which had been given them. The ſchedule for the parliament of England was preſented to the parliament by Sir Thomas Egerton, Lord Elleſmere, who was at that time lord high chancellor of England, and one of the commiſſioners for England at this treaty. It was preſented by him on the firſt day of the ſeſſion of parliament holden in the third year of the reign of king James the 1ſt, or in the year 1605, before the king himſelf, the Lords ſpiritual and temporal,

Proceedings of the ſaid commiſſioners in the year 1604.

Their propoſals are preſented to the Engliſh parliament in the year 1605.

and the Commons of England, who were all aſſembled in the upper houſe of parliament. But the conſideration of that ſchedule was, by another act of parliament made in that ſeſſion of the 3d year of king James's reign, deferred until the then next ſeſſion of parliament.

And are taken into conſideration in the year 1606.

In the ſaid next ſeſſion of parliament, which was held in the 4th year of the reign of king James the 1ſt, or in the year 1606, the ſaid ſchedule was taken into conſideration ſeparately by the houſe of Lords and the houſe of Commons. The material parts of it conſiſted of theſe four propoſitions; to wit, 1ſt, That all hoſtile laws of either nation one againſt the other, might be aboliſhed; and theſe laws were enumerated in the ſchedule; 2dly, That a certain courſe ſhould be taken for the facilitating of commerce and merchandizing by the merchants of both nations, both with each other and with foreigners; and 3dly, That the common law of both nations ſhould be declared to be, that all perſons born in either kingdom *ſince* his Majeſty's acceſſion to the crown of England

The purport of the ſaid propoſals.

land were to be conſidered as natural-born ſubjects in both kingdoms; and, in the 4th place, That acts of the two parliaments of England and Scotland ſhould be paſſed for the benefit of all perſons born in either kingdom *before* his Majeſty's acceſſion to the crown of England, ſo as to make them alſo be conſidered as natural-born ſubjects in both kingdoms as well as thoſe perſons who were born *ſince* the ſaid acceſſion; but with certain cautions and reſtrictions with reſpect to the privilege of holding great offices under the Crown, and offices of judicature, and of having voice in parliament, and with a ſaving of the king's prerogative.

Upon the two firſt articles, (which related to the abolition of hoſtile laws and the encouragement of trade,) the Lords and Commons had ſundry conferences together in *the Painted-chamber*; and, in effect, they agreed to give way to the ſubſtance of them. But, as to the third article, the Commons could not aſſent to declare the law in the manner therein propoſed; and thereupon they appointed a committee of their own members to confer with

The houſe of Lords has conferences with the houſe of Commons upon the ſaid propoſals.

TheCommons object to the third propoſition of the commiſſioners, concerning the *poſt nati*.

with a committee of the Lords concerning this article; who, accordingly, met for this purpoſe on the 25th day of February, 1606, in *the Painted-chamber*. In this conference Sir Edwin Sandys delivered the principal objections of the Commons to the ſaid third propoſition concerning the *poſt nati*, and the Lord Chancellor Egerton was the principal ſpeaker on the other ſide of the queſtion. But, as the Commons adhered to their opinion, the committee of the Lords on the following day deſired the judges who attended them, to deliver their opinions upon the matter; which they accordingly did in favour of the *poſt nati*. The judges who ſpoke on this occaſion, were *Sir John Popham*, the lord chief juſtice of the King's Bench, *Sir Edward Coke*, chief juſtice of the Common Pleas, and *Sir Thomas Fleming*, chief baron of the Exchequer. The other judges, who declared that they agreed with theſe three in opinion, were ſeven in number; and their names were Juſtice *Fenner*, Juſtice *Williams* and Juſtice *Tanfield*, all judges of the King's Bench, Juſtice Warburton and Juſtice Daniel, judges of the court of Common Pleas, and Baron

The judges deliver their opinion in favour of the *poſt nati*.

Baron *Snig* and Baron *Altham*, barons of the Exchequer. So that there were ten judges in all, who concurred in this opinion. Theſe were all the judges that were preſent on this occaſion, except Judge *Walmeſley*; and he was of a different opinion.

This opinion was extremely agreeable to king James, not only becauſe it promoted his favourite deſign of uniting the two nations in as many points as poſſible, but becauſe it confirmed the opinion which he himſelf had been taught by his crown-lawyers to entertain upon the ſubject, and which he had, ſomewhat imprudently, declared to the people in an authoritative manner in one of his proclamations. This circumſtance, of its having already been declared by the king in his proclamation to be law, and that of its having been taken to be ſo by the commiſſioners of the two nations, and propoſed by them, in their third propoſition, to be ſo declared by parliament, are alledged by Lord Chancellor Elleſmere, in his argument at the conference upon this ſubject between the two houſes of parliament, to be ſtrong reaſons for declaring this

King James had already declared his opinion in favour of the *poſt nati* by a proclamation.

This circumſtance was urged by the Lord Chancellor to the houſe of Commons, as a reaſon for declaring the law to be ſo.

this opinion to be agreeable to law, unleſs it ſhould be moſt clearly contrary to it; it not being for the king's honour that his declared opinion ſhould be contradicted. And therefore we may well ſuppoſe that this conſideration had ſome little influence on the minds of the judges to determine their opinion in favour of the *poſt nati*, unleſs they had thought the law to be clearly otherwiſe beyond all poſſibility of doubt.

It ſeems probable that this reaſon might ſomewhat influence the opinion given by the judges.

But, whether the judges acted partially or impartially in delivering this opinion, it is certain that it did not convince the houſe of Commons that the law was ſo; which gave occaſion to king James to mention the matter to his parliament in a very long ſpeech, which he delivered to them from the throne on the 31ſt day of the enſuing month of March, that is, about five weeks after the judges had delivered this opinion. In this ſpeech there are the following paſſages. " But for the " *Poſt nati*, your own lawyers and judges, " at my firſt coming to this crown, informed " me, there was a difference between the " *Ante* and the *Poſt Nati* of each kingdom: " which

The Commons were not convinced by the opinion of the judges.

The king mentions the ſubject in a ſpeech to the parliament, ſome weeks after the delivery of the ſaid opinion of the judges

Paſſages of the king's ſpeech, relating to this ſubject.

" which cauſed me to publiſh a proclamation
" that the *poſtnati* were naturalized, *ipſo*
" *facto*, by the acceſſion to the crown. I
" do not deny that judges may err, as men;
" and therefore I do not preſs you here to
" ſwear to all their reaſons: I only urge, at
" this time, the conveniency for both king-
" doms, neither preſſing you to judge nor
" to be judged. But remember alſo, it is as
" poſſible, and likely, that your lawyers may
" err as the judges. Therefore, as I wiſh
" you to proceed here in ſo far as may tend
" to the weal of both nations, ſo would I
" have you, on the other part, to beware
" to diſgrace either my proclamation or the
" judges, who, when the parliament is done,
" have power to try your lands and lives:
" for ſo you may diſgrace both your king
" and your laws: for the doing of any act
" that may procure leſs reverence to the
" judges, cannot but breed a looſeneſs in the
" government and a diſgrace to the whole
" nation."------" In any caſe wherein the
" law is thought not to be cleared (as ſome
" of yourſelves do doubt that, in this caſe
" of the *poſtnati*, the law of England doth

" not clearly determine,) then in ſuch a " queſtion, wherein no poſitive law is reſo- " lute, *rex eſt judex*; for he is *lex loquens*, " and is to ſupply the law where the law " wants." By theſe paſſages in this ſpeech of king James we may perceive how anxious the king was to get this point relating to the *poſtnati* ſettled in their favour.

Names of the lawyers who argued for the Commons at the conference with the Lords.

The lawyers who argued on the ſide of the houſe of Commons in the conference with the committee of Lords, before the judges delivered their opinion, were Doddridge, the king's ſollicitor general, (who was afterwards a judge,) and Lawrence Hyde, (who was afterwards chief juſtice of the King's Bench, and was uncle to the famous earl of Clarendon, lord chancellor to king Charles the ſecond,) Brook, Crew, and Hedley, all profeſſors of the Common Law, according to the expreſſion of Serjeant Moore, (from whoſe reports the foregoing account of this proceeding is taken) that is, as I ſuppoſe, ſerjeants at law; which degree of ſerjeants is the higheſt degree of learning that belongs to the profeſſion of an advocate, or barriſter at

at law, in England. You ſee therefore, by theſe reſpectable names of lawyers who maintained a different opinion from the judges upon this queſtion, how far it was from being conſidered at that time as a clear point in favour of the *poſtnati*, and likewiſe how warmly it was agitated and conteſted, as a matter of capital importance. In ſhort, after all theſe debates and opinions and ſpeeches, the Houſe of Commons adhered to their firſt opinion, and could not be brought to conſent, either, to declare by an act of parliament, that the law was already as the king and the judges had laid it down, (as the commiſſioners of the two nations had recommended in their third propoſition,) or to alter the law, and make it ſo for the future. But the thing went off at that time, and the third propoſition of the commiſſioners of the two nations did not take effect. The Commons, however, agreed to aboliſh the hoſtile laws that were then in being againſt the Scots, and an act of parliament was accordingly paſſed for that purpoſe.

The Commons adhered to their firſt opinion notwithſtanding the opinion of the judges.

But they agreed to aboliſh the hoſtile laws againſt Scotland.

