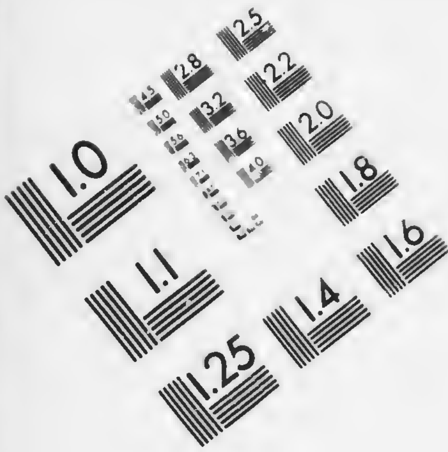


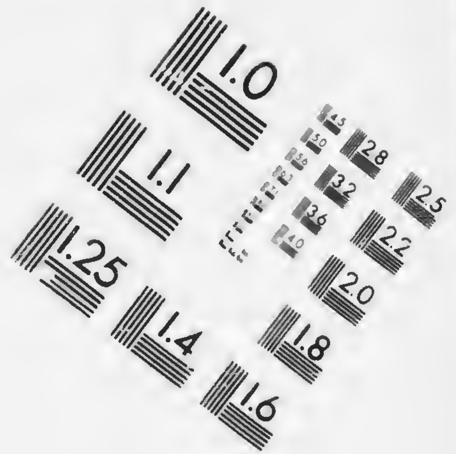
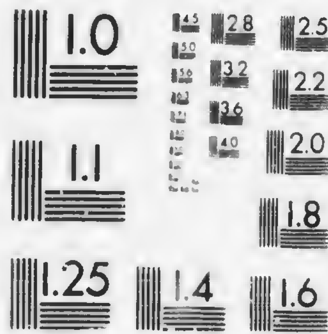
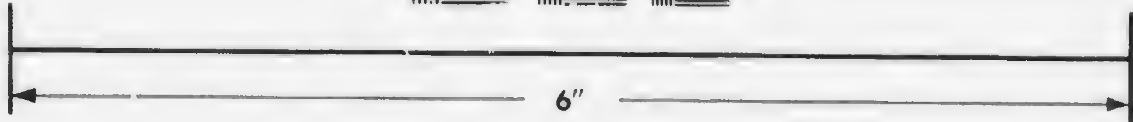
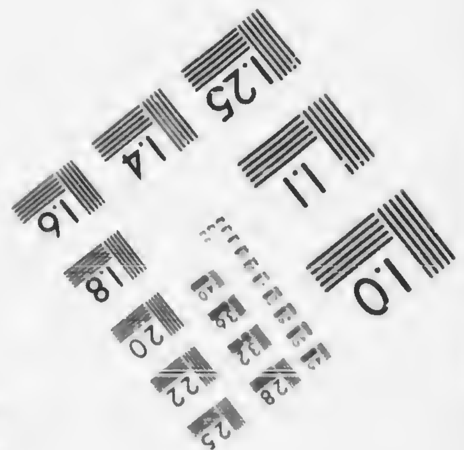


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM/ICMH
Microfiche
Series.

CIHM/ICMH
Collection de
microfiches.

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1987

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [ ] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [x] Additional comments:/ Commentaires supplémentaires: Various pagings.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inégale de l'impression
- [ ] Includes supplementary material/ Comprend du matériel supplémentaire
- [ ] Only edition available/ Seule édition disponible
- [ ] Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X 14X 18X 22X 26X 30X

12X 16X 20X 24X 28X 32X

The copy filmed here has been reproduced thanks to the generosity of:

Memorial University of St. John's

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol —► (meaning "CONTINUED"), or the symbol ▼ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

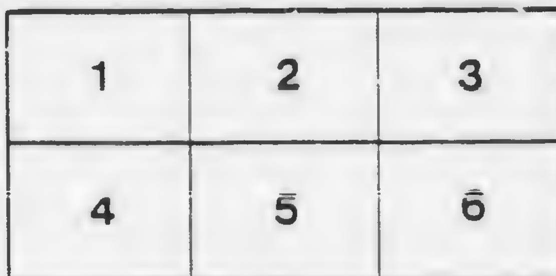
Memorial University of St. John's

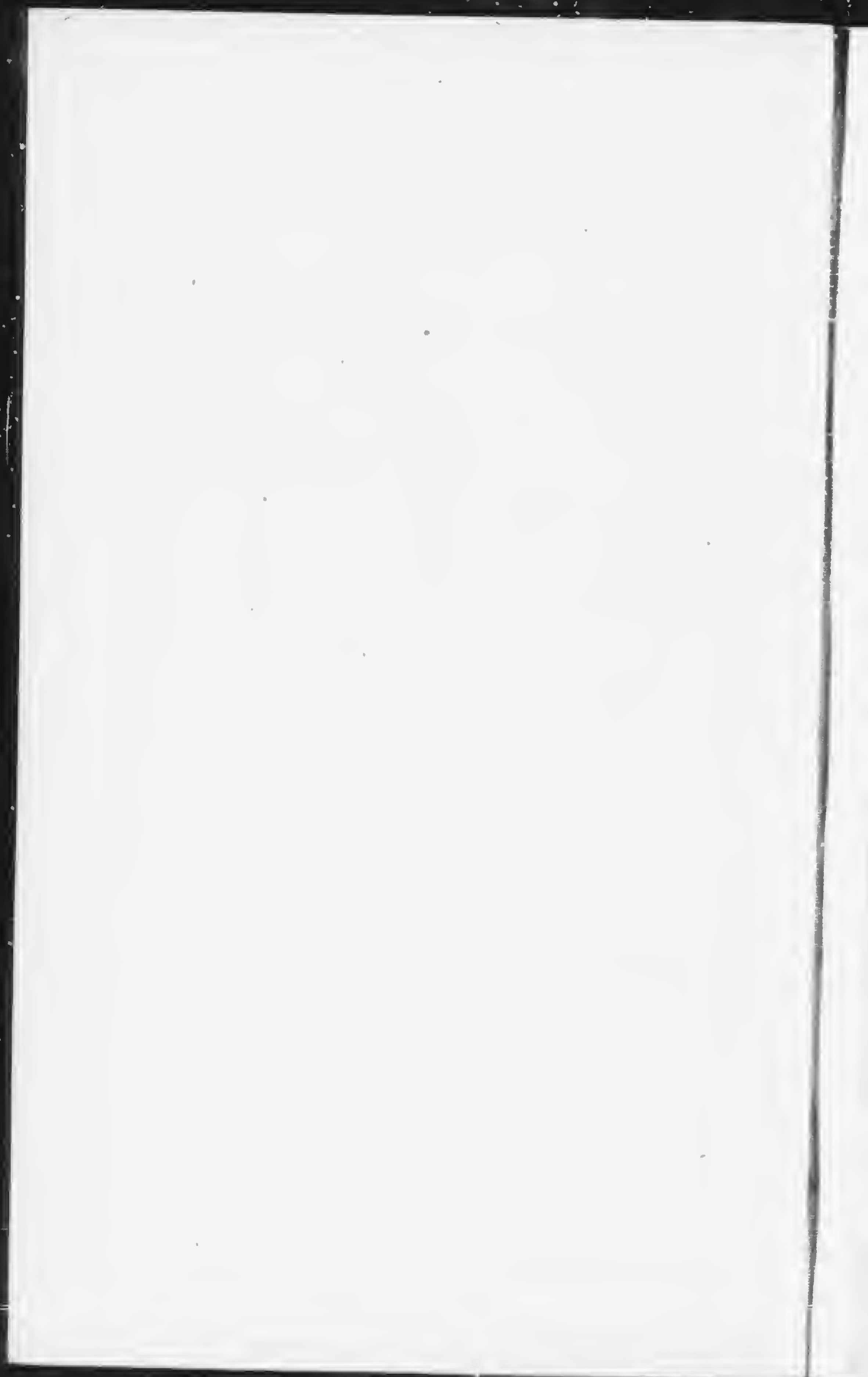
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole —► signifie "A SUIVRE", le symbole ▼ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





73613

OPINIONS

OF

EMINENT LAWYERS

ON VARIOUS POINTS OF

ENGLISH JURISPRUDENCE,

CHIEFLY CONCERNING THE

COLONIES, FISHERIES AND COMMERCE

OF GREAT BRITAIN:

COLLECTED AND DIGESTED, FROM THE ORIGINALS IN THE BOARD OF TRADE, AND OTHER DEPOSITORIES.

BY GEORGE CHALMERS, Esq., F.R.S., S.A.

BURLINGTON:
C. GOODRICH AND COMPANY.

1858.

PREFACE

TO FIRST AMERICAN EDITION.

The answers of the wise, though last in order, are classed with the Principum placita of a servile court among the sources of law. "Constat autem jus nostrum quo utimur aut scripto aut sine scripto, ut apud Græcos, 'των νομων ὁι μεν εγγραφοι, ὁι δε αγραφοι,' id est, legum aliæ sunt scriptæ, aliæ non scriptæ.' Scriptum autem jus est lex, plebiscitum, senatus consultum, Principum placita, magistratuum edicta, responsa prudentum." Juris Institutionum liber primus.

In these United States of America, rejoicing in the sovereignty we have now possessed nearly one hundred years, we are too ready to forget the history of the past. But if we permit ourselves to forget it, our descendants will take us to task, and though selfishness may say, "what has posterity done for us", let us remember what our ancestors have done. This book, well studied, will repay the American reader for his pains. Colonial and provincial domination, under which the American colon-

ies so long suffered, is at an end, but its records deserve to be treasured up. "Obsecro vos (says Canuleius in Livy,) si non ad fastos, non ad commentarios pontificum admittimur; ne ea quidem scimus, quæ omnes peregrini etiam sciunt? Consules in locum regum successisse? nec aut juris aut majestatis quidquam habere, quod non in regibus ante fuerit?" lib. 4. cap. 3.

The opinions of the Attorneys-General of the United States have been published, and their value is known to all lawyers. It cannot be said the present publication possesses the same practical value. But tempus edax rerum destroyed even the lintei libri of ancient Rome, and the American press may be said not to be ill employed in reproducing a book forgotten in Europe, except by the observing few. The adjoining British colonies, the growth of which it is so pleasant for us to witness, and who so largely avail themselves of our publications, will feel an interest in this production of our press. It is quite as much dedicated to them as to ourselves. In the might and majesty of the people of the United States of America, we can now say with the poet, while we chronicle the times of dependence long past:

> "Una nota est Martis Nonis: sacrata quod illis
> Templa putant lucos Vejovis ante duos.
> Romulus ut saxo lucum circumdedit alto:
> Quilibet huc, inquit, confuge, tutus eris.
> O quam de tenui Romanus origine crevit!"
>
> Ovidii Fastorum lib. 3. v. 429 et seq.

BIOGRAPHICAL NOTICE

OF THE EDITOR.

George Chalmers, the compiler of the present volume, was born at Fochabers in Scotland in the year 1742, and educated at King's College, Aberdeen. He studied the law at Edinburgh, and in 1763 accompanied an uncle to America, to assist him in the recovery of certain lands claimed by him in Maryland. He soon established himself in the practice of his profession at Baltimore, and in a few years acquired an extensive and lucrative business. In the revolutionary struggle, he espoused the royalist cause, and in the great question relative to the payment of tithes, he appeared in behalf of the clergy. In this controversy he was opposed by the celebrated Patrick Henry of Virginia, and was admitted to have displayed much learning and ability in sustaining the claims of the Episcopal church, but the violence of party spirit, aggravated perhaps by the part he had taken in this dispute, soon compelled him to sacrifice his professional prospects and seek for refuge in his native country.

Mr. Chalmers arrived in England about the year 1775, and immediately devoted himself, with much assiduity, to the study of the history of the British colonies in North America. His first work, the Political Annals of the United Colonies, displayed great diligence, research, and fidelity, and has been of essential use in facilitating the labors of later historical investigators in the same field. The first volume was published in 1780, but the second unfortunately, never appeared.—In 1786, Mr. Chalmers was appointed chief clerk to the committee of Privy Council charged with "the consideration of all matters relating to trade and foreign plantations," and he continued to discharge the duties of this office for nearly fifty years. The situation gave him, of course, the freest access to all the archives connected with the colonial interests of Great Britain, and furnished him abundant facilities for the prosecution of his favorite studies.