The affair of the *poſtnati* was revived two years after by Calvin's caſe, in the year 1608;

and then was determined judicially in favour of the *poſtnati*.

The judges were blamed for this deciſion, as having been influenced by a deſire to gratify K. James's humour.

The words of Mr. Wilſon, the hiſtorian, upon this ſubject.

This affair of the *poſtnati* ſeems to have reſted here for about two years, and was then revived by the action above-mentioned brought in the name of the infant, Robert Calvin, againſt Richard and Nicholas Smith, for the poſſeſſion of a freehold houſe near London; and was then determined in a judicial manner by the reſolution of the judges in favour of the *poſtnati*; which reſolution has ever ſince been allowed to be the law upon this ſubject. But the judges on this occaſion were ſuppoſed by many people to be influenced by a deſire of gratifying the king's humour, as well as on the former occaſion, when they delivered their opinion before the committees of the houſes of Lords and Commons. For I find that Mr. Wilſon, in his hiſtory of the life and reign of king James the 1ſt, ſpeaks of their conduct in this matter in ſevere terms. After giving an account of the debates in parliament upon this affair of the union of the two kingdoms and the privileges of the *poſtnati*, he has theſe words. "The parliament only feared, that the king's "power would have ſuch an influence upon "the judges of the kingdom, that the Scots "would

" would be naturalized too ſoon; (they were " reſolved not to be acceſſary to it;) which " indeed ſome two years after was confirmed " in *Calvin's* caſe of *poſt-nati*, reported by " the Lord Chief Juſtice *Coke*, (who was fit " metal for any ſtamp royal,) and adjudged " by him, and the Lord Chancellor Elleſ- " mere, and moſt of the judges of the king- " dom, in the Exchequer-chamber, though " many ſtrong and valid arguments were " brought againſt it. Such power is in the " breath of kings, and ſuch ſoft ſtuff are " judges made of, that they can vary their " precedents, and model them into as many " ſhapes as they pleaſe." This Mr. Wilſon is an original writer, who lived in the time of which he writes, and all through the following reign of Charles the 1ſt, and is the moſt copious hiſtorian that is extant of the reign of king James the 1ſt. We may therefore reaſonably believe that the cenſures he here paſſes upon Lord Coke and the other judges, on account of their deciſion of Calvin's caſe, were ſuch as he had often heard beſtowed upon them at the time of that tranſaction by the popular men of that age.—

This

This is the beſt account I am able to give you of the occaſion of the diſſatisfaction of many people with the judges for their conduct in that buſineſs, and of the ground of the ſuſpicion that was then entertained of their having decided this queſtion in the manner they did, from a deſire to gratify the king.

End of the account of the affair of the *poſtnati*.

FRENCHMAN.

I am obliged to you for the trouble you have taken to ſatisfy my curioſity on this ſubject, and have now nothing further to aſk concerning it.——We may therefore now return to the original ſubject of our inquiry, to wit, the power of the Crown to make laws for the inhabitants of conquered countries, if there remains any thing further to be ſaid upon it. I therefore beg you would reſume the conſideration of this queſtion.

ENGLISHMAN.

I would do ſo with pleaſure, if the ſubject were not exhauſted. But I believe we have gone through all the branches of Lord Manſfield's argument in ſupport of the ſole legiſlative

tive authority of the Crown over conquered countries, and have given them a very full and fair examination: which is all I propoſed to do upon the ſubject. For, as to my own opinion upon it before that deciſion of Lord Mansfield, I have already mentioned it to you in the beginning of our converſation, together with the reaſons upon which I grounded it, and had the ſatisfaction of finding that you intirely agreed with me in both, and even anticipated ſome of the latter. What effect the mere authority of Lord Mansfield, ſitting in his judicial capacity, as chief juſtice of the court of King's Bench, and delivering a contrary opinion, but grounding it on reaſons that we think weak and unconcluſive, ought to have upon our minds, I will not pretend to determine. But it is hard to give up one's reaſon to mere authority.

FRENCHMAN.

So hard that I ſhall not do it. This is too important a point to be ſettled by a ſingle deciſion of a court of juſtice, or, perhaps I ought rather to ſay, by the opinion of a ſingle judge. For, by what you ſtated to me of that

An inquiry, whether the opinion of Ld. Mansfield concerning the power of the Crown over conquer'd countries, delivered in the judgement in the case of Campbell and Hall, ought to be considered as the opinion of the other judges of the Court of King's Bench.

that judgement in the case of Campbell and Hall, it does not appear to be quite certain that all the judges of the court of King's Bench concurred with Lord Mansfield in opinion upon that first point of the cause. For, since, as Lord Mansfield expressly declared, they all agreed that the plaintiff Campbell was intitled to the judgement of the court upon the second point, to wit, that the king, if he had had the sole legislative authority over the island of Grenada immediately after the conclusion of the treaty of Paris in February, 1763, had nevertheless precluded himself, by his proclamation of October, 1763, from exercising it from that time forward, and had thereby transferred the said power to the future governours, councils, and assemblies of the said island; I say, since all the judges agreed with Lord Mansfield in the opinion that the plaintiff Campbell ought to have judgement upon this second ground, it is possible that they might not concur with him in his opinion upon the first point, concerning the king's original legislative authority over that island before the said proclamation of October,

1763.

1763. Unleſs, therefore, it was expreſsly declared by Lord Mansfield (who ſeems to have been the only judge that ſpoke upon that occaſion) that the other judges concurred with him in that opinion upon the firſt point, I do not think we are bound to conſider it as being their opinion. I therefore ſhould be glad to know whether Lord Mansfield expreſsly declared that the other three judges of the court did concur with him in that opinion.

ENGLISHMAN.

I do not find that he did make ſuch a declaration, though, with reſpect to the ſecond point, he expreſſed himſelf in theſe poſitive words; "But, after full conſidera-" tion, we are of opinion, that before the " 20th of July, 1764, the king had pre-" cluded himſelf from the exerciſe of a le-" giſlative authority over the iſland of Gre-" nada." There is therefore a poſſibility that your ſurmiſe may be true, that the other judges did not agree with him in opinion upon the ſaid firſt point. Yet their ſilence on the occaſion ſeems to imply an

assent to what he delivered. So that I don't know what to conclude concerning that matter. All that is certain is, that the other judges did not openly declare their concurrence with Lord Mansfield in this opinion.

FRENCHMAN.

Well, be that as it may; whether they did, or did not, concur with Lord Mansfield in that opinion, I confess I cannot bring myself to accede to it, after having seen the weakness of the reasons which have been alledged in support of it by so very able a defender of it as Lord Mansfield. For, if that opinion could have been rendered plausible and probable by any man, I presume it would have been so by Lord Mansfield. And yet we have seen how remarkably he has failed on this occasion, both in his reasonings and in his facts; I must therefore adhere to my first opinion till some better arguments are produced to make me change it.——But, as this inquiry has run into great length, in consequence of the full and particular manner in which you have examined the

the ſeveral hiſtorical examples adduced by Lord Mansfield in ſupport of his opinion, and likewiſe of ſome digreſſions to other ſubjects which you have made to gratify my curioſity, I muſt deſire you to reſume the ſubject for a little while longer, and repeat the principal concluſions we have agreed upon in anſwer to the ſeveral branches of Lord Mansfield's argument, and to ſtate them in as compact and ſummary a manner as you can, to the end that I may be the better able to arrange and retain them in my memory.

ENGLISHMAN.

I think this will indeed be very proper, for both our ſakes; and therefore I will endeavour to do it with as much brevity as ſhall be conſiſtent with a full enumeration of the ſeveral concluſions, (relative to the main ſubject,) upon which we have agreed; but without any mention of the collateral and incidental ſubjects to which we have digreſſed. But even this will take up many words.

A recapitulation of the principal concluſions eſtabliſhed in the foregoing pages in oppoſition to Lord Mansfield's argument in ſupport of the ſole legiſlative power of the Crown over conquered countries.

Concluſions concerning Lord Manſfield's reaſonings from the general principles of law and reaſon.

We have agreed, then, in the firſt place, that Lord Mansfield has reaſoned very inconcluſively in the firſt part of his argument, in which he endeavours to eſtabliſh the king's ſole legiſlative authority over conquered countries upon general principles of law and reaſon;——That he has therein confounded the power of making war, and the ſummary and arbitrary authority neceſſarily attendant upon it, (which confeſſedly belong to the Crown alone,) with the power of governing conquered countries in time of peace, after they have been finally ceded by their former ſovereigns to the Crown:—— And that he has likewiſe confounded this latter power of governing a country, and exerciſing legiſlative authority over it, after it is ceded, with the power of making peace, or of either accepting the ceſſion of the conquered country from its former ſovereign, or reſtoring the country back to him:—— And, laſtly, that he has endeavoured to deduce a right of making laws for a conquered country from the right of granting away the vacant lands of it, that is, from a right of *ownerſhip*; which, if it were to be admitted

admitted in other cafes to be fufficient for this purpofe, would prove every land-owner to be an abfolute monarch, or legiflator, over the perfons who rented, or took grants of, his land. Thefe, I think, are the remarks we concurred in making upon the firft part of Lord Mansfield's argument, in which he endeavoured to eftablifh this fole legiflative power of the Crown upon principles of law and reafon.

Conclufions concerning the precedents from hiftory, which were cited by Lord Mansfield.

I come now to his precedents from hiftory, which are the cafes of Ireland, Wales, Berwick upon Tweed, Gafcony, Calais, New-York, Jamaica, Gibraltar, and Minorca.

Of Ireland.

With refpect to Ireland we obferved, that he argued, from king John's having, by his fole authority, introduced the laws of England into Ireland, that he therefore was the fole legiflator of it; which we agreed to be by no means a juft conclufion, there being a manifeft difference between a power in the conquering king to introduce, once for all, immediately after the conqueft, into the conquered

conquered country the laws of the conquering country, and the *regular, permanent, legiſlative authority* by which the laws of the conquered country may, at any time after, be changed at the pleaſure of the legiſlators, (whoever they are,) not only by introducing into it the laws of the conquering nation, but any other laws whatſoever, and this as often, and in as great a degree, as the legiſlators ſhall think fit. And we further obſerved, that Lord Coke, in the paſſage quoted from this report of Calvin's caſe, has expreſsly declared that the kings of England were *not* poſſeſſed of this permanent legiſlative authority over Ireland, not having a right to alter the laws of England, (when once introduced there by king John,) without conſent of parliament; and that Lord Mansfield has adopted this opinion of Lord Coke, though it claſhes with the concluſion which he laboured to draw from this caſe of Ireland in favour of the king's ſole legiſlative power in the iſland of Grenada. And we further obſerved that, for ſome centuries paſt, at leaſt, the laws which have been made for the government of Ireland have been

been made either with the conſent of the parliament of England, or with that of the parliament of Ireland. So that, upon the whole matter, Ireland appears to be a very unfit example of the exerciſe of ſuch a ſole legiſlative authority in the Crown over a conquered country as Lord Mansfield aſſerted to have belonged to it in the caſe of the iſland of Grenada before the publication of the royal proclamation of October, 1763. Theſe, I think, are the principal remarks we agreed upon concerning Ireland.

Of Wales,

With reſpect to Wales, it appeared to us that Lord Mansfield had miſtaken two very material facts relating to it. For, in the firſt place, he aſſerted that that country had not been a fief of the crown of England before its compleat reduction by king Edward the 1ſt, notwithſtanding king Edward, in the famous *Statutum Walliæ*, paſſed immediately after the reduction of it, expreſsly declares that it had been ſo, and notwithſtanding a cloud of paſſages in that venerable old hiſtorian, Matthew Paris, (who lived in the reign of king Henry the 3d, king Edward's father,) which

which prove that it was in ſuch a ſtate of feudal ſubjection to the crown of England throughout all the reign of king Henry the 3d and for ſeveral reigns before. But, in oppoſition to theſe deciſive teſtimonies, Lord Mansfield will have it that Wales had never been a fief of the crown of England before the reduction of it by king Edward, but was then, for the firſt time, reduced by his victorious arms, to be a dependant dominion of the crown of England; but that, for ſome reaſons of policy, (which, however, Lord Mansfield does not ſtate, nor even hint at,) king Edward thought proper to declare it to have been in a ſtate of feudal ſubjection to the Crown before his conqueſt of it. And here we obſerved that Lord Mansfield reaſoned inconcluſively even from his own aſſumed ſtate of the fact. For, if Wales had not been a fief of the crown of England before king Edward's reduction of it, but had been (as Lord Mansfield ſuppoſes) an abſolutely independant ſtate until that time, yet, if king Edward had, for any reaſons of policy, thought fit to conſider it (though falſely) as having been before in a ſtate of

feudal

feudal ſubjection to the Crown, ſuch a plan of policy in king Edward would have rendered Wales an unfit example of the exerciſe of the power of a king of England over a conquered country; becauſe it muſt be ſuppoſed that king Edward would, in ſuch a caſe, have exerciſed only ſuch rights of government over it as were compatible with the political ſituation in which he would have thought fit to place it, which would have been that of an antient fief of the Crown reduced into poſſeſſion. And we obſerved alſo that he had miſconceived another material fact relating to this country, with reſpect to the power by which laws were made for the government of it after its reduction by king Edward. For he aſſerts that king Edward made laws for it by his own ſingle authority, notwithſtanding it is expreſsly declared by that king himſelf in the preamble of his famous *Statutum Walliæ*, above-mentioned, that the laws he then eſtabliſhed for the government of it were made *de conſilio procerum regni noſtri*, or by the conſent of his parliament.

Theſe miſtakes we obſerved to have been made by Lord Mansfield in what he ſaid concerning thoſe two great examples of Ireland and Wales; which are alſo of too great antiquity to have much weight in determining a queſtion concerning the conſtitution of the Engliſh government at this day.

We then obſerved that all the other inſtances that were mentioned by him, except thoſe of Gibraltar and Minorca, are of no importance to the queſtion. Theſe inſtances were the town of Berwick upon Tweed, the dutchy of Guienne, or Gaſcony, the town of Calais in France, the province of New-York in North America, and the iſland of Jamaica.

Of Berwick upon Tweed.

All that he ſays of Berwick upon Tweed is, that it was governed by a royal charter. But that circumſtance is no proof that the king was the ſole legiſlator of it, any more than he is of the cities of York, Briſtol, Exeter, and twenty other towns in England, which are governed alſo by royal charters. And even that charter of Berwick appears to have been confirmed by act of parliament in the reign of king James the firſt.

As

As to the dutchy of Guienne, or Gaſcony, and the town of Calais in France, they were not acquired by the kings of England by conqueſt, but by marriage and inheritance, and conſequently can afford no example of the power of the Crown over conquered countries.

Of the dutchy of Gaſcony and the town of Calais, in France.

And the province of New-York in America is an unfit example for this purpoſe, becauſe, though perhaps in truth it might be a mere conqueſt made upon the Dutch in the year 1664, after they had been many years in quiet poſſeſſion of it, yet it was not ſo conſidered by king Charles the ſecond, who took it from them, but was claimed and ſeized upon by his order as a part of the territory of the more antient Engliſh colony of New-England, into which, it was pretended, the Dutch had intruded themſelves without the permiſſion of the Crown. And, upon this ground of an already-exiſting right to it in the crown of England, it was granted away by K. Charles the 2d to his brother, the duke of York, before ever the fleet, which was ſent to take poſſeſſion of it, had ſailed from England; and it was

Of the province of New York.

taken poſſeſſion of by colonel Nicholls, as a part of the king's old dominions, before the king entered into the firſt Dutch war. As, therefore, it was not conſidered by the Crown as a conquered country, the government eſtabliſhed in it cannot be juſtly cited as an example of the authority of the Crown over conquered countries.—And nearly the ſame thing may be ſaid of the iſland of Jamaica; ſince Lord Mansfield tells us that he had found, upon inquiring into the hiſtory of it, that it had been almoſt intirely abandoned by the Spaniſh inhabitants of it ſoon after its conqueſt by the arms of England in the year 1655 in the time of Cromwell's uſurpation, and that it was occupied only by Engliſh ſettlers at, or ſoon after, the reſtoration of king Charles the 2d in 1660; inſomuch that it had been conſidered ever ſince that period as an Engliſh plantation, and not as a conquered country. For, if this be true, (as I do not doubt it is,) it renders this iſland an unfit example of the exerciſe of the legiſlative authority of the Crown over conquered countries. I mean only, however, that it is not a *direct* example for this purpoſe:

Of the iſland of Jamaica.

poſe: for *indirectly*, I acknowledge, both this iſland and the province of New-York may be uſed as arguments in favour of this authority, by reaſoning as follows. "The power of the Crown over a *conquered country* muſt be at leaſt as great as it is over a *planted* country, or colony. Therefore, ſince the king of England exerciſed legiſlative authority over the iſland of Jamaica for about twenty years, without the concurrence of either the Engliſh parliament or an aſſembly of the people; and ſince the duke of York did the ſame thing in the province of New-York for about eighteen years by virtue of a delegation of the powers of government to him from the Crown by king Charles's letters-patent; and theſe two countries were not conſidered as conqueſts, but as plantations of Engliſhmen; it follows, *à fortiori*, that in countries that are not only conquered, but conſidered as conquered, the Crown may lawfully exerciſe the ſame authority." This would have been a tolerably plauſible argument, and much ſtronger than any of thoſe which Lord Mansfield made uſe of in that judgement. But he did not make uſe of this argument;

Of both Jamaica and New-York.

argument; and indeed could not, conſiſtently with the opinion he delivered concerning *planted countries*, or colonies: for in theſe he declared that the king alone *had not* the power of making laws and impoſing taxes, but the king and parliament conjointly, or the king and the aſſembly of the freeholders of the colony conjointly, agreeably to the opinion of Sir Philip Yorke and Sir Clement Wearg in the year 1722 concerning the iſland of Jamaica. He could not, therefore, make uſe of the foregoing argument *à fortiori* in favour of the king's ſole legiſlative authority over conquered countries, which is built upon the ſuppoſition of his Majeſty's having had ſuch an authority over *planted countries*, or colonies; becauſe he denied the exiſtence of the latter authority, which is its foundation. According to Lord Mansfield's doctrine, therefore, of the king's *not* being the ſole legiſlator of planted countries, the inſtances of New-York and Jamaica cannot afford the above indirect argument *à fortiori* in ſupport of the king's ſole legiſlative authority over conquered countries. Nor can they afford a direct argument, independently

ently of the conſideration of planted countries, in ſupport of this authority; becauſe thoſe places, or provinces, (though really conqueſts,) were conſidered and treated as planted countries. And therefore they ought not to have been cited by Lord Mansfield as proofs of the ſaid authority.——As to the opinion of ſuch lawyers (if there are any ſuch at this day) as would go further than Lord Mansfield in their notions of the king's legiſlative authority, and would ſay, that the king is the ſole legiſlator not only of all conquered countries, but of all *planted* countries in which he has not diveſted himſelf of his authority by ſome charter or proclamation, I ſhall ſay nothing to it but that I agree with Lord Mansfield in conſidering the opinion of ſuch lawyers as erroneous with reſpect to planted countries, and that I am inclined to go beyond Lord Mansfield in thinking it likewiſe erroneous with reſpect to conquered countries, or, at leaſt, that the arguments adduced by his lordſhip in ſupport of it in that latter caſe, are not ſufficient to eſtabliſh it.