Among the numerous works of which Mr. Chalmers was the author or compiler, we may mention, in addition to the Annals and this collection of Opinions, a Collection of Treaties between Great Britain and other Powers in 2 vols. 8vo, London 1790; Life of Thomas Paine, author of the Rights of Man, (tenth edition). 1793, under the assumed name of Francis Oldys; a Chronological Account of Commerce and Coinage in Great Britain from the Restoration to 1810, London, 1810; Considerations on Commerce, Bullion, Coin, Circulation, and Exchange,

London, 1811; but he is most widely known among general readers by his Life of Mary Queen of Scots, London 1818, 2 vols. 4to, reprinted in 3 vols. 8vo. and his Caledonia, or an Account, Historical and Topographic, of North Britain, vol. I. London, 1807 4to, vol. II. London, 1810 4to, both of which are works of great and permanent value. The Caledonia was never completed, but it was the principal original work of his life and occupied a large proportion of his leisure hours for a period of more than twenty years. It was designed to extend to five volumes, but though he had made extensive researches for the purpose of completing it, the materials he had collected were not found, at his death, in such a state as to warrant their publication.

He died at London on the 31st of May 1825, at the age of eighty-three, and as his last illness was a short one, he kept up his literary activity to nearly the close of his life. The present is not a fit occasion for a critical appreciation of Mr. Chalmers' literary ability, but the value of his contributions to the domestic history of Great Britain, and to that of her colonies and their relations to the mother country, is admitted to be great. The work a new edition of which is now offered to the public, though relating to questions not much discussed at present, will be found to touch upon principles whose practical bearing is even yet by no means exhausted, and it is believed to possess scarcely less interest for the citizens of the United States, than for the

people of those American Provinces which still remain connected with the British crown. It is in fact the most complete and authentic record we possess of the current of legal opinion in England upon the relations between that country and her American colonies, and, as such, has been very frequently referred to by the ablest American jurists in the discussion of the great questions it is so well calculated to elucidate. Having never been reprinted since its first appearance at London in 1814, it has become extremely rare, and the publishers believe that they are rendering a useful service to the professional and the historical inquirer, by making more generally accessible so valuable a repository of legal and political doctrine.

BIOGRAPHICAL NOTICES

OF AUTHORS.

	Page.
Aland, Sir John Fortescue, Lord Fortescue.	25
Arden, Sir Richard P., Lord Alvanley.	36
Chalmers, George, Clerk of Committee of Privy Council.	v
Cook, Sir John, King's Advocate.	23
Compton, Henry, Bishop of London.	22
De Grey, Sir William, Lord Walsingham.	35
De Witt, John, Keeper of the Seals.	39
Eyre, Sir Robert, Chief-Justice.	24
Exton, Dr. Thomas, Of the Commons.	19
Fane, Francis, Counsel to Board of Trade.	26
Finch, Heneage, Solicitor-General.	20
Gibson, Edmond, Bishop of London.	26
Harcourt, Sir Simon, Lord-Chancellor.	23
Hawles, Sir John, Solicitor-General.	22
Hedges, Sir Charles, King's Advocate.	23
Hendman, Humphrey, Doctor of Civil Law.	23
Henley, Sir Robert, Lord-Chancellor.	32
Holt, Sir John, Chief-Justice.	20
Jackson, Richard, Privy-Counsellor.	37
Jenkins, Sir Lionel, Privy-Counsellor.	19
Jones, Sir William, Attorney-General.	19
Kemp, William, Attorney-General, of New York.	37
Kenyon, Sir Lloyd, Chief-Justice.	35
King, Sir John, Treasurer of Inner Temple.	19
King, Sir Peter, Lord-Chancellor.	24

Page.
Lamb, Sir Matthew, Counsel to Board of Trade. 37
Levinz, Sir Creswell, Attorney-General. 20
Lloyd, Sir Nathaniel, Advocate-General. 23
Lloyd, Sir Richard, Baron of the Exchequer. 34
Lutwyche, Thomas, King's Counsel. 28
Macdonald, Sir Archibald, Privy-Councillor, 36
Marriot, Sir James, Vice-Chancellor. 37
Montagne, Sir James, Chief-Baron. 24
Murray, Hon. William, Chief-Justice. 29
Newton, Henry, King's Advocate. 23
Northey, Sir Edward. Attorney-General. 23
Norton, Sir Fletcher, Lord Grantley. 34
Parker, Sir Thomas, Earl of Macclesfield. 23
Pratt, Charles, Earl Camden. 32
Raymond, Sir Robert, Chief-Justice. 25
Reeve, Sir Thomas, Chief-Justice. 28
Ryder, Sir Dudley, Chief-Justice. 29
Sawyer, Sir Robert, Attorney-General. 20
Smith, William, Chief-Justice of Quebec. 37
Somers, Sir John, Lord-Chancellor. 21
Strange, Sir John, Master of the Rolls. 29
Strahan, Dr. William, Of the Commons. 25
Talbot, Charles, Lord-Chancellor. 28
Temple. Sir William, Master of the Rolls. 39
Thompson, Sir William, Baron of the Exchequer. 26
Treby, Sir George, Chief-Justice. 21
Trevor, Sir Thomas, Chief-Justice. 22
Ward, Sir Edward, Chief-Baron. 21
Wearg, Sir Clement. Solicitor-General. 27
West, Richard, Chancellor of Ireland. 26
Willes, Edward, Justice King's-Bench. 35
Willes, Sir John, Chief-Justice. 28
Winnington, Sir Francis, Solicitor-General. 19
Wynne, Sir William, Vicar-General. 38
Wood, Robert, Doctor of Civil Law. 23
Yorke, Hon. Charles, Lord-Chancellor. 33
Yorke, Sir Philip, Chief-Justice. 27

CONTENTS.

THE KING'S PREROGATIVE ABROAD.

I. OF HIS ECCLESIASTICAL AUTHORITY.

Page.

The opinion of the Attorney-General Northey, on this subject in 1705, relating to the Jesuits and papists in Maryland. 42

The letter of the Right Rev. Dr. Gibson, the Bishop of London, to the Duke of Newcastle, upon the right of the independent ministers in New England, to hold synods. 44

The joint opinions of Attorney and Solicitor-General, Yorke and Wearg, in 1725, on the same subject. 45

Mr. West's opinion, in 1719, on the king's right to present to vacant benefices in Virginia. 53

Two opinions of the Attorney-General, Northey, relative to the clergy of Virginia. 56

The same lawyer's opinion on Popery in Maryland. 60

The Bishop of London's observations on a law of Virginia for the suppression of Vice. 63

The Attorney-General, Northey's, opinion on the granting of letters of administration on the same estate, both in England, and in the colonies. 63

II. OF THE KING'S CIVIL AUTHORITY.

First. Of his rights of property.

The Lord Chief Justice Holt's opinion, 3d June, 1690, that the

Page.

King might take away the Charter of Maryland, (Lord Baltimore's,) it being in a case of necessity. 65

The opinion of the Attorney and Solicitor-General, Northey and Harcourt, that the Queen, having a right to govern all her people, may resume a Government under a Royal Charter that had been abused. 66

The opinion of the Attorney-General, Northey, on the Queen's prerogative to receive a surrender of the Pennsylvania Charter. 67

The opinion of the Attorney and Solicitor-General Ryder, and Murray, on the King's prerogative to receive the resignation of the Charter of Georgia, and to establish a Royal Government. 69

The opinion of the Attorney-General Northey, on the surrender of the Bahama Charter. 72

On the King's Right to the three lower Counties on Delaware, by Attorney and Solicitor-General, Northey and Thompson. 73

Of the King's authority over Guernsey and Jersey, by the Attorney and Solicitor, Ryder and Strange. 88

Of the King's right to the islands in the river Delaware, by the Attorney and Solicitor General Raymond and Yorke, in 1721. 90

Of the King's right to certain waste lands in New Hampshire, by the Attorney and Solicitor General, Ryder and Murray. 91

Mr. West's opinion how far the King has a right to grant ceded lands. 105

The opinion of the Attorney and Solicitor, Yorke and Talbot, whether the King's right to the lands of Pemaquid remain in the Crown. 106

Of the King's right to the woods in the Province of Maine, by Mr. West. 133

Mr. Fane's opinion on the King's right to the woods in New England. 137

The opinion of the Attorney and Solicitor General, Yorke and Talbot, on the King's right to the woods in New England. 139

Third. OF THE KING'S GRANTS.

The opinion of the Attorney General Treby, in 1689, on a grant, for life, of Auditor of the Virginia revenue. 160

Page.

Of the King's right to mines in New Jersey, by the Attorney and Solicitor, Raymond and Yorke. 141

Of the royal right of escheats in Virginia, by the Attorney and Solicitor-General, Somers and Trevor. 142

Of the peculiar Escheats in New Jersey, which was in the hands of Proprietaries, by the Attorney-General Northey. 143

On the escheat of negroes, in Jamaica, by the Solicitor-General Montague. 144

On the escheat of ambergris, in Jamaica, by the same lawyer. 146

On the escheat of lands and negroes in Jamaica, by the Attorney-General Northey. 147

On the Queen's right of quit-rents, in New York, by the same lawyer. 149

Mr. Fane's opinion on the King's right to treasure-trove, in the Bahamas. 150

The Attorney-General Northey's opinion of the Queen's right to royal fish, at New York. 150

The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the King's right to the territory of Avalon, in Newfoundland, which had been granted to Sir George Calvert, in 1623. 151

The opinion of the Attorney-General Harcourt, on the Queen's right of escheat, to an estate in Jamaica. 153

The opinion of Mr. Jackson on the King's right to the white pine trees growing on the Kennebeck River. 155

The opinion of the same counsel on the construction of the 8 Geo. I., for the preservation of the white pine trees in New England. 157

Second. Of the King's power of Taxation.

The opinion of the Attorney-General Northey, that the Queen might direct to be levied a tax on the conquered part of St. Kitt's, in 1704. 158

The same lawyer's opinion, that the Queen might legally take off the duty of five shillings per ton, on French ships, when the English ships should be exempted from paying the duty of fifty sols per ton, in France. 159

Page.

Mr. Lamb's opinion on the appointment of Sheriffs in New Jersey. 161

Mr. Fane's opinion on the King's power to confirm the titles to land in Connecticut. 163

The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the King's right to make new grants of land in New Hampshire. 164

The opinion of the Attorney-General Yorke, on the manner of discussing objections to the King's grants. 168

The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the question between the King and the Proprietors of the Northern Neck, in Virginia. 169

The opinion of the Attorney and Solicitor, Ryder and Strange, concerning the grants of lands in Carolina, before and after the purchase, by the King, of the Proprietors' rights. 171

The opinion of the Attorney and Solicitor General, Yorke and Talbot, on grants that are void for uncertainty. 175

The opinions of Mr. Fane, and of the Attorney and Solicitor-General, Willes and Ryder, on the question of patenting lands, under old grants from the Proprietaries of Carolina. 176

The opinion of the same lawyers, on the nullity of a similar grant to Mr. Hodgson. 178

The opinion of Mr. Fane, on the validity of the grant of the Secretary's office in South Carolina. 178

The opinion of the Attorney-General Willes, on the right of the Proprietor of Maryland, to appoint to offices, under the King's Charters. 179

Fourth. Of an anomalous exclusion of the King's right of granting a Colonial office.

The opinion of the Solicitor General Montague, on the exclusive right of the Governors, to appoint naval officers. 181

Fifth. Of the King's general jurisdiction over his territories abroad.

The opinion of the Attorney and Solicitor-General, Raymond and Yorke, on the King's power to establish a Civil Jurisdiction at Gibraltar. 184

Page.

The opinion of the Attorney-General Northey, that the Queen might establish a Court of Equity in Massachusetts Bay. 194

Mr. West's opinion on the King's right to establish a new office of law at Barbadoes. 195

The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the King's right of establishing a Government in Georgia, upon the surrender of the Trustees. 198

Mr. Fane's opinion, on the King's power of calling an Assembly, in New York. 199

The opinion of Chief-Justice Morris, in New Jersey, on the King's power of mercy. 200

III. HOW FAR THE KING'S SUBJECTS, WHO EMIGRATE, CARRY WITH THEM THE LAW OF ENGLAND.

First. As to the Common Law.

Mr. West's opinion on this subject in 1720. 206

The opinion of the Attorney and Solicitor General, Pratt and Yorke, that the king's subjects carry with them the common law, wherever they may form settlements. 206

Mr. Fane's opinion, how far subjects can be detained in custody, on a charge of piracy. 207

Second. As to the extension of the Statute Law.

The Attorney-General Yorke's opinion on this subject, in 1729. 208

The opinion of the Attorney and Solicitor, Henley, and Yorke, that the subjects emigrating, do carry with them the statute law, in 1757. 209

The opinion of the advocate, the attorney, and solicitor, Hay, Yorke, and Norton, on the same subject in 1762. 210

The opinion of the attorney and solicitor-general, De Grey, and Willes, on the extension of acts of parliament to the colonies, when they are mentioned, generally, as dominions of the crown, 1767. 211

The opinion of attorney and solicitor-general, Raymond, and Yorke, how far the statute of monopolies extends to the colonies. 213

The opinion of the attorney-general Yorke, in 1727, how far statutes extend to the Isle of Man. 214

Page.

The opinion of the attorney and solicitor-general, Yorke, and Wearg, on the extension of the laws of England to the colonies and other analogous topics of law. 215

The opinions of Northey, Ryder, and Strange, on the discontinuance of the American act of queen Ann. 232

OF THE COLONIAL CONSTITUTIONS.

First. Of the Governor.

See the opinion of the Attorney-General Blenman, of Barbadoes, in 1729. 233

The opinion of Mr. Thomas Reeve, on the same subject, in 1727-8. 237

Mr. West's opinion, in 1725, whether a Governor can vote as a Councillor. 238

Mr. West's opinion, in 1719, concerning a Governor's power to prorogue the assembly, under an adjournment. 239

The opinion of the Attorney and Solicitor-General, Trevor, and Hawles, in 1700, on the determination of a Governor's commission. 243

The opinion of the Attorney and Solicitor-General, Yorke, and Talbot, on the effect of notice on the validity of a governor's commission. 244

The opinion of Mr. Thomas Reeves, and Mr. Lutwyche, on the continuance of the governor's commission. 244

The opinion of the Attorney and Solicitor-General, Ryder, and Murray, on the question, whether the great seal of the province should not be affixed to every act of government, that requires a seal, in the Colony. 246

The opinion of the Attorney and Solicitor-General, Ryder, and Murray, of the Governor's right to prorogue the Assembly to any place within his government. 248

The opinion of the Chief Justice Morris, of New York, on the question, whether the change of the Governor would dissolve the Assembly. 249

The opinion of Mr. Hamilton, an eminent lawyer of Pennsylvania, on the same subject. 258

Page.

Mr. Fane's opinion on the nature of the bond to be given by the Governors of Proprietary Governments, for observing the Acts of Trade. 261

The opinion of the Attorney and Solicitor General Trevor and Hawles on the trial of a Lieutenant Governor, and other legal topics. 262

Second. Of the Council.

The opinion of the Attorney and Solicitor-General, Murray and Lloyd, in 1755, on the question whether the Governor and Council have the power of making laws. 263

The opinion of the Attorney-General Pratt, on the several powers of the Council and Assembly of Maryland. 264

The opinion of the Attorney and Solicitor-General, Henley, and Yorke, how far the proclamation of martial law suspends the functions of the Council. 268

Third. Of the Representative Assembly.

The opinion of the Attorney-General Raymond, on the King's power to grant the privilege of having an Assembly, and on the right given by the King to particular districts, to choose delegates. 269

The opinion of the Attorney and Solicitor-General, Ryder and Murray, upon the issuing of writs for choosing new representatives. 271

The opinion of the same lawyers, on the right of the Crown, to enable particular towns, to send delegates to the Assembly. 272

Mr. Fane's opinion on the same point. 273

The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the same point. 276

The opinion of the Attorney and Solicitor-General, Murray and Lloyd, on the privileges of the Jamaica Assembly. 292

The opinion of the same lawyers, whether a person chosen into the Assembly, had a right to sit he having been convicted of a crime in England. 293

The opinion of the Attorney and Solicitor-General, Northey, and Harcourt, how far a representative, absenting himself, may be punished. 294

Page.

The opinion of the Attorney-General De Grey, whether the Assembly of South Carolina could grant money to the Bill of Rights Society. 296

IV. SEVERAL OPINIONS ON THE ACT OF THE MARYLAND ASSEMBLY, "FOR THE ESTABLISHMENT OF RELIGIOUS WORSHIP, ACCORDING TO THE CHURCH OF ENGLAND."

The opinion of Mr. Hollyday, an eminent lawyer of Maryland, on this subject. 299

Sketches of an argument on this subject, by Mr. Daniel Dulany, one of the ablest lawyers, which America ever produced, after he had retired from the bar. 306

The Opinion on the same subject, by Mr. William Paca, an eminent lawyer of Maryland. 320

V. OF THE WANT OF SOVEREIGNTY, IN THE GOVERNOR, THE COUNCIL, AND REPRESENTATIVE BODY, WHEN MET IN ASSEMBLY.

The opinion of the Attorney General Harcourt, on the impropriety of an act of recognition of Queen Ann, by the Assembly of Maryland. 332

The opinion of the Solicitor General Thomson on the limited effect of an act of naturalization, by an Assembly. 333

The opinion of the Attorney General Murray, on the question whether an Assembly can impose a duty on the importation of convicts into a colony. 333

Mr. West's opinion on the question, when the six months commenced wherein the Crown might repeal the acts of the Pennsylvania Assembly. 336

The opinion of the Attorney and Solicitor General, Raymond and Yorke, relating to the time when the three years for the King's approval or repeal of the Massachusetts acts commenced. 337

The opinion of the Attorney General Northey of the bad effects of temporary acts of Assembly which in his judgment could only be remedied by an act of parliament. 338

Page.

The opinion of the same lawyer, concerning the illegality of the legislative proceedings at New York, against Bayard and Hutchins. 340

The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the power of the Assembly of Connecticut to make laws. 341

The opinion of Mr. Lamb on an usurped Assembly in South Carolina. 342

The opinion of Mr. Fane, on the same topic. 343

The opinion of the Attorney and Solicitor-General, Harcourt and Montague, on similar topics of incompetence. 344

The opinion of the Attorney-General Northey, that care should be taken for the regular transmission, in order to the consideration of the Queen's Councils. 346

The opinion of the same lawyer on the Queen's power of repealing the acts of the Maryland Assembly. 348

The opinion of the same lawyer, on the unfitness of an act of the Jamaica Assembly, as inconsistent with the Queen's prerogative. 349

VI. OF THE VARIOUS MODIFICATIONS OF THE CONSTITUTED ASSEMBLY'S ACCUSTOMED POWERS.

The opinion of the Attorney-General Raymond, that an act of Assembly has the same effect in the Colony, as an act of Parliament has in the mother country. 351

The opinion of the Attorney and Solicitor-General Murray and Lloyd on the usual privileges of the Jamaica Assembly. 352

The opinion of the Attorney and Solicitor-General, Yorke, and Talbot, on the general policy applicable to the same Assembly. 353

The opinion of Mr. Fane, on the general policy of the same Assembly. 356

The opinion of the Attorney and Solicitor-General, Ryder and Strange, on acts of North Carolina, that were not binding either on the Crown, or people. 359

The opinion of Mr. West, on the mode of granting money by the Barbadoes Assembly and the means. 360

Mr. West's objections to various acts of the Barbadoes Assembly, shewing their unfitness. 364

Page.

Mr. Fane's objections to an act of the same act, as unfit. 369

The opinion of the Attorney-General Rawlin, Barbadoes, on the act of Assembly creating paper money. 373

The objections of the Attorney General Northey, to the same act creating paper money. 382

The objection of the same lawyer to act of Barbadoes, as unreasonable. 384

The report of Mr. West, in favor of a Jamaica act, upon general principles of colonial policy. 385

The Attorney-General, Northey's objection to Barbadoes acts, as unreasonable and unjust. 390

Mr. West's objections to an act of the same Assembly, for licensing lawyers upon the same principle. 392

Mr. West's objections to an act of the South Carolina Assembly, incorporating Charlestown, upon a new principle. 395

The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the uncircumspect mode of continuing laws used by the Jamaica Assembly. 397

The Solicitor-General Eyre's objections to an act of the Jamaica Assembly, for its unreasonableness. 401

The objections of the Attorney and Solicitor-General, Ryder and Murray, to a law of North Carolina, as being contrary to reason, inconsistent with the laws, and prejudicial to this kingdom. 402

Mr. Fane's observations on the Virginia Assembly, for relief of the College of William and Mary. 403

The objections of the Attorney-General Northey, on some of the Virginia acts, in 1701. 405

The Solicitior General Harcourt's reports on the acts of the Bermuda Assemblies, in 1690-91 93-94. 408

The same lawyer's report on the acts of the same Assembly, 1698. 417

The same lawyer's report on the acts of the same Assembly, in 1704. 420

Mr. West's objections to an act of the same Assembly, as it imposed a duty on the importation of British manufactures. 422

Page.

The objections of the same lawyer, to similar laws of the same Assembly. 423

Mr. Lamb's observations on an act of the Carolina Assembly, relative to coins. 425

Mr. West's observations on the continuance of the revenue acts of the Jamaica Assembly. 429

The observations of the Attorney and Solicitor-General, Ryder and Murray, on the acts of the Jamaica Assembly, in 1751. 431

Mr. West's observations on an act of the Virginia Assembly, tending to prohibit the importation of convicts. 436

The observations of the same lawyer, on an act of the same Assembly, tending to prevent free black men from voting at elections. 439

The same lawyer's objections to an act of the Pennsylvania Assembly, establishing a paper credit. 441

The observations of the same lawyer, on the peculiarities, and unfitness, of other acts of the same Assembly. 442

Tha observations of the Solicitor-General, Thomson, on an act of the New Jersey Assembly, for ascertaining the seat of government. 445

Mr West's remarks on an act of the same Assembly, tending to lesson the jurisdiction of the supreme courts of justice. 445

The report of the Attorney and Solicitor-General, Ryder and Murray, on some singular acts of the New Jersey Assemby. 446

Mr. West,s opinion on the revenue acts of Jamaica, upon special questions put on them. 449

The report of the same lawyer on the Jamaica act of Assembly, for colonizing the island. 454

The opinion of the Attorney and Solicitor-General Murray and Lloyd, on four acts of the Jamaica Assembly, which, after hearing parties, they deemed of such a nature as the Governor ought not, according to his instructions to have passed. 456

The opinion of the Attorney and Solicitor-General Hervey and Yorke, that circuit courts in Jamaica could not be established, in the proposed, mode, but by the legislature of the island, or by an act of parliament. 458

Page.

The opinion of the Attorney and Solicitor-General Ryder and Murray, how far an act of Assembly ought to be repealed which would endanger the rights of purchasers under it, when a long acquiescence has occurred. 460

VII. OF THE COLONIAL JUDICATORIES AND THEIR PROCEEDINGS: THEIR JURISDICTIONS EMANATE FROM THE KING, UNDER THE VARIOUS MODIFICATIONS OF THE SEVERAL ACTS OF THE ASSEMBLY.

The several remarks of the Lord Chief Justice, Sir Thomas Parker and Sir Peter King on the draught of a letter from the Board of Trade to the Earl of Sunderland, on the judicial proceedings in Bermudas. 461

The opinion of the Attorney-General, Northey, on the general policy of the colonial courts. 467

The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the establishment of a court of criminal jurisdiction in the Leeward Islands. 468

The opinion of the Attorney-General Murray, on the jurisdiction of the Jamaica courts. 472

The opinion of the Attorney and Solicitor, Ryder and Murray, on the jurisdiction of the Bermuda courts. 474

Mr. Lamb's opinion on the courts of South Carolina. 476

On the courts of chancery, in Barbadoes, by the Attorney-General Northey. 479

The opinion of Mr. Jackson, on the power of the Governors, as Chancellors over idiots. 481

A second opinion of the same lawyer, on the same subject, in a letter to the Secretary of the Board. 482

The opinion of the Attorney and Solicitor, Ryder and Strange, on the erecting of a court of exchequer in the colonies. 484

The Attorney-General Northey's opinion, on an act of the Barbadoes Assembly to dock the entail of an estate. 485

The opinion of the Solicitor-General Thomson, on the same subject. 486

Page.