As

Of Gibraltar. As to Gibraltar and Minorca, in which the king has made from time to time ſome regulations by his orders in his privy council, we have obſerved that the former of theſe places is really nothing more than a garriſon-town, without an inch of ground belonging to it beyond the fortifications; and that the

Of Minorca. latter of them, though an iſland of ſome extent, has always been conſidered by the people of England in nearly the ſame light, or as an appendage to the fortreſs of St. Philip's caſtle, which defends the harbour of Mahon;—that its civil government has been intirely neglected by the miniſters of ſtate in Great-Britain ever ſince the conqueſt of it, and that no attempt has been made to encourage the profeſſion of the Proteſtant religion in it, or to introduce the Engliſh laws there, even upon criminal matters; and yet that the ſtate of the laws, which are ſuppoſed to take place there, is ſo uncertain and undetermined, that, (though the old Spaniſh laws are ſuppoſed to be in force, and moſt frequently appealed to,) the inhabitants ſometimes plead the Engliſh laws. And from theſe circumſtances of neglect, confuſion,

and

and uncertainty,——and likewiſe from the ſmall importance of the ſubjects upon which the kings of Great-Britain have exerciſed a legiſlative authority over theſe places by their orders in council, (no laws for creating new felonies or capital crimes, or for impoſing taxes on the inhabitants of thoſe countries, or for any other very important purpoſe, having ever been made with reſpect to them,) ——we concluded that neither this iſland nor the town of Gibraltar were fit examples to prove Lord Mansfield's aſſertion concerning the ſole legiſlative authority of the Crown over conquered countries.

Theſe were the principal remarks we made upon Lord Mansfield's ſecond ground of argument in ſupport of the ſole legiſlative authority of the Crown over conquered countries, which conſiſted of hiſtorical examples, which were ſuppoſed to be precedents of the exerciſe of ſuch an authority.

Concluſions concerning the opinions of judges and other eminent lawyers, which were cited by Lord Mansfield.

I come now to Lord Mansfield's laſt head of argument in ſupport of this authority; which conſiſted of the opinion of the judges, as reported by Lord Coke, in Calvin's caſe,

and of that of Sir Philip Yorke and Sir Clement Wearg, (attorney and ſollicitor general to king George the 1ſt,) in the year 1722, on a queſtion referred to them concerning the iſland of Jamaica.

Of the opinion of the judges in Calvin's caſe.

Concerning the opinion of the judges in Calvin's caſe we obſerved in the 1ſt place, that it was extrajudicial, having little, or no, relation to the queſtion then under conſideration, which was, "whether a perſon born in Scotland ſince the acceſſion of king James the 1ſt to the crown of England, was to be conſidered as a natural-born ſubject in England as well as in Scotland, ſo as to be intitled to purchaſe land, and maintain actions at law for the poſſeſſion of it, in the former kingdom as well as in the latter." And, upon this ground of its being extra judicial, we concluded that this opinion of the judges concerning conquered countries was not to be conſidered as deciſive upon the ſubject.

In the ſecond place, we obſerved that this opinion of the judges, concerning the power of the Crown over conquered countries, was intermixed with another opinion, concerning the

the difference between Pagan and Chriſtian conquered countries, which was ſo unreaſonable, illiberal, and unjuſt, that Lord Manſfield ſaid it had long ago been moſt deſervedly exploded. Now, if the opinion of thoſe judges on the latter ſubject is ſo very contemptible, it muſt, ſurely, leſſen our reſpect for the wiſdom and judgement of the judges who delivered it, and conſequently muſt take off much of the weight which their other opinion, concerning Chriſtian countries conquered by the arms of England, would otherwiſe derive from their authority.

In the 3d place, we obſerved that it appears from the hiſtory of thoſe times, that the judges, who determined Calvin's caſe, were conſidered by many perſons of that age as having acted with a ſervile degree of complaiſance to king James on that occaſion; which may be ſuppoſed to have influenced them in the opinions they delivered upon incidental points that were mentioned in the courſe of their arguments, as well as in their opinion upon the main queſtion then in diſpute before them. And this conſidera-

tion muſt contribute to leſſen the authority of their opinions upon thoſe incidental points as well as upon the main point, and conſequently that of their opinion, ſo much relied upon by Lord Mansfield, concerning the power of the Crown over conquered countries.

That opinion of the judges is really contrary to Lord Mansfield's opinion.

And, in the 4th and laſt place, we obſerved that this opinion of Lord Coke and the other judges in Calvin's caſe, concerning the legiſlative power of the Crown over conquered countries, is not the ſame with Lord Manſfield's opinion upon this ſubject, but materially different from it. For Lord Coke aſcribes to the Crown only the power of changing the laws of the conquered country *once for all*, upon the conqueſt of it, and introducing the laws of England in their ſtead: but he adds that, when once the king has introduced the laws of England into the conquered country, he cannot afterwards alter them without the conſent of parliament; which is ſaying, that the king and parliament conjointly, and *not* the king alone, are poſſeſſed of the permanent right of legiſlation over it. So that this

this authority of Calvin's caſe, (ſuch as it is,) is rather adverſe than favourable to Lord Mansfield's doctrine upon this ſubject.

Theſe are the obſervations we made with reſpect to this opinion of the judges in Calvin's caſe, upon which Lord Mansfield laid ſo great a ſtreſs.

Of the opinion of Sir Philip Yorke and Sir Clement Wearg in 1722.

The only remaining authority cited by Lord Mansfield was the opinion given by Sir Philip Yorke and Sir Clement Wearg in the year 1722 upon a queſtion that was referred to them concerning the iſland of Jamaica.

This opinion, we acknowledged, did really co-incide with Lord Mansfield's opinion upon the authority of the Crown over conquered countries, though the opinion of the judges in Calvin's caſe did not. But we agreed that, as thoſe learned gentlemen were at that time in the ſervice of the Crown in the offices of attorney and ſollicitor general to king George the 1ſt, (which muſt naturally be ſuppoſed to have given them ſome degree of

byaſs

byaſs in favour of the prerogative of the Crown, and this opinion appears to have been given by them in a very haſty and negligent manner, (ſince they did not take the pains to inquire, and to form a judgement, whether Jamaica ought to have been ſtill conſidered as a conquered country, or had, by the conduct of the Crown in the government of it ſince the reſtoration in 1660, been brought into the condition of a planted country, or colony; which was ſo neceſſary to their giving an uſeful and ſatisfactory opinion upon the matter referred to them;) I ſay, we agreed that, for theſe reaſons, this opinion of theirs was not intitled to much regard with reſpect to the deciſion of the important queſtion which is the ſubject of our preſent inquiry.

And thus we compleated our diſcuſſion of Lord Mansfield's third and laſt head of argument, which was grounded on the opinions of judges and other learned lawyers.

End of the recapitulation begun in p. 347.

This, I preſume, is the kind of recapitulation which you wiſhed me to make to you, of the principal concluſions we had agreed on in the courſe of our examination of Lord Mansfield's opinion upon this ſubject.

FRENCH-

FRENCHMAN.

It is: and I am much obliged to you for making it; as it enables me to carry off theſe concluſions, which we have agreed on, more eaſily than I otherwiſe could do. Nor do I think of any thing further to trouble you about upon the ſubject. And yet, before I intirely quit it, I muſt beg leave to expreſs my ſurprize at the *very poſitive and peremptory manner* in which Lord Mansfield aſſerted this power of making laws for conquered countries to belong to the Crown. "No "diſpute, ſays he, was ever ſtarted before "upon the king's legiſlative right over a "conqueſt. It never was denied in Weſt-"minſter Hall; it never was queſtioned in "parliament." And again, "No book, "no ſaying of a judge, no opinion of any "counſel, publick, or private, has been "cited on the other ſide; no inſtance has "been found in any period of our hiſtory, "where a doubt has been raiſed concerning "it." Theſe are ſtrangely confident expreſ-ſions, conſidering the weakneſs of the proofs he adduces in ſupport of them; to which, indeed,

A remark on Lord Manſfield's peremptory manner of aſſerting the ſole legiſlative authority of the Crown over conquered countries.

indeed, they form a remarkable contraſt. This, I confeſs, has ſurprized me in a man ſo much celebrated for his learning and abilities as Lord Mansfield. I therefore wiſh to know how you account for it; and the rather, becauſe this extream poſitiveneſs in a man of his abilities has a tendency to dazzle and overbear my judgement, and make me yield implicitly to his opinion, notwithſtanding I have ſatisfied myſelf, by our diſcuſſion of this ſubject, that the reaſons he has adduced in ſupport of it, are very weak.