The opinion of the Attorney-General Northey, on the same subject. 486

The opinion of the Solicitor-General T. F. Aland on the samo subject. 487

The opinion of the Attorney and Solicitor General, Yorke and Talbot, that no fine levied, or recovery suffered, [in England], of lands lying in the plantatious, can operate effectually unless the samo has been so authorised by acts of assembly in the colonies. 488

The opinion of the Attorney-General Northey, on the right of appeal from the colonial courts. 488

The opinion of the same lawyer, on the same topics. 489

The opinion of the Attorney and Solicitor, Ryder and Murray, on the commission granted to De Lancy, the Chief-Justice of New York. 491

The opinion of the Attorney General, Yorke, in 1728, on tho King's right to order a *nolle prosequi* to be entered on prosecutions, in Jamaica, for the penalty of an act of Assembly. 491

Mr. Fane's opinion on act of the New York Assembly, for preventing prosecutions by information, as inconsistent with the King's prerogative. 493

The opinion of the Attorney and Solicitor General, Yorko and Talbot, on the same subject. 496

The opinion of the Attorney-General Northey, concerning the proceedings in the courts of New York, on an escheat, and an appeal therefrom. 497

The opinion of the Attorney-General Northey, on the evidence of free negroes. 497

VIII. OF THE ADMIRALTY JURISDICTION.

The opinion of the Attorney General Northey. 499

The opinion of of the same lawyer, on a similar subject, in 1703. 502

The opinion of the Advocate-General, Sir John Cooke, on the same jurisdiction. 504

Mr. Fane's opinion on tho Admiralty Jurisdiction, in the Bahamas. 507

Page.

The Attorney-General Northey's observations on some acts of the Barbadoes Assembly, as inconsistent with the Admiralty Jurisdiction. 507

Mr. West's opinion on the Admiralty Jurisdiction, in the plantations. 510

Mr. Strahan's opinion, on the power of collecting admiralty dues, in Bermuda. 522

The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the trial for a murder committed at sea. 523

The opinion of the Advocate, Attorney, and Solicitor-General, in 1716, on the same point. 525

The opinion of the Attorney and Solicitor-General of Barbadoes, Chilton, and Rawlin, on the trial of pirates there. 527

The opinion of the Attorney and Solicitor General, Northey and Thompson, on the pardon of pirates, in the colonies. 529

The opinion of the Attorney-General Northey, on appeals from the admiralty courts, in the colonies. 531

The opinion ot the Advocate-General, Sir Nathaniel Lloyd, on the same subject. 532

The Advocate-General, Sir John Cooke's opinion, on the seizure of a Spanish brigantine, on the high sea, by an uncommissioned vessel. 533

ON THE NATIONAL FISHERIES.

The opinion of the Attorney General, Raymond, on the heads of a patent for carrying on the fishery, in 1721. 533

Mr. Fane's opinion on the duties on whale fins. 535

The Attorney General Yorke's opinion, on the power of the justices of the peace in Newfoundland. 536

The same lawyer's opinion on the powers of the several officers at Newfoundland. 538

The opinion of the Attorney General, Ryder, on the King's power to erect courts of justice at Newfoundland 541

The opinion of the Attorney General, Ryder, that the King could not give power to establish a criminal court at Newfoundland, but under the great seal. 542

Page.

The opinion of the same lawyer, in pursuance of the former, that the King may instruct his governor of Newfoundland, to cause to be executed such persons as might be convicted of capital crimes, except treason. 543

The opinion of the Advocate, Attorney, and Solicitor-General, Hay, Norton and De Grey, how far the King's power was limited at Newfoundland, by the statute of King William. 545

The opinion of the Attorney and Solicitor General, Sawyer and Finch, on the Eastland and Greenland Companies. 546

ON COMMERCE.

The opinion of the Solicitor General Thompson, on the King's prerogative of prohibiting his subjects from going abroad. 548

Mr. West's opinion upon establishing British manufactures in France. 548

The opinion of the Attorney-General Macdonald, how far the King may restrain his subjects from going abroad. 554

The opinion of the Attorney General Yorke, relating to English subjects being engaged in the East India Company of Sweden. 557

Mr. Fane's opinion as to the seizing any machinery, which were designed to be exported, and which were used in the English manufactures. 560

The report of the whole judges upon the memorial of the African Company, touching the assiento, in 1689. 561

The opinion of the Attorney and Solicitor-General, Treby and Somers, on the Spanish trade in the West Indies. 562

The opinion of the Attorney and Solicitor-General, Trevor and Hawles, on carrying logwood to Venice, whether legal. 563

Report of the Attorney General, Northey, on preserving the rights of British built ships. 564

The opinion of the Solicitor-General Thomson, on Spanish ships trading to the British islands. 566

Mr. West's opinion on the same subject. 567

The opinion of the Attorney General Northey, on the importation of naval stores from Holland. 567

The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the same topics. 569

Page.

The opinion of the Solicitor-General Montague, on Irish ships carrying barley from Rochelle to Lisbon, in 1703. 570

Mr. Fane's opinion on the carriage of Canary wines directly to the British plantations. 5[illegible]

The opinion of the Solicitor-General Eyre, on granting passes to ships, contrary to the act of navigation. 573

Mr. Fane's opinion on the King's seizing vessels, trading against law, in the British Islands. 574

The opinion of the Attorney-General, Yorke, on the commencement of duties upon importation. 576

The opinion of the Attorney and Solicitor-General, Kemp and Smith, at New York, on the distribution of forfeitures, under the acts of trade. 576

The opinion of the Attorney-General, Levinz, on the importation af painted stoneware. 579

The opinion of Sir William Jones, Sir F. Winnington, and Mr. J. King, in 1676, on the statute 21st James, of monopolies, how far an action would lie, in the Barbadoes courts, for seizing goods of the African Company. 580

The opinion of the Attorney-General, Sawyer, in 1681, concerning interlopers. 581

The opinion of the Attorney and Solicitor General, Harcourt and Montague, on the changes effected, by the union, in trade. 582

The opinion of the Solicitor-General, on the American act establishing the case of prize, during the war of Queen Anne. 585

The opinion of the Solicitor General, Thomson, relating to a duty laid, in Carolina, upon British commodities. 686

The same lawyer's opinion on choosing a treasurer of the factory at Lisbon. 587

The opinion of the Attorney-General, Ryder, upon the case of distressed English seamen at Cadiz. 588

Mr. Fane's opinion, on the privileges of the Russia company, carrying on a trade to Armenia. 590

The opinion of the Attorney and Solicitor General, Ryder and Strange, on the act of Georgia, about trade with the Indians. 591

Page.

Mr. West's opinion on some acts of South Carolina for regulating the trade with the Indians. 592

Mr. West's opinion, relating to Custom House officers being concerned in trade and shipping. 599

The report to the King, of the Attorney and Solicitor-General, Northey and Thompson, on a proposed charter to a corporate body, for insuring ships. 599

The opinion of the Attorney-General, Levinz, on the King's power to grant a patent for making black pepper white. 609

The Attorney-General Northey's opinion on foreign coins. 610

OF THE LAW OF NATIONS.

The opinion of Sir Leoline Jenkins, on Captain Cook's case. 611

The opinion of Doctors Exton and Lloyd, how breakers of treaties are to be punished in England. 616

The opinion of the same civilians, on the offence of accepting commissions to cruize against the King's allies. 617

The opinion of the Advocate General, Cooke, on making reprisals upon Portugal, in 1709. 618

The opinion of the Attorney and Solicitor-General, Northey and Raymond, upon the petition of several merchants, whose ships had been taken by the Danes. 619

The report of several civilians on the seizure of British vessels, by the Spaniards, in the West Indies. 620

The Advocate-General, Doctor Simpson's opinion, on the project of a treaty of commerce with Prussia. 621

The Advocate General, Dr. Paul, on the merchants of Minorca trading with Algiers. 623

The opinion of the Advocate, Attorney, and Solicitor General, Paul, Ryder, and Murray, how far salvage was due on a Spanish ship and cargo, that had been stranded in North Carolina. 625

The opinion of the Attorney and Solicitor-General, York, and Talbot, on the duration of the treaty of neutrality, in 1686. 625

The opinion of the Attorney and Solicitor-General, Ryder, and Murray, on the same subject. 626

Page.

The opinion of the Attorney and Solicitor, Norton, and De Grey, on the same subject. 628

The opinion of the Advocate-General, Sir James Marriott, on the same subject. 629

The opinion of the Attorney-General Pratt, on the question whether Guadaloupe became, in 1759, a British Island. 639

The opinion of the Solicitor-General Yorke, on the same legal topics. 641

The opinion of the Attorney and Solicitor-General, Trevor and Hawles, how far Scotchmen were aliens, and how a Lieutenant-Governor could be tried for misdemeanor. 643

The opinion of the Attorney-General Northey, on the questions of alienage, and trading with her Majesty's enemies. 645

The opinion of the Attorney-General Norton, whether the French and Spaniards who remained in the ceded countries after the peace of 1763, were aliens or subjects. 646

Of the legal effects, resulting from the acknowledged independence of the United States, by Geo. Chalmers. 648

The opinion of Sir Lloyd Kenyon, in 1783, on the question, whether the goods imported from the United States must pay alien duties, and are subject to the regulations of the acts of navigation. 688

The opinion of Sir William Wynne, in which the Attorney, and Solicitor-General, Arden and Macdonald, concurred on the state of American ships, after the independence of the United States. 690

The opinion of the Attorney General, Arden, in 1788, on the American trade. 691

Discussions on the question, "whether inhabitants of the United States, born there before the independence, are, on coming to this kingdom, to be considered as natural born subjects?" By a Barrister. 692

Surinam,—discourse of, by Mr. J. De Witt. 44

PREFACE.

MANY years of agitation and revolution have elapsed, since it occurred to me, that the commentaries on the Laws of England were barren on such legal topics as relate to our Colonies, Fisheries and Commerce. The commentator was, probably, unable to obtain materials; as the appeals from our foreign dominions lay to the King in his Council, and not to the King in his Bench. There have been scarcely any reports of cases, which were decided on such appeals, and were accessible to research; but, if such appeals had lain to the King in his Bench, then there would have been many reports laid before the public, whence the commentator on the laws of Englai l might have drawn, with an inquisitive spirit and a liberal hand.

Such were my convictions, while I was digging through the books of the BOARD OF TRADE, and other depositories for the materials of my Political Annals of the Revolted Colonies, which I offered to the public in 1780; and I was thus induced to take copies of such

2

law opinions as appeared in the course of my researches. Those copies swelled, during my progress, to a bundle; and it seemed to me, that if they were digested under heads, they might somewhat supply the juridical defects, which have been already intimated, rather than shown.

It became, at length, known, that I had made such collections of law opinions; and professional gentlemen, setting out to the west and to the east, to execute various offices in the Judicial Departments, desired to derive some rays of knowledge from the deliberate opinions of their elders, who had risen to eminence, as much by their integrity as their talents.

Such a limited use of such opinions, was said to be penurious; and I was urged to send my collections to the press, as the properest mode of making such lore useful to the many as well as to the few; it was, indeed, apparent, that such documents, lying separated in different depositories, and obscured by meaner matters, were of very little value, and of less instruction to the Governors, as they had always been to the governed: the very Departments of State, which possessed such unknown treasures, could neither be much wiser for their unconscious possession, nor in any manner regulated in their practice by unknown precedents: "*Idem est non esse et non apparere,*" was a maxim very applicable to the statesmen who filled those departments, and could not pursue any settled policy, by those beacons which had

lighted their predecessors on their official course. Owing to all those considerations, I have been induced, at the end of many years, to give publicity to those juridical opinions, in the hope of doing some good by their publication, while no object of any use can be gained by their concealment. Those opinions will do honor to the lawyers who gave them, not only as they display a perfect knowledge of the several subjects, but evince a deliberation and candor, which are equal to their skill. Those opinions were often given, after seeing agents and hearing counsel, and sometimes delivered with many qualifications, when the cases were either imperfectly stated, or the facts uncircumstantially understood. On perusing the following opinions, the more judicious reader will be apt to cry out: No country enjoys such a college of civilians, as the Prerogative Court supplies—neither Greece nor Rome, in their best days, produced such municipal lawyers as have illuminated this nation by their learning; animated the people by their eloquence; and dignified their profession by their probity.

It has been my endeavor to arrange the following opinions according to my limited notions of a just analogy; and, when it is recollected, that so great a jurist as Sir Matthew Hale, acknowledged his inability to reduce his analysis of the law to an exact logical method, censoriousness may, perhaps, think with less severity of my unskillfulness.