ENGLISHMAN.

Your remark is very juſt. There is a ſtrange degree of poſitiveneſs in his aſſertions, that is very ill ſuited to the weakneſs of his arguments in ſupport of them. And what makes it the more ſurprizing is, that he himſelf ordered this caſe of *Campbell* and *Hall* to be argued no leſs than three times, on three different days, at the bar, before he decided it; which would, ſurely, have been unneceſſary, and, conſequently, injurious to the parties (by forcing them to ſuffer a needleſs delay, and incur an unneceſſary degree of expence,

expence, in the profecution of their legal claims,) if the matter had been ſo extreamly clear and free from doubt as he, in delivering his judgement, repreſents it. But that poſitiveneſs of aſſertion is agreeable to his conſtant manner of ſpeaking, and may, perhaps, be conſidered as one of the ingredients of his ſpecies of eloquence, as it certainly has the effect you mention, of dazzling, for a time, and overbearing his hearers into an acquieſcence in the truth of the propoſitions he ſo peremptorily aſſerts. But you, who have examined the reaſons adduced by him in ſupport of his aſſertion concerning the preſent ſubject, and have found them to be inſufficient, ought to break through the inchantment, and to yield to the concluſions of your own underſtanding, and embrace what appears to it to be the truth; agreeably to the old Latin proverb, *Amicus Plato; Amicus Socrates; ſed magis amica veritas.* However, to take off ſomething of the impreſſion which you ſay thoſe poſitive aſſertions of Lord Mansfield, which you juſt now repeated, are apt to make upon your mind, I will endeavour to ſhew you that moſt of them might

Aſſertions of an oppoſite tendency to thoſe of Lord Mansfield may be made with equal truth.

be changed into others of an oppoſite tendency, which ſhould be either as nearly, or more nearly, agreeable to the truth: though yet, I confeſs, they will not be deciſive of the queſtion againſt the legiſlative authority of the Crown, any more than Lord Mansfield's aſſertions are deciſive in favour of it; becauſe both thoſe aſſertions and Lord Mansfield's, (to which they are oppoſed,) are negative propoſitions, from which no certain concluſions can be drawn.

Lord Mansfield's firſt aſſertion, concerning the king's legiſlative power over a conqueſt.

Lord Mansfield ſays in the firſt place; "That the king's legiſlative right over a "conqueſt has *never been denied* in Weſt-"minſter-Hall." Now, if this aſſertion were true, it would prove nothing, unleſs this legiſlative right had been frequently aſſerted in Weſtminſter-Hall, and made the ground of ſome proceeding there; which it has not. We may therefore change this aſſertion into the following; "The king's legiſlative right "over a conqueſt has *never been aſſerted* in "Weſtminſter-Hall." And this latter aſſertion is as near the truth as Lord Mansfield's, or rather nearer to it. For the king's legiſlative

A counter aſſertion, that is equally true.

power

power over a conqueſt has not been aſſerted in Weſtminſter-Hall, as I believe, above two, or three, times; and that by ſingle judges, and in a ſlight, occaſional, and extrajudicial manner: but (if we underſtand by it the full, and proper, and permanent legiſlative power, and not the power of introducing, once for all, the laws of England into the conquered country,) the king's legiſlative power over a conquered country was denied by *Lord Coke and almoſt all the other judges* in Calvin's caſe, where they ſaid, " that, " when once king John had introduced the " laws of England into Ireland, no ſubſe- " quent king could alter them without the " conſent of parliament." You ſee, therefore, that this firſt aſſertion of Lord Mansfield, " That the king's legiſlative right over " a conqueſt has never been denied in Weſt- " minſter-Hall," is not true; and that, if it were true, it would not be material to the deciſion of the main queſtion, unleſs the ſaid legiſlative right had been frequently aſſerted in Weſtminſter-Hall, and made the ground of ſome proceeding there; which it has not.

Lord Mansfield's second assertion on the same subject.

Lord Mansfield's next assertion is, "That "the king's legislative right over a conquest "was never questioned in parliament." Now we may assert, I believe, with equal truth, "That it never was acknowledged, or as- "serted, in parliament." And the reason of both these equally true, but very different, propositions, is, that the Parliament has never had occasion to consider the conduct of the Crown with respect to any conquered countries, since we have any memorials of the debates in Parliament; which is only from the reign of king Edward the 6th, or about the year 1550: and indeed, I believe, we may go further, and say, that the Crown has made no new conquests since that period, to be the objects of this supposed legislative authority, except the province of New-York, the island of Jamaica, the town of Gibraltar, and the island of Minorca, of which we have seen that the two first, (though in truth they were conquered from the Dutch and the Spaniards,) were always considered as planted countries, or colonies, and the two last have been considered by the English nation as mere garrison towns, or fortresses, no otherwise worthy

A counter assertion that is equally true.

worthy of notice than as they defend the harbours of Gibraltar and Port Mahon, which are uſeful to the Britiſh trade in the Mediterranean. However, I will not take upon me to ſay with any degree of confidence, either, "that the king's legiſlative right over a conqueſt has never been denied in parliament," (as Lord Mansfield aſſerts) or "that it has never been acknowledged, or aſſerted, in Parliament;" becauſe I do not pretend to be well enough acquainted with the many folio volumes of the Journals of the two houſes of parliament, to venture upon either of theſe aſſertions, or rather negations: but I am inclined to think they are both true: and in that caſe one of them may fairly be ſet againſt the other.

Lord Mansfield's third aſſertion on the ſame ſubject.

Lord Mansfield's next, or third, aſſertion is, "That no book, no ſaying of a judge, no opinion of any counſel, publick or private, has been cited on the other ſide." Now, in anſwer to this aſſertion, it may be truly aſſerted that, "No book, no ſaying of any judge, no opinion of any private counſel, (that is, of any counſel that was uninfluenced

A counter aſſertion to it, that is more agreeable to truth.

" influenced by the poſſeſſion of a precarious
" office held at the pleaſure of the Crown,)
" and but one opinion of any publick coun-
" ſel, (or counſel in poſſeſſion of ſuch offi-
" ces,) namely, that of Sir Philip Yorke and
" Sir Clement Wearg, in the year 1722,
" (and that opinion ſeems, upon other
" grounds, to have been a very haſty one;)
" has been cited by his Lordſhip in ſupport
" of this legiſlative authority of the Crown
" over conquered countries." I ſay this aſ-
ſertion may be truly made in oppoſition to Lord Mansfield's: for the ſaying of the judges in Calvin's caſe (which is the only opinion of any judges, which Lord Mansfield has cited in ſupport of this authority) appears, upon examination, to be adverſe to his Lordſhip's doctrine. And thus we ſhall have aſſertion againſt aſſertion concerning the want of opinions of judges and other learned men upon this ſubject, ſuppoſing the aſſertion of Lord Mansfield to be true. But theſe aſſertions prove nothing on either ſide. The want of the opinions of judges and other learned men concerning a queſtion never agitated, affords us no grounds for the deciſion of it: and

there-

therefore we muſt have recourſe to other methods of inveſtigation in order to ſatisfy ourſelves concerning it.

But Lord Mansfield's aſſertion, that "No "book, no ſaying of a judge, no opinion of "any counſel, publick or private, has been "cited on the other ſide," is not ſtrictly true. For the opinion of *Vattel*, a learned modern writer on the law of nations, was cited on that ſide: and, as this queſtion ſeems rather to belong to the law of nations than to the municipal law of England, ſuch an authority ought not to be diſregarded. *Vattel's* work is writ in French: but I have an Engliſh tranſlation of it, in which the paſſage relating to this ſubject is expreſſed in theſe words. "It is aſked, to whom the conqueſt belongs; "to the prince, who made it, or to the ſtate? "This queſtion ought never to have been "heard of. Can the ſovereign act, as ſuch, "for any other end than the good of the "ſtate?—Whoſe are the forces employed in "the war?—Even, if he had made the con-"queſt at his own expence, out of his own "revenue, or his proper and patrimonial "eſtates,

The opinion of *Vattel* was cited at the trial in oppoſition to Lord Mansfield's doctrine of the king's being the ſole legiſlator of conquered countries.

" eſtates, does he not make uſe of his ſub-
" jects arms? Is it not their blood that is
" ſhed?—And, even ſuppoſing that he had
" employed foreign, or mercenary, troops,
" does he not expoſe his nation to the ene-
" my's reſentment? Does he not draw it into
" the war, while the advantage is to be his
" only?—Is it not for the cauſe of the ſtate,
" and of the nation, that he takes arms?
" Therefore all the rights proceeding from
" it appertain to the nation. If, indeed, the
" ſovereign makes war for a cauſe perſonal
" to himſelf, as, for inſtance, to aſcertain a
" right of ſucceſſion to a foreign ſovereignty,
" the queſtion is altered: ſuch an affair would
" be foreign to the ſtate; but then the na-
" tion ſhould be at liberty either to aſſiſt its
" prince or not concern itſelf. And, if he
" is impowered to make uſe of the national
" force in ſupport of his perſonal rights, ſuch
" rights are no longer to be diſtinguiſhed
" from thoſe of the ſtate." The meaning of this paſſage, as applied to Great-Britain, ſeems to be, that every country conquered by the Britiſh arms is an acquiſition to the Britiſh nation, and not to the king alone;—

that

that its publick revenue becomes part of the publick revenue of Great-Britain, as much as the taxes raiſed in Great-Britain itſelf, and is to be diſpoſed of in the ſame manner, and for the ſame publick uſes, as thoſe taxes, inſtead of belonging to the king's privy purſe; — and that the power of impoſing new taxes on the inhabitants of ſuch country, and likewiſe that of making new laws for their government, muſt belong to the ſame body of men as is lawfully poſſeſſed of thoſe powers in the kingdom of Great Britain itſelf; that is, to the King, Lords, and Commons of the kingdom, conjointly; they being the body who legally repreſent the whole people of Great-Britain, and are inveſted with the whole authority originally inherent in, and derived from, the ſaid people, or, according to Vattel's expreſſion, the ſaid ſtate or nation.

This paſſage from Vattel's book on the law of nations was cited in one of the arguments of this cauſe of *Campbell* and *Hall* before Lord Mansfield: and therefore he ought not to have ſaid that *no book* was cited on that ſide of the queſtion. If he meant that no book

of Engliſh law was cited on that ſide, he ſhould have confined his expreſſion to that ſort of book.

Nor is Lord Mansfield's aſſertion above-mentioned, "That no book, no ſaying of a "judge, no opinion of any counſel, publick "or private, has been cited on the other ſide," ſtrictly true with reſpect to the ſecond article of it, *the ſayings of judges*, any more than with reſpect to the firſt article, *of authorities from books*. For we have ſeen that, upon examination, the opinion of the judges in Calvin's caſe appears to be an authority on that ſide of the queſtion: ſince the judges there affirm, that, when once king John had introduced the laws of England into Ireland, no ſubſequent king could alter them without the conſent of parliament; which is ſaying, that the legiſlative authority over conquered countries does not belong to the king alone, but to the king and parliament conjointly.

There are two opinions of attornies-general that ſeem unfavourable to Lord Mansfield's doctrine of the ſole legiſlative authority of the Crown over conquered countries.

As to the opinions of lawyers on this ſubject, it may, perhaps, be true (as Lord Mansfield aſſerts,) that none were cited in the arguments in that cauſe on that ſide of the queſtion.

queſtion. Yet I have met with two opinions of very reſpectable lawyers that incline much to that ſide of the queſtion, though they may not intirely adopt it. Theſe are the opinions of Sir William Jones, who was attorney-general to king Charles the ſecond, and Mr. Lechmere, who held the ſame office under king George the 1ſt: and they were given while thoſe gentlemen reſpectively held that office under the Crown; which gives thoſe opinions an additional weight; becauſe, the byaſs on their minds ariſing from their poſſeſſion of that office, having probably been in favour of the Crown, an opinion againſt the prerogative of the Crown muſt have been the effect of ſtrong conviction. Sir William Jones was attorney-general to king Charles the ſecond, in the year 1679, in the time of the ferment about the Popiſh Plot, while that king (though fond of arbitrary power,) was obliged, by the ſpirit of the times, to employ ſome honeſt and popular men in his ſervice, and to paſs ſome popular laws for the preſervation of publick liberty. He executed this office with great applauſe, and was reckoned to be the moſt learned lawyer of

Theſe are the opinions of Sir William Jones and Mr. Lechmere.

Of Sir William Jones.

that time; Sir Matthew Hale, the great chief juſtice of the King's Bench, being then dead: and he was alſo eſteemed a very honeſt man, and a lover of his country. Now it is ſaid in the life of Sir William Phips, page 23, (as it is quoted in Mr. Smith's hiſtory of New-York, from which I take it,) that this Sir William Jones told king Charles the 2d,

The opinion of Sir William Jones.

"*That he could no more grant a commiſſion to "levy money on his ſubjects in the plantations, "without their conſent by an aſſembly, than "they could diſcharge themſelves from their al-"legiance.*"

According to this account of this learned lawyer's opinion, it is not certain whether he had, or had not, in his mind, when he gave it, the diſtinction between *planted countries*, or colonies, and *conquered countries*, and whether he meant to deny the right of the Crown to levy money by its own ſingle authority in both theſe ſorts of dependant countries, or only in the former. But, according to other accounts of this ſame opinion, it appears to have related to *conquered* countries as well as planted ones. For in a letter written by the houſe

houſe of repreſentatives of the province of the Maſſachuſets Bay, in the month of January, 1768, to the Earl of Shelburne, (who was at that time one of his Majeſty's principal ſecretaries of ſtate,) it is recited in theſe words; " Sir William Jones, an eminent ju- " riſt, declared it as his opinion, to king " Charles the ſecond, *That he could no more* " *grant a commiſſion to levy money on his ſub-* " *jects in Jamaica, without their conſent by an* " *aſſembly, than they could diſcharge themſelves* " *from their allegiance to the Crown.*"

Another account of the ſame opinion.

In this account we ſee that this opinion related to Jamaica; which was a conquered country. The only remaining doubt therefore is, whether Sir William Jones, when he gave this opinion, conſidered Jamaica as continuing ſtill in its original ſtate of a conquered country, or whether he ſuppoſed its political condition to have been altered by the events that had happened to it ſince its conqueſt, (ſuch as the withdrawing of the Spaniſh inhabitants from it, and the acceſſion of Engliſhmen to it, who were invited by the king's proclamation to come and ſettle in it,)

ſo

ſo as to have been thereby converted into the political condition of a colony, or country that had been originally planted by Engliſhmen under the king's authority; which is the light in which Lord Mansfield ſeems to think that iſland ought to have been conſidered in the year 1722, when Sir Philip Yorke and Sir Clement Wearg gave their opinion concerning it. But there may be a great deal of difference between the condition of Jamaica, in the year 1722, and its condition in king Charles the 2d's time, about the year 1677, or 1678; when this opinion probably was given: and the reaſons for conſidering it as having changed its political ſtate from that of a *conquered* to that of a *planted* country, or colony, were much ſtronger in the year 1722 than at the other period. For during the greater part of Charles the ſecond's reign, and therefore, probably, when this opinion was given, the inhabitants of Jamaica were governed only by a governour and council, without an aſſembly of the people: and conſequently king Charles, when this opinion was given, had not yet, (by granting them the privilege of being repreſented by an aſ-

ſembly

ſembly with a power to make laws and impoſe taxes for the publick uſes of the iſland,) diveſted himſelf of his antecedent right to impoſe taxes on them, if ſuch a right had really belonged to him. It ſeems therefore not unlikely that Sir William Jones, when he gave this opinion, might conſider the iſland of Jamaica as continuing ſtill in its original ſtate of a conquered country, notwithſtanding moſt of the Spaniſh inhabitants had left it: and, if he did conſider it in that light, it is evident that this opinion of his would, in ſuch caſe, be an opinion exactly in point to contradict Lord Mansfield's doctrine of the king's ſole legiſlative authority over conquered countries.

And, agreeably to this conjecture, I find, in another account of this opinion, that Sir William Jones did conſider Jamaica as a conquered country, and expreſsly called it ſo, and yet denied the king's authority to impoſe taxes on its inhabitants without the conſent of an aſſembly. For, in another letter of the ſame aſſembly of the repreſentatives of the province of Maſſachuſets Bay, written in the

ſame

ſame month of January, 1768, as the former letter to Lord Shelburne, and addreſſed to Dennis De Berdt, Eſq; their agent in England, they ſpeak of this opinion of Sir William Jones in theſe words; "There was, "even in thoſe times [the times before the "Revolution] an excellent attorney-general, "Sir William Jones, who was of another "mind, and told king Charles the ſecond, "*that he could no more grant a commiſſion to* "*levy money on his ſubjects in Jamaica,* "*though a conquered iſland, without their con-*"*ſent by an aſſembly, than they could diſcharge* "*themſelves from their allegiance to the Engliſh* "*Crown.*" If this laſt account of Sir William Jones's opinion is the true one, it is evident that he conſidered Jamaica as continuing ſtill in the condition of a conquered country, and conſequently that his opinion with reſpect to the king's power over conquered countries is directly contrary to Lord Mansfield's.

A third account of the ſame opinion.

Of the opinion of Mr. Lechmere.

The other opinion which I mentioned as material to our preſent enquiry was that of Mr. Lechmere, a lawyer of conſiderable eminence, and eſteemed a man of great integrity,

tegrity, who was attorney-general to king George the 1ſt. This opinion I had occaſion to mention to you in our laſt converſation, juſt before I begun the account of the impoſition of the duty of four and a half per cent. upon goods exported from Grenada by the king's letters patent of July, 1764. It is ſhortly thus. When the Britiſh miniſters of ſtate, in the year 1717, had a deſign of adviſing the king to impoſe, by his royal prerogative, the ſaid duty of four and a half per cent. on goods exported from the iſland of Jamaica and the little iſlands of Anegada and Tortola, which are ſituated at a ſmall diſtance from St. Chriſtopher's, they conſulted Mr. Lechmere, the attorney-general, upon the legality of the intended meaſure. And he, thereupon, honeſtly told them, " *that the* " *perſon who ſhould adviſe his majeſty to take* " *ſuch a ſtep, would be guilty of high treaſon.*" But I do not know whether he conſidered Jamaica as ſtill continuing in the ſtate of a conquered iſland, or not. If he did, this opinion of his would be an opinion exactly in point to our preſent ſubject, and directly contrary (as well as the opinion of Sir Wil-

liam Jones, according to the laſt account of it,) to the doctrine of Lord Mansfield concerning the ſole legiſlative authority of the Crown over conquered countries.