This multifarious subject may be properly digested under the following heads:

First, The King's Prerogative abroad:

I. Of his Ecclesiastical Authority;

II. Of his Civil Authority. This last may be again subdivided into four divisions: (1.) The King's rights; (2.) The King's power of taxation over conquests;(3.) the King's Grants; (4.) An anomalous exclusion of the King's Prerogative, in the appointment to one office.

Secondly, Of the King's General Jurisdiction abroad.

Thirdly, How far the King's subjects, who emigrate. carry with them the English law:

I. The Common Law;

II. The Statute Law.

Fourthly, Of the Colonial Constitutions. This head may be subdivided into six divisions:

I. Of the Governor;

II. Of the King's Council;

III. Of the Representative Assembly;

IV. Of the want of sovereignty in the Colonial Legislatures;

V. Of the various modifications which the Constituted Assembly admits;

VI. Of the Colonial Judicatures.

Fifthly, Of the Admiralty Jurisdictions.

Sixthly, Of the National Fisheries.

Seventhly, Of Commerce: This head may be subdivided into four divisions:

I. Manufactures set up abroad;

II. The Acts of Navigation;

III. Miscellaneous matters of Trade:

IV. Of Coins.

Eighthly, Of the Law of Nations. This head may be subdivided into two divisions:

I. Treaties;

II. The legal effects arising from the direct independence of the United States.

Superior to all those Colonial Jurisdictions was the King in his Council, at Whitehall. During the first age of the Colonies, from 1606 to 1640, the whole superintendence of the King was exercised, both executively and legislatively, by the Privy Council.

An age of innovation and reform now began; and the jurisdiction of the Privy Council, within the realm, as to persons and property, was regulated by Parliament.*

But, whatever may have been taken away at the sad commencement of the civil wars, was assumed by the Parliament, which exerted every act of sovereignty over the colonies†. When the monarchy was re-established, in 1680, the King's ancient jurisdiction

* 16 Ch. I, ch. 10; 1 Blacks. Com. 230, 231.

† See the several acts in Scobbell, which are the prototypes of the acts of navigation.

over the trans-atlantic colonies was restored, with the King's government. But the plantations had now, by many accessions, grown into bulk: and the King's superintendence became still more necessary and frequent, for preserving the sovereignty of the Crown, and the subordination of the colonies. A Council of Trade and Plantations was now established; consisting of an indefinite number of respectable persons, who were not, however, members of the Privy Council. Of that Council of Trade was Sir Josiah Child, who was then a brewer in Southwark; and is still remembered for the solid sense of his commercial treatises. This Council was abolished on the 12th of March, 1574-5, when the whole affairs of Trade and Colonies were placed, by the King's declaration, in Council, under the jurisdiction of a Committee of the Privy Council, which, during the various changes of varying times, still retained its colonial authority of ancient times.

The distresses, both of our commerce and our colonies, during the revolution war, created discontent: and this discontent and those distresses produced outcries and complaints, which predisposed the nation for some change: such, then, was the origin of the BOARD OF TRADE AND PLANTATIONS, during the year 1696. By a commission, under the Great Seal, a nobleman for President and several gentlemen, who were eminent for their knowledge of commerce and of colonies, were appointed, with various powers, for super-

intending and promoting both.* During many years, their superintendence over the plantations was vigilant and incessant; but what could such a board do for promoting Commerce or Fisheries, more than removing obstructions out of the way, by their advice and aid, it is not easy to tell. They were either useful or useless, like other establishments, according to the use that was made of them. If a conceited, meddling, forward person happened to bear sway as Secretary of State, he deprived the Board of its jurisdiction and usefulness; if a person of consequence and talents, happened to preside at such a Board, it became exceedingly advantageous to the State, by investigating colonial titles and complaints, by assisting negotiators with their informations and advices, in addition to the

* The plan of the Board of Trade, during the reigns of King William and Queen Anne, seems to have been, to appoint two noblemen and eight commoners, as Commissioners for executing the two great objects of the commission—the promoting of trade and the superintending of the plantations. The members of the first Board were: John, Earl of Bridgewater; Ford, Earl of Tankerville; Sir Philip Meadows, who wrote 'Observations concerning the Sovereignty of the Seas; William Blaithwayt, who had been Secretary of the Old Council of Trade and Plantations, and died Auditor of colonial revenue; John Palexfen, the Chief Justice's brother, and a merchant in the city, who published a tract on Trade; the well known John Locke, who wrote on the coinage; Abraham Hill, whose collections on trade and colonies are in the British Museum; and John Methuen, who, from 1690 represented the Devizes in Parliament: he was sent to Portugal, as Ambassador Extraordinary, for the special purpose of making the commercial treaty dated the 27th of December, 1703: he died about the year [illegible]5. The Board of Trade was a proper nursery of such ministers.

usual occupations of such a department. The first commission specially recommended to the attention of the Board, one of the most difficult of subjects—the poor, the poor-rates, the poor laws; a subject of such complication, as baffled the united labors of the ten Commissioners, and seems to defy the wisdom of Parliament.

It was probably intended, that the Board of Trade should have power to administer an oath: and the Solicitor-General, Thompson, gave his opinion to this effect:

SIR: In obedience to the commands of the Lords Commissioners for Trade and Plantations, signified by yours of the 5th instant, I am of opinion, that the clause in the commission, which is under the Great Seal, does empower the Commissioners, or any three of them, to administer an oath to witnesses, who shall come before them to be examined, touching any matter mentioned in the commission, to which that power does relate. I am, &c.,

Wm. Popple, Esq. WM. THOMPSON.

February 6, 1719-20.

By a special clause of the first commission, the Board was empowered to call for the advice and aid of the Attorney and Solicitor-General.* The following opinions will show, that soon after the revolution, the Ministry called upon the Lord Chief Justice Holt, for

---

* The law officers were each allowed a standing fee of a hundred guineas, with ten guineas to each of their clerks.

his advice; but he does not appear, when acting in this character of adviser, in his best light. The whole Judges were called upon, soon after the same epoch, to give their advice as to the legality of the *assiento* trade, though it must have been the magnitude of the object, more than its difficulty, which required such mighty knowledge as the lights of Westminster Hall enjoyed, to see that such a trade with the Spanish colonies, in Spanish ships, was inconsistent with the acts of navigation.

When treaties of commerce were in contemplation, during the year 1709, the Board of Trade was empowered to call in the aid of the King's Advocate-General. The following opinions show several instances of the joint advice of the Advocate, the Attorney and Solicitor-General, which was asked and received, by the King's ministers: what other country can boast of Jurists, with such extent of knowledge, and reach of thought, as such joint advice exhibits!

Soon after the accession of George I. the acts of the Colonial Assemblies, which were to be reviewed, became extremely voluminous; the standing fee of a hundred guineas had ceased to be any object to the Attorney and Solicitor-General: and it became apparent, that advice was at length asked on particular business of such magnitude, as a fee of an hundred guineas was quite unequal to the affairs and income of the law-officers of the crown, from other sources. Thus, the progress of business led on to the special appointment

of one of the King's learned counsel, to attend to the law affairs of this Colonial Department.

The first counsel, who was thus assigned to the Board of Trade, in April 1718, was Richard West, who had distinguished himself, by publishing "An Inquiry into the manner of creating Peers;" and represented, in Parliament, successively, Grampound and Bodmin. He was allowed a special salary of three hundred pounds a year. The Advocate, the Attorney and Solicitor-General, continued to be consulted on particular occasions, and were paid the accustomed fees for such applications. In June 1725, Mr. West was appointed Chancellor of Ireland: but he unhappily died at Dublin, in December 1726; leaving a son, who distinguished himself as the correspondent and friend of Gray, the poet.

Francis Fane, of the Inner Temple, a relation of the Earl of Westmorland, the President of the Board of Trade, was immediately appointed, as the successor of Mr. West, in June 1725. He continued to represent in Parliament, either Taunton or Petersfield; and to act as learned counsel to this establishment, which required so much legal assistance, till November, 1746, when he was appointed a member of the Board.

After this long service, he was immediately succeeded by Matthew Lamb, the representative in Parliament for Stockbridge. He was created a Baronet in January 1775, and he continued a representative in Parliament for Peterborough, as well as the learned

counsel to the Board of Trade, till his decease, on the 6th of November, 1768: his son, Sir Peniston, was created a peer of Ireland, on the 2d of May, 1770. It is unnecessary to tell who were the law officers of the Crown that gave special opinions to the Board, while Mr. Fane and Sir Matthew Lamb acted as law counsellors to that establishment: the world has seldom seen such a succession of Jurists, whether we regard their knowledge, their temper or their integrity.

At a very critical moment of colonial affairs, this important office of law adviser to the Board of Trade remained undisposed of during several years of great colonial perturbation: at length, on the 30th of April, 1770, Richard Jackson, one of the King's learned counsel, was appointed to this trust, which this accomplished lawyer very sufficiently discharged till the abolition of the Board, at the same epoch which saw thirteen revolted Colonies acknowledged to be sovereign States. By the same statesman, who advised that acknowledgment, Mr. Jackson was appointed a Commissioner of the Treasury, though his *omniscience* could not prevent the fall of the minister, who mortified the nation by his prejudices, and injured it by his projects. Mr. Jackson died on the 6th of May, 1787, leaving a very ample fortune to his two sisters. At the time of his decease he was one of the King's learned counsel, a member of Parliament, and a fellow of the Royal and Antiquary Societies.

The first shock which the Board of Trade had to sustain, was given by the inconsiderate hand of the Earl of Shelburne, when he was appointed Secretary of State, on the 23d of May, 1766. The correspondence and the patronage which the Board had long enjoyed, was now resumed, and they were informed, from authority, "that the Commissioners were, in future, to act as a board of advice and counsel upon such points only as should be referred from the Privy Council or Secretary of State."* The authority of Parliament had been recently shaken by the repeal of the Stamp Act, and the Commission for plantation affairs, which had knowledge and experience and energy, was thus reduced to a board of reference.

When the repeal before mentioned did not procure acquiescence, and the shock which had been given to the Board did not enforce respect, very different measures were adopted. A Secretary of State for the colonies was created, and in July, 1768, the Board was restored to the authority and practice which it enjoyed and used, "antecedent to the date of the said letter of the 26th of August, 1766."† The Colonial Secretary was, thenceforth, directed to be a constituent member of the Board, but the past could not be recalled, while little souls on little shifts relied.

---

* Lord Shelburne's letter of the 26th of August, 1766.

† Lord Hillsborough's official communication, dated the 6th of July, 1768.

None of the statesmen of that period, nor those of of the preceding or subsequent times, had any suspicion that there lay among the documents in the Board of Trade and paper office, the most satisfactory proofs, from the epoch of the revolution in 1688, throughout every reign, and during every administration, of the settled purpose of the revolted colonies to acquire direct independence: those shifts of policy only strengthened the previous design which had so long been entertained, of acquiring positive sovereignty; yet was not such a design believed by little souls, even after that long meditated event had occurred, by the positive declaration of it in 1776. The subsequent struggles of inefficient shifts, at whatever expense of many millions and much bloodshed, only led on to that avowed acknowledgment of real sovereignty, which was tardily given in 1782. At the same epoch, the statesman whose eloquence and efforts had so efficaciously contributed to that event, moved for the law which abolished the Board of Trade.* Lord Shelburne, as Secretary of State, again held the ominous pen which, on the 2d of August, 1782, even months before the Act had passed, communicated to the several members of the Commission, the deadly tidings, that the King had no further occasion for their commercial or colonial services; yet a peace was still to be made with the United States, with France,

* 22 Geo. III. ch. 82.

with Spain and with Holland. Lord Shelburne lived to hear in Parliament, that the peace of 1783 was unsatisfactory.

Acquiescence in what cannot be remedied, is one of the great morals which nations in their progress, have to practice. After all those events, domestic and foreign, it was supposed by some, that the whole business of the late Board of Trade had devolved upon the Secretary of State; but the Secretary for the colonies had been abolished by the same stroke of law that had dissolved, untimely, the Board's commission; and the devolution exclusively fell upon the Privy Council, as the King's Standing Council from ancient times; it accordingly acted for several years, in some difficult questions, while the old trade and new habits of the United States were to be regained by means of a committee of its own members.

The Secretary of State, however, while some difficulties still remained, appointed a law officer to enlighten his steps, though under the late act of Parliament,* deliberation and advice did not belong to an office which, under that statute, was merely ministerial for transmission, rather than for counsel. He recollected, perhaps, that the Board of Trade did enjoy the instructive aid of a learned person, but he did not know, probably, by what authority and for what purpose, such an officer had been appointed by the

* 22 Geo. III. Ch. 82.

King. To his own counsel, the Colonial Secretary now referred the several Acts of Assembly as they arrived from the colonies, before they were referred to the Privy Council, for examination and report to the King; it is easy then, to see that such a reference was made by incompetent authority to an incompetent adviser. The reference, therefore, to such a counsellor, and his report on such acts of Assembly were, of course, *coram non judice;* and it was a measure of retardation rather than furtherance, towards ultimate completion by the King's consent or approbation: thus, the appointment of such a law officer, the advice of such an officer, and the fees of such an officer, when demanded of private parties for private acts, as such a demand in recompense for incompetent advice, thus *coram non judice,* must be deemed unofficial and unconstitutional. The law, as we learn from Sir Edward Coke, scowls on new offices, especially, where something is demanded for nothing. The Parliament scowls at every act by which money is, in any manner raised on the subject, without some sort of assent, either virtually or directly, in Parliament or Assembly. Every man, every woman and every child must scowl at fees which are demanded, not for service, but for hindrance. When Sir Philip Yorke, the Attorney-General, was consulted about a commission to empower justices of peace to raise money for local purposes, at Newfoundland, like a great lawyer and good man, he cried out, "he hoped no commission would

be given for such a purpose, without some sort of assent by those who were to pay the tax."

At length in August, 1786, a committee of Privy Counsellors, like the analogous committee of 1674, was appointed, by the declaration of his Majesty in his Council, for the consideration of all matters relating to trade and foreign plantations, with a Chairman, and Vice-Chairman and suitable officers. When this committee was appointed, the act of the 22d of the same King* attached upon it, as it had enacted, that the business theretofore done by the Board of Trade, should be executed by a committee of Privy Council, with all the authorities, powers and jurisdictions, given and enjoyed by the said Commissioners for trade and plantations.

The authority, power and jurisdiction thus given by Parliament, precluded all other power in this respect, whether claimed by the Secretary of State or by others, other than the mere transmission of the colonial acts to the Privy Council, as the constitutional channel through which the colonial acts must come before such a committee, for the King's ultimate decision. When the Board of Trade was abolished, the Commissioners left behind them vast manuscript collections, which are of far more value to the King and nation, than all the money that had been paid to them, in the nature of a salary, with a penurious spirit

* 22 Geo. III. Ch. 82.

and a tardy hand; yet, it must be allowed, that the value of such collections must be limited, by the use which is made of them for the public benefit.

From those manuscript collections chiefly, as I have already intimated, the following opinions were transcribed, when researches were made for minor matters; and from them is now published, for the first time, the opinion of the Attorney and Solicitor-General, Sir Philip Yorke and Sir Clement Wearg, which was mentioned with so much approbation by Lord Mansfield, when delivering the judgment of the Court of King's Bench, in the case of Campbell and Hall, when his Lordship considered this opinion as authority which had not been answered, though two such great names had considerable weight. Such opinions, when given to the King, or his Councils, by the law officers of the Crown; who are bound by their duties, to give their sentiments and advice according to their skill and knowledge may be deemed of little less authority than decided law; and the following opinions are published with the well meaning hope of contributing somewhat to the useful stock of juridical knowledge which the profession and the people enjoy, as the safest shield of private rights; as the noblest palladium of the public good in such an empire as ours; whose interest, and whose pride it is, to be governed by law.

SKETCHES

OF THE

EMINENT LAWYERS,

WHOSE OPINIONS ARE GIVEN TO THE PUBLIC IN THIS WORK.

---

1. *Dr. Exton*, of the Commons. He published, in 1664, "Maritime Dicœologie, or Sea Jurisdiction of England," folio.

2. *Dr. Lloyd*, of the Commons: flourished 1677.

3. *Sir Lionel Jenkins*, was born in Glamorganshire, in 1620: and having entered Doctor's Commons, rose, amidst vicissitudes and revolutions, through every step of his profession, to the top. He was made Secretary of State in April 1680, and a Privy Counsellor. He resigned his dignified office in April, 1684; and died in 1685, after a life of usefulness and honor. He represented Oxford University in several Parliaments. His letters and arguments were published by Wynne, 1724, in 2 vols. folio.

4. *Sir John King*, was elected Treasurer of the Inner Temple, on the 30th of October, 1675.

5. *Sir Francis Winnington* was made Solicitor-General in 1672; became Reader of the Middle Temple in 1675; and Treasurer of the same society in 1676.

6. *Sir William Jones*, who was Treasurer of Gray's

Inn in 1671, was constituted Solicitor-General in November 1673; and Attorney-General in January 1674-5.

7. *Sir Creswell Levinz,* who was Treasurer of Gray's Inn in 1679, succeeded Sir W. Jones as Attorney-General during the same year. His "Reports," which were praised by Lord Mansfield, were published in 1702; and these were soon followed by his "Entries." There is a gentleness in his opinions, as Attorney-General, which does him high honor, during an age of little scrupulosity. He was created Sergeant on the 29th of November, 1681.

8. *Sir Robert Sawyer* was appointed Attorney-General on the 14th of February 1680-1, and again, on the 7th of February 1684-5. He died in 1692.

9. *Heneage Finch* was appointed Solicitor General in January, 1678, in the room of Winnington; his commission was renewed in February 1684; but he seems to have been superseded by Sir Thomas Powis, in April 1686. Heneage Finch represented Oxford University in Parliament during 1678, in 1688, and as low down as 1700.

10. In 1688-9 the whole Judges of England.

11. *Sir John Holt* was born at Thame, in Oxfordshire, 1643; and was educated at Abington school, where his father was Recorder; he proceeded to Oriel College, Oxford, became a member of Gray's Inn, in 1658, and was chosen Recorder of London on the 13th of February 1685–6. He was appointed the King's Sergeant on the 22d of April 1686; on the 17th of April 1689, he was appointed to the high office of Chief Justice of the King's Bench; and in March 1709, he finished his useful career, without leaving any issue to perpetuate his name. His letter to the Lord-President, the Earl of Danby, advising the seizure of the charter

of Maryland, without office found, on the ground of necessity, deducts something from his character of inflexibility, as a Judge.

12. *Sir George Treby* was appointed the Recorder of London, in 1680; Solicitor-General, the 4th of March 1688-9; Attorney-General, on the 7th of May 1689; Chief-Justice of the Common Pleas, on the 30th of April 1692; and dying in 1701, was succeeded by Sir Thomas Trevor on the 5th of July 1701.

13. *Sir John Somers* was born at Worcester in 1652; was educated at Trinity College, Oxford, whence he removed to the Middle Temple; he succeeded Treby as Solicitor-General on the 7th of May 1689, and as Attorney-General on the 2d of May 1692; in 1693 he was appointed Lord-Keeper of the Great Seal; and in 1697, was created Lord Chancellor, with the title of Lord Somers. But on the 21st of May 1700, he was superseded, when Sir Nathan Wright was appointed Lord-Keeper. Lord Somers was, in 1708, appointed President of the Council, which office he resigned in 1710. He died in 1716, after surviving the powers of his mind. He appears to have been a collector of tracts during an age when such lore abounded. His judgment on the banker's case was published, some years after his decease. His pamphlet, appealing to the judgment of nations, concerning the rights of kings and the privileges of the people, has run through many editions, as we might easily expect from the title and the subject.

14. *Sir Edward Ward*, the King's Sergeant, was appointed Attorney-General as successor to Somers, on the 4th of April 1693. He was made Chief Baron of the Exchequer, on the 10th of June 1695, and he died,

probably, in November 1714, when Sir Samuel Dodd succeeded him.

15. *Sir Thomas Trevor* was appointed Solicitor-General on the 2d of May 1692; and Attorney-General on the 10th of June 1695. He was made Chief-Justice of the Common Pleas on the 5th of July 1701; he soon after acquired the peerage; and died, probably, in October 1714, when he was succeeded by Sir Peter King, as Chief-Justice of the Common Pleas.

16. *Sir John Hawles* was appointed Solicitor-General on the 13th of July, 1695; and probably died in 1702, as Sir Simon Harcourt succeeded him in that office, on the 1st of June, 1702. In 1680, Sir John Hawles published his popular tracts on Englishmen's rights. During the same age of agitations, he published his remarks on some State trials. He also published, in 1689, a reply to Sir Bartholemew Shower, in his controversy with Sir Robert Atkins on Lord Russell's innocence. The State papers which have since been published. have decided the points that were then in controversy.

17. *Henry Compton*, the son of the first Earl of Northampton, was born in 1632, and educated at Queen's College, Oxford. He was created Bishop of Oxford, 1674; and in the subsequent year, was translated to London. He had the honor to educate the two princesses, Mary and Anne. He firmly opposed the illegal innovations of James II. by defying the persecutions of power. At the eve of the revolution, he conducted the Princess Anne to Nottingham, to prevent her being conveyed to France. He had the additional honor of inaugurating King William, after defending the King's title among the peers. He died in 1713, at the age of

81, with the character of an eminent divine and patriot statesman.

18. *Sir John Cooke*, an eminent civilian, who was King's Advocate, 1702.

18-22. *Sir Charles Hedges*, *Sir Nathaniel Lloyd*, *Henry Newton*, *Robert Wood*, *Humphrey Hendman*, were all Doctors of the Civil Law and eminent civilians at the accession of Queen Anne. Sir Charles Hedges was the King's Advocate and Secretary of State; Sir Nathaniel Lloyd was King's Advocate; Henry Newton seems to have been a Master in Chancery, in October 1691, and afterwards King's Advocate.

23. *Sir Edward Northey* was appointed the Attorney-General, on the 10th of July 1701; was removed on the 25th of April, 1707; was reappointed, on the 19th of October 1710; and was superseded by Lechmere, on the 14th of March, 1717. In the subsequent year, a pension of one thousand five hundred pounds a year was settled upon the late Attorney-General, Northey. He died near Epsom, among his relations, on the 16th of August 1723; and was buried, by his own request, in Epsom church-yard, where there is a monument to his memory; his daughter married Lord Raymond.

24. *Sir Simon Harcourt* was appointed Solicitor-General, on the 1st of June 1702, and Attorney-General on the 25th of April 1707; he was superseded in October 1708, and was reappointed on the 18th of September 1710. He was, on the 9th of October 1710, appointed Keeper of the Great Seal, and in April 1712, Lord Chancellor, and during the same year was created a peer. He died on the 28th of July 1727.

25. *Sir Thomas Parker* rose speedily from being an Attorney at Derby, by great talent and eloquence, to

the height of his profession. He was created Sergeant in 1705, when he was also chosen into Parliament. Having distinguished himself here, he became distinguished everywhere else. He was appointed to succeed Sir John Holt, as Chief-Justice of England, on the 16th of March 1710. He became Chancellor on the 12th of May 1718; and was created Earl of Macclesfield, on the 5th of November 1721. His fall was as rapid as his rise: He was accused, in Parliament, of some corruption in the sale of offices in Chancery; he resigned his high station on the 24th of January 1724; he was found guilty by his peers; and was fined thirty thousand pounds. He died on the 28th of April 1732.

26. *Sir Peter King*, from very different studies, became a student of the Middle Temple. He was chosen Recorder of London in 1708, and was appointed Chief-Justice of the Common Pleas, on the 26th of October 1714. He was made Lord-Keeper on the 1st of June 1725; and on the 27th of June 1727, Lord Chancellor and Baron of Ockham. His infirmities induced him to resign this high office, and he died on the 22d of July 1734, aged 65

27. *Sir James Montagu* was appointed Solicitor-General in April 1707, Attorney-General in October 1708, Queen's Sergeant in October 1714, and at the same time, Baron of the Exchequer. In 1718, he was appointed one of the Commissioners for the keeping of the Great Seal; on the 4th of May 1722, he was appointed Chief Baron; and he died on the 20th of October 1723.

28. *Sir Robert Eyre* was appointed Solicitor-General in October 1708; was made one of the Justices of the King's Bench, in May 1710. He was raised to be Lord

Chief-Justice of the Common Pleas, and he died in January 1736.

29. *Doctor William Strahan* of the Commons. He published in 1722, a translation of Domat's Civil Law, in two volumes folio, which was republished in 1737.