Theſe two reſpectable opinions, againſt the ſaid ſuppoſed legiſlative authority of the Crown, may fairly be ſet in oppoſition to the opinion of Sir Philip Yorke and Sir Clement Wearg, ſo much relied on by Lord Mansfield, in ſupport of it.

End of the examination of Ld. Mansfield's peremptory aſſertions.

You now, I hope, are ſatisfied that Lord Mansfield's peremptory aſſertions, " that no " doubts had ever been entertained by any " lawyers, before the ſaid caſe of Campbell " and Hall, concerning the king's ſole le- " giſlative authority over conquered coun- " tries," are not quite agreeable to the truth, but that ſome lawyers of character in former times have preſumed to entertain a different opinion, and even to tell the king's miniſters that they did ſo. And conſequently you ſhould ſhake off from your mind that over-great awe and deference to that learned Lord's opinion which the peremptory manner of his

his making thoſe aſſertions had impreſſed upon it, and ſhould boldly venture to entertain that opinion upon the ſubject which, upon the full inquiry you have made into it, appears to you to be the moſt reaſonable.

FRENCHMAN.

I will endeavour to do ſo, as far as I am able. But, I proteſt, I find it difficult; as his authoritative manner of making theſe aſſertions does ſtill retain ſome influence over my mind, notwithſtanding you have now convinced me that they are neither altogether true, nor deciſive of the matter in queſtion, if they *were* true. However, upon the whole, I do venture to conclude that the reaſons he has given in ſupport of his opinion, "that "the king alone has a legiſlative authority "over conquered countries," are far from being ſufficient to maintain it. I ſhould therefore continue to hold the opinion which at firſt appeared to me moſt reaſonable, to wit, "that the king and parliament conjointly, "and not the king alone, had a right to "make laws for the inhabitants of conquered countries, and to impoſe taxes on them,

if it were not for one remaining difficulty, concerning which I must desire the assistance of your opinion. This difficulty is grounded on the authority which Lord Mansfield's doctrine may, perhaps, derive from the very circumstance of its being his opinion, and having been delivered by him, as such, in his judicial capacity on a question that brought the subject regularly before him for his decision; more especially, if we consider the silence of the other judges of the court of King's Bench, when Lord Mansfield delivered this opinion, as implying their concurrence with him in it. For in this case it may be said, that, on the only occasion on which this doctrine " of the king's sole legislative " power over conquered countries" has been brought into question before an English court of justice, it has been decided in favour of the Crown by the unanimous opinion of all the judges of the court; and that, whatever the law might be before, such a decision must be considered as settling it for the future in favour of the said power of the Crown, or must be a peremptory guide to all future courts of justice in their decision of the same question,

An enquiry how far Lord Mansfield's declaration of his opinion, in favour of the sole legislative power of the Crown over conquered countries, in the judgement he delivered in the case of Campbell and Hall, is decisive of the law upon that subject.

queſtion, as often as it ſhall occur before them. I ſhould be glad to know, therefore, what you think of this concluſion, and whether, by the rules obſerved by Engliſh courts of juſtice with reſpect to points already decided by the ſame or other courts, ſuch a queſtion ought to be conſidered as having been decided for ever in favour of the Crown by this one deciſion of Lord Mansfield and the court of King's Bench. If it is to be ſo conſidered, I muſt needs think that Lord Mansfield and his brother judges will, by that opinion of theirs in their judgement on the caſe of Campbell and Hall, have, *indirectly*, made a law of the moſt capital importance to Great-Britain and the Britiſh dominions.

ENGLISHMAN.

The courts of juſtice ſometimes determine points of law in a manner that is contrary to their own former deciſions of them.

Your queſtion is a very proper one, and not a very eaſy one to anſwer; there being no expreſs law, nor even conſtant uſage, that aſcertains, in all caſes, the degree of deference which is to be paid by courts of juſtice to the former judicial deciſions of the ſame or other courts of juſtice. And we have ſeen Lord Mansfield himſelf, ſince he has been chief juſtice

juſtice of the King's Bench, and his brother judges of that court, in more than one inſtance, determine a point of law in a manner directly contrary to the determination of it by all the judges of the ſame court of King's Bench on a former occaſion, though the ſaid former determination had been acquieſced in by the party againſt whom it had been made, and had been taken and reputed for good law ever after, till the new caſe in which Lord Mansfield and the other judges of the court of King's Bench determined the point in a different manner. I particularly remember an inſtance of this kind in a caſe in which the names of the parties were *Wyndham* and *Chetwynd*, containing the qualifications neceſſary to the three witneſſes who, by a certain ſtatute made to prevent frauds, are required to atteſt and ſubſcribe a will of lands, in order to its validity. But the general rules concerning the authority of judicial determinations of points of law I take to be as follows.

A remarkable inſtance of this kind.

General rules concerning the authority of judicial determinations of points of law.

In the firſt place, where a point of law has been agitated in all the courts through which it may be carried by appeal, or writ of

of error, and has been finally determined by a judgement of the higheſt court of appeal, that is, of the houſe of Lords, (for that is, in Great-Britain, the higheſt court of appeal both in matters of law and equity;) ſuch a determination is reckoned to be of almoſt as much authority with reſpect to the point ſo ſettled, as an act of parliament; or, at leaſt, it is ſo conſidered by all the ordinary courts of juſtice, though, perhaps, the houſe of Lords itſelf might, on another occaſion, if they thought there was very ſtrong ground for it, determine it in a different manner.

In the ſecond place, when a point of law has been fully argued, and ſolemnly determined by one of the four great courts of Weſtminſter-Hall, that is, the court of Chancery, the court of King's Bench, the court of Common Pleas, and the court of Exchequer; and the party, againſt whom the judgement has been given, has acquieſced in it, and has forborn to bring an appeal, or a writ of error, into the next higher court of juſtice, to which the right of reviſing the judgements of the firſt court, and correcting the errors in them, belongs;

belongs; and ſuch forbearance does not ariſe from the poverty or inability of the ſaid party to bear the expence of proſecuting ſuch writ of error, or appeal to the next higher court; ſuch a determination acquires a great degree of reſpect and authority in Weſtminſter-Hall, and is uſually adopted and followed by the courts of juſtice in their ſubſequent determinations of the ſame point of law, as often as it comes before them. Yet it is not of quite ſo great authority as a determination of the houſe of Lords upon a queſtion brought there in the laſt reſort: and we have ſometimes ſeen ſuch determinations overturned by ſubſequent determinations of the ſame or other courts of juſtice in Weſtminſter-Hall; as was done in the court of King's Bench in the caſe of *Wyndham* and *Chetwynd*, which I juſt now mentioned to you. Yet ſuch overturnings of the former ſolemn determinations of courts of juſtice are very unfrequent, and are not in general approved of, though, perhaps, in ſome very ſtrong caſes, where the former determinations have been made upon very wrong principles, they may be juſtifiable.

In

In the third place, when a matter has been fully argued before one of the courts of Weſtminſter-Hall, and a ſolemn judgement has been given upon it in favour of one of the parties; and in the ſaid judgement more than one point of law has been determined in favour of ſuch party; and the loſing party acquieſces in the ſaid judgement, and forbears to bring a writ of error for a reverſal of it in a higher court of juſtice; the determinations of ſuch points of law acquire a conſiderable degree of weight and authority in the eſtimation of lawyers and ſubſequent courts of juſtice, but yet are not quite ſo much reſpected as the determinations in the two former caſes: and for this plain reaſon, that, as more than one point of law are determined at the ſame time in favour of one of the contending parties and againſt the other, it is uncertain, whether the loſing party, when he acquieſces under the whole judgement, and forbears to bring a writ of error in a ſuperior court to get it reverſed, acquieſces in all the points of law determined againſt him, or only in ſome, or one, of them; becauſe, if only one of them is right-

ly determined againſt him, the judgement againſt him would be affirmed upon a writ of error, as much as if all the points had been ſo determined. This uncertainty concerning the particular points of law, in the determination of which the loſing party may be ſuppoſed to acquieſce, takes from the determinations of each of the points of law, that are determined againſt him, ſome part of the weight and authority which ſuch determinations would otherwiſe derive from his acquieſcence.

And fourthly, if a matter has been fully argued before a court of juſtice in Weſtminſter-Hall, and a ſolemn judgement has been given upon it in favour of one of the parties; and in the ſaid judgement one, or more than one, point of law has been determined in his favour, and another point, or points of law have been determined againſt him; and the loſing party acquieſces in the ſaid judgement, and brings no writ of error to reverſe it; ſuch an acquieſcence of the loſing party can operate as a confirmation of only thoſe points of law which are determined againſt him,

him, and not of thoſe which are determined for him. In ſuch a caſe, therefore, there will be ſeveral determinations of points of law, all deliberately made by the ſame judges and in the ſame cauſe, which will have different degrees of weight and authority, namely, the points determined in favour of the loſing party, and the points determined againſt him. For the points determined in favour of the loſing party will have that degree of weight and authority which ariſes from the reſpect due to the learning, abilities, and integrity of the judges who have decided them, and to the deliberate manner in which they have been conſidered and diſcuſſed before they were decided; but thoſe which are determined againſt the loſing party will, beſides the weight and authority ariſing from the foregoing circumſtances, be intitled to an additional degree of reſpect ariſing from the acquieſcence of the loſing party, which will ſhew that he and his counſel, learned in the law, deſpair of having thoſe points determined in a different manner, if they were to bring a writ of error for the purpoſe.

Theſe ſeem to me to be the different degrees of authority which are attributed by the Engliſh courts of juſtice to the aforeſaid different ſorts of judicial determinations of points of law by former judges: which, I preſume, you will agree with me in thinking reaſonable.

FRENCHMAN.

I enter very readily into theſe diſtinctions between the different ſorts of judicial determinations, and think them very natural and reaſonable. And, according to this gradation of them, it ſeems to me that the opinion of Lord Mansfield, delivered in the caſe of Campbell and Hall, concerning the ſole legiſlative authority of the Crown over conquered countries, (even ſuppoſing the other judges of the King's Bench to have concurred with him in it,) muſt be placed in the fourth, or loweſt, claſs of them. For in that caſe there is no room to infer any thing, from the acquieſcence of either of the parties, in favour of that opinion. For, as to the defendant *Hall*, who was the loſing party, all that can be inferred from his acquieſcence in the

The opinion of Ld. Manſfield, concerning the ſole legiſlative authority of the Crown over conquered countries, delivered in the caſe of Campbell and Hall, is a judicial determination of the fourth, or loweſt, claſs of thoſe above deſcribed.

the judgement given againſt him in that action is that he and his counſel acquieſced in the opinion of the court upon the ſecond point, " of the immediate operation of the " king's proclamation of October 1763, as a " bar to the exerciſe of his antecedent legiſ- " lative authority," and deſpaired of having it otherwiſe determined, if he ſhould have brought it into the houſe of lords by writ of error. And as to the plaintiff Campbell, who gained his cauſe, he could not bring a writ of error to reverſe a judgement that was given in his favour. So that the opinion of Lord Mansfield upon that firſt point muſt, indeed, be conſidered as the opinion of that learned Lord, and, perhaps, of the whole court of King's Bench, upon a point that had been fully argued before them, and muſt be intitled to all the reſpect which is due to it on that account, but cannot derive any additional weight from the acquieſcence of either of the parties under it; that is, it muſt be a judicial deciſion of the loweſt of the four claſſes of judicial deciſions which you have been juſt now deſcribing.

ENGLISHMAN.

It is exactly ſo. The opinion of Lord Mansfield upon that firſt point is a deciſion of that fourth and loweſt claſs. And therefore I ſuppoſe that it would not be conſidered by the ſame or any other court of juſtice in Weſtminſter-Hall, on any other occaſion in which the ſame point, "of the king's legiſlative authority over conquer'd countries," ſhould occur, as being abſolutely binding and deciſive of the queſtion, ſo as to be intitled to the confirmation of ſuch court of juſtice, though the reaſons on which it was founded ſhould be intirely diſapproved by the judges of which ſuch court ſhould be compoſed; ſince we have ſeen, in the caſe of *Wyndham* and *Chetwynd*, (which was determined by Ld. Mansfield himſelf) that even a deciſion of the ſecond claſs is not always ſo conſidered. But yet it would certainly have conſiderable weight with the judges of ſuch ſubſequent court of juſtice, ſo as to induce them to give judgement agreeably to it, if they were only in a ſtate of doubt concerning the validity of the reaſons on which it had been grounded,

and

and did not thoroughly diſapprove them. So that I am afraid we muſt allow, that (weak and ill-grounded as it appears to you and me,) this opinion of Lord Mansfield, concerning the king's ſole legiſlative power over conquered countries, is a temporary judicial determination of that queſtion in favour of the prerogative of the Crown. But, as you rightly obſerved, it is a deciſion of the fourth, or loweſt, claſs of the ſeveral ſorts of judicial determinations above deſcribed.—But I hope your curioſity is now ſatisfied with reſpect to this important queſtion of law, concerning the ſuppoſed ſole legiſlative authority of the Crown over conquered countries, which, I think, we have very ſufficiently diſcuſſed.

FRENCHMAN.

My curioſity is, indeed, ſatisfied on this ſubject: but the pleaſure I have had in the inquiry is allayed with ſome mixture of uneaſineſs ariſing from the weight that may be thought to belong to that opinion of Lord Mansfield. For how can any lover of liberty and the Engliſh conſtitution (as I moſt ſincerely

ſincerely profeſs myſelf to be) not be ſorry to find, that the only judicial deciſion that has been made upon the ſubject, has aſcribed to the Crown alone, without the concurrence of the parliament, a power to make laws and impoſe taxes at pleaſure on the inhabitants of all countries that are conquered by the Britiſh arms?——I therefore hope, either, that the law upon this ſubject will ſoon be altered by an expreſs act of parliament for the purpoſe, or that the queſtion may again be brought under the conſideration of ſome court of juſtice, and be there determined in a different manner, as the caſe juſt now mentioned, of *Wyndham* and *Chetwynd*, was determined, by Lord Mansfield himſelf and the other judges of the King's Bench, in a manner directly contrary to a former determination of the ſame point of law in the ſame court of King's Bench, though the ſaid former determination had been a deciſion of the ſecond claſs. For it may be of terrible conſequence to the freedom of the Engliſh conſtitution to have ſo enormous a power fixed permanently in the poſſeſſion of the Crown.

ENG-

ENGLISHMAN.

I heartily join with you in theſe wiſhes: but doubt a little whether they are likely to be ſoon accompliſhed. However, if this queſtion were again to come before a court of juſtice, and the merits of the cauſe were to turn ſingly upon the deciſion of it, (which was not the caſe in the action of Campbell againſt Hall,) I can hardly perſuade myſelf that the judges of any court in Weſtminſter-Hall would think themſelves bound to determine it agreeably to Lord Mansfield's opinion, merely through deference to that opinion and without any new reaſons that ſhould influence their own judgements in favour of it; ſeeing that the reaſons alledged by Lord Mansfield in ſupport of it have appeared, upon examination, to be ſo very weak, and that its authority as a judicial deciſion is two degrees lower than that of the caſe in the court of King's Bench, above alluded to, (which is called the caſe of *Anſty* and *Dowſing*,) which was overturned by the ſame court in the ſubſequent caſe of *Wyndham* and *Chetwynd*, that caſe having been a deciſion of the ſecond claſs, and this being only of the fourth.

End of the examination of the opinion delivered by Ld. Mansfield in the judgement in the caſe of *Campbell* and *Hall*, concerning the ſole legiſlative power of the crown over conquered countries.

But this is all matter of conjecture, and conſequently not worthy our further conſideration.

We will now, therefore, if you pleaſe, take our leave of this ſubject, and, with it, put an end to the preſent converſation: for I have not either time, or inclination, juſt at preſent, to enter upon a new ſubject. But in a day, or two, if you deſire it, we will meet again; and then we will conſider the remaining topicks which I mentioned to you in our former converſation, and which we had reſolved to diſcuſs on the preſent occaſion, if we had had convenient time for it. Theſe, you may remember, were another meaſure, or two, which appeared to me to be highly proper to be adopted by Great-Britain in the preſent criſis of affairs, in order to a permanent accommodation of the unhappy differences in which ſhe is now involved with ſo many of her colonies on this continent.

Two meaſures more, (beſides thoſe diſcuſſed in the firſt Dialogue,) ſeem neceſſary to be adopted, in order to a thorough reconciliation between Great-Britain and her colonies.

FRENCHMAN.

I well remember them, and ſhall be glad to hear you ſpeak of them when we are more

more at leiſure. The firſt of them was, to remove from the minds of the Americans the apprehenſions of having biſhops eſtabliſhed amongſt them without the conſent of their aſſemblies. And the other was, to amend the conſtitutions of the provincial councils in the ſeveral royal governments of America (which are governed only by the king's commiſſions, without a charter) by increaſing, to, at leaſt, twice their preſent number, the members of ſuch councils, and appointing them to hold their ſeats in the ſaid councils during their lives or good behaviour, inſtead of holding them at the mere pleaſure of the crown. Theſe were the two remaining meaſures which you conſidered as expedient to be adopted, in order to a thorough reconciliation between Great-Britain and her colonies. Now that theſe meaſures would be agreeable to the Americans, and conſequently would have a tendency to that good end of reconciliation, is indeed too evident to need a proof. But yet I am perſuaded that, beſides this general tendency of them, you have ſome particular reaſons, ariſing from your knowledge of the ſentiments of the Ameri-

The firſt of thoſe meaſures.

The ſecond.

cans upon theſe ſubjects, that make you conſider them as of ſo much importance. And theſe, if you have ſuch, I ſhall be glad to hear at large at our next meeting.

ENGLISHMAN.

Theſe were, as you ſay, the topicks that remained to be diſcuſſed by us: and I moſt certainly have ſuch particular reaſons as you ſuppoſe for wiſhing that theſe two meaſures were adopted. And, when we meet again, I will explain theſe reaſons to you in the fulleſt and beſt manner I am able; and, perhaps, may alſo ſuggeſt another meaſure, or two, (beſides thoſe you have juſt now mentioned,) that would alſo be uſeful towards this important end of reſtoring peace and confidence between Great-Britain and her American colonies. In the mean time, farewell.

The grounds and reaſons of theſe two meaſures will be explained in a third Dialogue.

End of the SECOND DIALOGUE.