30. *Sir Robert Raymond* was the Son of Sir Thomas Raymond, one of the Justices of the King's Bench, who died in 1683. Sir Robert was appointed Solicitor-General in May 1710, and Attorney-General in October 1714. he was made one of the Justices of the King's Bench in January 1723, and was advanced to be Chief-Justice of England, on the 28th of February 1724. On the Earl of Macclesfield's recession, he was appointed, with Sir Joseph Jekyl and Sir Geoffrey Gilbert, a Commissioner of the Great Seal, on the 7th of January 1724. Sir Robert Raymond was created a peer on the 21st of January 1730-1. He died on the 19th of March 1733. By Northey's daughter, he left a son, who dying in 1753, the peerage became extinct. Lord Raymond's Reports and Entries were published long after his death, and have been often republished by several editors.

31. *Sir John Fortescue Aland* was born in London, in March 1670, the son of Edmond Fortescue and Sarah, daughter of H. Aland of Waterford He chose the law for his profession, and was called to the bar by the Inner Temple Society. He was appointed the Solicitor-General in 1715; and he was made a Baron of the Exchequer in January 1716. In May 1718, he was appointed one of the Justices of the King's Bench; and in January 1728, he was removed to the Court of Common Pleas. Here he continued in the performance of a very important trust, till the 26th of June 1746, when

he was created an Irish peer, by the title of Lord Fortescue of Credan, in the county of Waterford. He did not long survive this splendid reward of his services to the State; dying at seventy-six, on the 19th of December 1746; and leaving his second and only surviving son, Dorner, who died in 1781, without issue, whereby the title became extinct. Sir John patronized Elstob, the Saxon scholar, whom he encouraged to publish, with corrections and enlargements, the Saxons Laws, appears to have republished in 1714, and in 1719, the Lord Chancellor Fortescue's work on the difference between an absolute and a limited monarchy, with a learned preface, concerning the Laws of England, remarks and an index by Sir John himself.

32. *Sir William Thomson* succeeded Sir Peter King as Recorder of London in 1714; was appointed Solicitor-General on the 8th of February 1716, and was superseded on the 17th of March 1719. He was appointed a Baron of the Exchequer, on the 27th of November 1722; and he died in November 1739.

33. Richard West was appointed counsel to the Board of Trade in 1718, and died Chancellor of Ireland in 1726.

34. Francis Fane succeeded Mr. West as Counsel to the Board of Trade in 1725, and resigned this trust in 1746.

35. Edmond Gibson was born in Westmoreland, 1699. He entered Queen's College, Oxon, as a servitor. He seems to have early applied much of his genius and attention to old English literature. He published at Oxford in 1691, the *Polemo Middinia* of Drummond, a macaronic poem, and James V. King of Scot's Christ's Kirk on the Green, with illustrative notes. He published, at

that seat of learning, what was doubtless of more importance, in 1692, the Saxon Chronicle, with a Latin translation, an index and notes. He was soon after appointed Chaplain to Tennison, the Bishop of London He took his Master of Arts degree in 1694; and in the subsequent year, he gave an edition of Camden's Britannia which his gratitude dedicated to Bishop Tennison. Preferments now flowed upon him in rapid course, and his *Codex Juris ecclesiastici Anglicani* he gave to the learned world in 1713. He soon had his reward; when Wake was advanced to the primacy, from Lincoln, in 1715, Gibson was promoted to the See which the Primate had left; and in 1723, he was translated to London, where he acquired the jurisdiction of the colonies, and incidentally, a seat at the Board of Trade and Plantations. He died at Bath in 1748, leaving, with several children, a great character for learning, and still more for attachment to the Church, whose interests he had promoted.

36. The Chief-Justice, *Lewis Morris*, of New York.
37. *Mr. William Hamilton*, of Philadelphia.
38. The Attorney-General *Blenman*, of Barbadoes.
39. The Attorney-General *Rawlins*, of Barbadoes.
40. The Chief-Justice *R. H. Morris*, of New Jersey.
41. The Attorney-General *Chilton*, of Barbadoes.
42. *Sir Clement Wearg* was appointed Solicitor-General on the 3d of February 1723, and died in April 1726. Lord Mansfield mentioned him, in the case of Campbell and Hall, as a lawyer of great name.

43. *Sir Philip Yorke* was born at Dover in 1699. Such was his genius and diligence, that he quickly rose to be a great lawyer and a great man, during an age of learned lawyers and considerable men. He succeeded

Sir William Thomson as Solicitor-General in March 1719; he was appointed Attorney-General in January 1723, and Chief-Justice of England in October 1733, when two thousand pounds a year was added to the salary of that office, which requires independence and sufficiency. The Great Seal was delivered to him on the 14th of February 1737, which he held for nineteen years with universal applause. He resigned it in November 1756, amidst the convulsions and regrets of his country.

44. *Charles Talbot*, the son of William, Bishop of Durham, who died in 1730, was appointed Solicitor-General on the death of Sir Clement Wearg, in April 1726; and was constituted Lord Chancellor, and created Lord Talbot in 1733. He died in 1737, at the premature age of fifty-one, having previously lost his son, who was deplored in the pathetic strains of Thomson.

45. *Sir Thomas Reeve* was appointed a Justice of the Common Pleas in February 1733, and in January 1736, Chief-Justice of the same Court; and he died in 1737, leaving Instructions to his Nephew for the Study of the Law, which were published in the *Collectanea Juridica*, vol. ii. 79.

46. *Thomas Lutwyche* who was, probably, the son of Sir Edward Lutwyche, died on the 18th of November 1734, one of the King's Counsel. He entered the House of Commons in 1710, and continued to sit in it till his decease, when he sat for Amersham.

47. *Sir John Willes*, while a student at All-Souls College, Oxford, published in 1714, a pamphlet entitled, "The present Constitution and the Protestant Succession vindicated," in answer to a late book, the well

known Hereditary right of the Crown of England asserted. In 1718 he was sent to Scotland to assist in carrying on the prosecutions for high treason, which impolicy had instituted and the firmness of the Grand Juries disappointed, by throwing out the bills. He was nominated Attorney-General in December 1733, when Sir Philip Yorke was made Chief-Justice of England; and he was appointed, in January 1737, the Chief-Justice of the Common Pleas. He died in 1761. His Reports were published in 1799 by Dornford, extending from 1737 to 1758.

48. *Doctor Paul* of the Commons, the King's Advocate.

49. *Sir Dudley Ryder* became Solicitor-General in December 1733, on the promotion of Mr. Talbot, and Attorney-General in January 1737, and Chief-Justice of England, on the death of Sir William Lee, in April 1754. He died on the 25th of April 1756. He was to have waited upon his Majesty the day before, on account of his being created a peer, by the title of Lord Ryder of Harrowby, Lincolnshire, but his indisposition prevented his having that honor, which he had merited by his talents and services.

50. *Sir John Strange* became Solicitor-General on the promotion of Sir Dudley Ryder. He was chosen Recorder of London in November 1739; and he was appointed Master of the Rolls in January 1750; he died in 1754. He is remembered for his Reports, which were published by his son in 1755.

51. The *Hon. William Murray*, the fourth son of David, Viscount of Stormont, was born at Perth in 1705; and was educated at Westminster School and Christ's

Church, Oxford.* Returning from his travels, he entered into Lincoln's Inn where he was called to the bar in 1731. Here his abilities soon became known, both as a lawyer and an orator, and he immediately came into full business of the highest kind. In November 1742, he was appointed Solicitor-General, on the resignation of Sir John Strange; and he was, immediately after, chosen into Parliament for Boroughbridge, and for it served till he was appointed Chief-Justice. This is an important fact, as it shows that he obtained his first preferment from Westminster Hall, and not from the Senate House; and he was not even a King's Counsel till November 1742. How much he was consulted by the Pelhams, and how much his advice was followed by them, we may learn from Doddington's Diary. He was, of course, appointed one of the Managers for the Commons, on Lord Lovat's impeachment; and such was at once the moderation of his manner, the candor of his spirit and the efficacy of his eloquence, that he was thanked, both by the culprit and the Court. He was long Solicitor, not being appointed Attorney-General till April 1754; this furnishes an other point of instruction, that perse-

* He was admitted to St. Peter's College, Westminster in 1719, at the age of fourteen; and in 1723, was elected to Oxford. It is curious to remark, that the College Registrar, being probably, somewhat dull of hearing, recorded the admission of Mr. Murray, aged eighteen, born at *Bath*, in the county of Somerset. Sir William Blackstone dining with Lord Mansfield, and saying that he could prove by record evidence, that his Lordship was not a Scotchman born, but an Englishman, produced a copy from the College matriculation book, which made his Lordship laugh very much; and he explained the mistake, by supposing that the person who stated his place of birth, to have pronounced *Perth* with a broad accent, which the Registrar mistook for Bath.

verance in an inferior station, generally leads on to the highest; and it evinces, also, his unassuming gentleness. When Sir Dudley Ryder sunk under his infirmities, the Attorney-General Murray was immediately appointed Chief-Justice; he was created Lord Mansfield on the 8th of November 1756, and he was, of course, called into the Privy Council. Of his conduct, during two and thirty years as Chief-Justice, the Juridical Reports are the Records and the Commentaries. During the political contests of the year 1757, he acted officially as Chancellor of the Exchequer, in the room of Mr. Legge. In 1774 he went to Paris on a private embassy, and on his private affairs, probably; Lord Stormont, his nephew and heir, being then Ambassador at the French Court. He was three times offered the Great Seal, which he as often declined. He was advanced to an Earldom, in October 1776; and by a new grant, the remainder, after failure of his own issue male, was limited to his heir, the Viscount of Stormont. During the tumults of 1780, his house in Bloomsbury Square was burnt by the mob, with his books and manuscripts. With his usual delicacy, he declined all compensation, as he knew that he could not be compensated. He repaid the popular insult by an augmented assiduity in the labors of his high trust, for the popular good. At length, his infirmities induced him to resign his office in January 1788, when he was followed by the regrets of the profession, and the genuine respect of an enlightened public. He died at Caenwood on the 20th of March 1793, aged eighty-eight, leaving a very great fortune, the necessary effect of prudent management throughout so many years. His fine intellect and retentive memory remained to the

last, though he had lived, for several years, under great debility of person. In April 1784, he lost his wife, Lady Elizabeth Finch, to whom he was married in 1738, yet by whom he had no issue. On the morning of the 28th of March, he was buried in the same vault with his late Countess, in Westminster Abbey. The Judges of the several Courts, and the most eminent lawyers intended to have followed to the tomb the remains of this eminent jurist; but they were assured by Lord Stormont, that it was the particular request of the late Earl, that his funeral should be as private as possible. A monument has been erected to his memory, by the singular affection of a private person, in the same abbey that is crowded with monuments to the celebrated characters, which this nation has produced and fostered in every age.

52. *Sir Robert Henley* succeeded Lord Mansfield as Attorney-General in 1756. This was to be expected, from the notices of him in Doddington's Diary. He was appointed the Keeper of the Seal, on the 30th of January 1757, and he was created Lord Henley in 1760; appointed Lord Chancellor in January 1761; and created Earl of Northington in May 1764; and was made Lord President of the Council in June 1766. He died on the 14th of January 1774.

53. *Charles Pratt*, the third son of the Chief-Justice, was educated at Eton and King's College, Cambridge. He was, though in obscurity and without any previous office in the law, appointed Attorney-General when Henley was made Lord Keeper in June 1757. He was made Chief-Justice of the Common Pleas in 1762, and it was from this height, during a season of perturbation,

that he gained his popular honors. Other lawyers and other judges as great as he, have coveted the popularity which follows one, rather than what is followed. In 1765 he was raised to the peerage, and in 1766 was appointed to the Seals, which he lost by maintaining doctrines that his coadjutors did not approve. He sided with the colonial pretensions and opposed the government during the war of the revolted colonies; coming in collision with Lord Mansfield, while maintaining such pretensions, he lost ground as an orator and a lawyer, whatever he may have added to his popularity. In 1782, he was appointed Lord President of the Council, which he held during his life, if we except a short recession in 1783. On the 18th of April 1794, he died, having been created in May, 1786, Viscount Bayham and Earl Camden. He is ranked among the royal and noble authors, as the writer of a tract on the nature and effect of the Habeas Corpus Act, the great bulwark of English liberty, which he is said to have published in 1758; his argument in the case of Hindson and Kersey, wherein Lord Mansfield's argument in Windham and Chetwynd, was considered and answered, was given to the public in 1766.*

54. The *Hon. Charles Yorke,* the second son of the great Earl of Hardwick, was born in 1722, and owed his scholastic education to Cambridge, as he owed his law learning to Lincoln's Inn, which has produced so many profound lawyers. He was a coadjutor in writing

* This argument when published in London, was suppressed by order of the Court of Common Pleas, over which Lord Camden then presided; but it was soon published in an 8vo. pamphlet, at Dublin, 1766. Park's edit. Cat. R. and N. authors, vol. 4, 360.

the celebrated Athenian Letters, and amused himself with poetry. In 1745 he gave to the learned world his Considerations on the Law of Forfeitures, which went to the fourth edition in 1775, at the eve of another revolt. He entered Parliament as representative for Ryegate, in 1747, at the age of 25. He succeeded Sir Richard Lloyd as Solicitor-General in November 1756, and followed Lord Camden as Attorney, in December 1761; but he resigned this office in November 1763, and was again appointed in August 1765. He was chosen a Fellow of the Royal Society, a Trustee of the British Museum and Recorder of Dover. At length, in 1770, he was appointed Lord Chancellor, and was created a peer; but dying in the same month, before his patent had passed the Great Seal, the creation did not take effect, though the patent had passed through every other form.

55. *Sir Richard Lloyd* was appointed Solicitor-General in April 1754, upon the promotion of Lord Mansfield. In 1759, he was called to the degree of Sergeant, on his being made Baron of the Exchequer, and he died in 1761.

56. *Dr. George Hay*, the King's Advocate.

57. *Sir Fletcher Norton* was born on the 23d of June 1716, and in May 1741, married Grace, the eldest daughter of Sir William Chapple, one of the Judges of the King's Bench. He was appointed Solicitor-General in December 1761, in the room of the Hon. Charles Yorke, and Attorney-General in November 1763, which he held, probably, till August 1765. In February 1769, he was appointed Chief-Justice in Eyre, south of Trent,

which he held till June 1789. He was chosen Speaker of the House of Commons in 1770, and continued to fill that distinguished station till 1780. He was created Lord Grantley on the 9th of April 1782, and he died on the 1st of January 1789.

58. *Sir William De Grey* was appointed Solicitor-General in December 1763, in the room of Sir F. Norton, and Attorney-General in August 1766; he was made Chief-Justice of the Common Pleas in January 1771, in the room of Sir J. E. Wilmot, resigned. He was created Lord Walsingham in 1780, and died on the 9th of May 1781.

59. *Edward Willes* was appointed Solicitor-General in August 1766, in the room of Sir William de Grey, and in June 1768, one of the Justices of the King's Bench, in the place of Mr. Justice Hewitt.

60. *Sir Lloyd Kenyon*, of the Middle Temple, was, on the 20th of April 1782, appointed Attorney-General in the room of Wallace, who, however, was restored on the 16th of April 1783, and on the 26th of December 1783, he was again appointed Attorney-General, acting at the same time, as Chief-Justice of Chester. Such shifts of policy show the distraction of the times. He was appointed Master of the Rolls. In June 1788, he was raised to the yet higher office of Chief-Justice of England, on the resignation of Lord Mansfield, and was at the same time, created Lord Kenyon of Gredington, in the county of Flint. He died at Bath on the 2d of April, 1802, while Chief-Justice, custos rotulorum of Flintshire, and one of the Governors of the Charter-House.

61. *Sir Richard P. Arden,* the second son of John Arden, of Arden, in Cheshire, was educated under the tuition of Thyer, the editor of Butler's Remains, and proceeded to Trinity College, Cambridge, wherein he distinguished himself. He took his M. A. degree in 1769. He was called to the bar by the Middle Temple Society, and was appointed Solicitor-General on the 26th of December 1783, and Attorney-General on the 30th of March 1784. He succeeded Sir Lloyd Kenyon as Master of the Rolls, in 1788. He was appointed Chief-Justice of the Common Pleas in May 1801, when he was created Lord Alvanley, and he died on the 19th of March 1804.

62. *Sir Archibald Macdonald* was born in 1747, the son of Sir Alexander Macdonald, of Slate, by the Lady Margaret Montgomery, the daughter of the Earl of Eglington, and is, of course, the brother of the late Lord Macdonald. His education, however, was English; he entered Westminster School in 1760, at the age of thirteen, and was elected to Christ Church, Oxford, in 1764. He was elected Representative in Parliament for Hindon, in 1774, and for Newcastle under Line, in 1780 and 1784; he was appointed one of the King's Counsel in 1778, and one of the Judges for Wales in 1780. In April 1784, he was appointed successor to Sir Richard P. Arden as Solicitor-General; and in September 1788, he also succeeded Sir Richard as Attorney-General. In February 1793, he was appointed Chief Baron of the Exchequer, in the room of Sir J. Eyre, who was promoted to be Chief-Justice of the Common Pleas; and Sir Archibald was sworn a Privy Councilor on the 15th. After discharging this great trust

for upwards of twenty years, with satisfaction to himself and benefit to the public, he gave in his resignation, on account of the failure of his eye-sight, in October 1813, and on the 6th of November following, he was created a Baronet of the United Kingdom, in consideration of his long and faithful services.

63. *Sir Matthew Lamb*, who succeeded Mr. Fane as Counsel to the Board of Tra[illegible] in 1746, and died in November 1768.

64. *Richard Jackson*, [illegible]o was appointed Counsel to the Board of Trade in April, 1770, and died on the 6th of May 1787, a Privy Councilor and Clerk of the Paper Office in Ireland, an office which Lord [illegible]owes had held.

65. *William Kemp*, Barrister-at-law, who died Attorney-General of New York, about the year 1793.

66. *William Smith*, who was a lawyer of the same Province, and died Chief-Justice of Quebec.

67. *James Holyday*, of Maryland.

68. *William Paca*, of the same Province.

69. The *Hon. Daniel Dulany*, Secretary, and one of the Council, of the same Province.

70. *Sir Jam*[illegible]*ot*, Doctor of Laws, was born in 1731, the son [illegible]orney in Hatton Garden. Choosing the civil law for his profession, he receive[illegible] university education at Cambridge. He is said to have obtained his first promotion by arranging the Duke of Newcastle's library, when Chancellor of the University of Cambridge. He was elected Master of Trinity H[illegible]ll, on the death of Dr. Dickens. He distinguished himself as a civilian, by publishing in 1759, "The Case of the Dutch Prizes taken in the War before the last." In July, 1764, he was appointed the King's Advocate, in the room of Sir George Hay, who was promoted to be

Judge of the Arches and the Prerogative Courts. In 1768, being then Vice-Chancellor of the University of Cambridge, he presented the honors of that illustrious body, to the King of Denmark, at Newmarket. In 1769 he published "The Rights and Privileges of both the Universities, and of the University of Cambridge in particular, defended in a Charge to the Grand Jury at the Quarter Sessions for the Peace, at Cambridge, October the 10th, 1768;" he also published his argument in the case of the Colleges of Christ and Emanuel. His poetry may be seen in Dodsley's Collections. He distinguished himself by the acuteness of his answers, when examined at the bar of the House of Commons, on the Quebec Constitution. He was appointed Judge of the High Court of Admiralty in the room of Sir George Hay. He resigned this high office in October 1798, and at the age of 72 he died, on the 21st of March 1803, at two o'clock in the morning, while sitting in his chair, at Twinstead Hall, near Sudbury, which he had represented in two Parliaments. His learned and singular judgment in the High Court of Admiralty, in the case of the ship Columbus, is published in the Collectanea Juridica, vol. 1, p. 82.

71. *Sir William Wynne*, Doctor of Laws, seems to have followed the track of Sir James Marriot to the top of his profession, which has been dignified by so many eminent men, who were distinguished by their talents and probity. In October 1778, he was appointed Vicar-General of the province of Canterbury, and his Majesty's Advocate-General. On the decease of Sir J. Marriot, was elected in his room, Sir Wm. Wynne, one of his Majesty's Privy Council, Official Principal of the Arches Court of Canterbury, Master of the Prerogative Court of

Canterbury, Commissary of the Deanery of the Arches, and Master of Trinity Hall, Cambridge.

72. *John Reeves.*

73. *John De Witt* was born of a noble family in 1625; became pensionary of Dordrecht, and pensionary of Holland, Intendant of the Fiefs, and Keeper of the Seals. During troublous times he governed Holland with great ability, though he could not always command success. He excluded William the Third, Prince of Orange, from his constitutional share in the government of the States. He was thereupon attacked by four assassins. The Prince of Orange was restored to the Stadtholdership; but two great men could not safely exist at the same time, within the same republic; mutual accusations ensued; and a popular tumult arose, which sacrificed De Witt to the people's passions, at the Hague, in 1672; he died, repeating with his last breath, Horace's Ode—*Justem et tenacem propositi virum, &c.**

74. *Sir William Temple* was born in 1629, at London, the son of Sir William Temple, of Sheen, and Master of the Rolls in Ireland, by a sister of the learned Henry Hammond. He was a student at Emanuel College, Cambridge, under the erudite Cudworth. After some travel, he retired to a private life in Ireland, during the usurpation. At the restoration, he returned to England with a view of serving his country, chiefly, as a negotiator. He is chiefly praised for settling the triple league in 1668; and secondly, for procuring the marriage of the

* The man whose mind on virtue bent,
Pursues some great and good intent,
With undiverted aim,
Serene beholds the angry crowd,
Nor can their clamors, fierce and loud,
His stubborn honor tame.

Princess Mary with the Prince of Orange. Both DeWitt and the States of Holland expressed their satisfaction with the conduct of Temple. After the peace of Nimeguen, he was recalled from Holland, in February, 1678-9. He now applied himself to his private studies. He died in 1700, at Moor Park, near Farnham, in the seventy-first year of his age; leaving a character for principles and knowledge, which has been drawn in very opposite colors, by very different parties.

OPINIONS

OF

EMINENT LAWYERS

ON VARIOUS POINTS OF

ENGLISH JURISPRUDENCE.

First. The King, who wears the Crown of Great Britain and Ireland, enjoys the sovereignty of the general territory belonging to the same Crown, with the allegiance of the inhabitants thereof, under the various modifications of the existing law: The following opinions seem to acknowledge the truth of that proposition, as a fundamental principle of the established Constitution.

The King's prerogative, within those territories, may be considered, then, under two heads: I. Of his *Ecclesiastical* authority: II. Of his *Civil* authority.

I. Of the King's *Ecclesiastical* authority abroad. The royal prerogative, in this respect, is distributed into two subordinate heads: 1st, The Bishop of London is diocesan of the colonies: 2d, The Archbishop of Canterbury's prerogative power, concerning wills and administions, is superior to the analogous prerogative powers, in the colonies.

7

(1.) *The opinion of the Attorney-General Northey, on this subject, in* 1705.

To the Right Hon., the Lords Commissioners, for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, Jr., your Secretary, I have considered of the annexed extract of a letter from Colonel Seymour, Governor of Maryland, relating to the Jesuits and papists there; and the extract also sent me, of the grant of the Province of Maryland to Lord Baltimore, relating to the ecclesiastical power. And the questions proposed thereon, whether the laws of England against Romish priests, are in force in the plantations, and whether her Majesty may not direct Jesuits, or Romish priests, to be turned out of Maryland.

And as to the said clause in the grant of the Province of Maryland to Lord Baltimore, relating to the ecclesiastical power, I am of opinion, the same doth not give him any power to do any thing contrary to the ecclesiastical laws of England, but he hath only the advowsons of, and power to erect and consecrate churches, and such power as the Bishop of Durham had, as Earl Palatine, in his County Palatine, who was subject to the laws of England; and the consecrations of chapels ought to be, as in England, by orthodox ministers only.

As to the question, whether the laws of England, against Romish priests, are in force in the plantations; by the statute of 27mo. of Elizabeth, cap. 2., every Jesuit, seminary priest, or other such priest, deacon or religious, or ecclesiastical person, born within this realm or any

other Her Majesty's dominions, made, ordained or professed, by any authority or jurisdiction, derived, challenged or pretended, from the See of Rome, who shall come into, or be, or remain in any part of this realm or any other of her Majesty's dominions, is guilty of high treason. It is plain, that law extended to all the dominions the Queen had when it was made; but some doubt hath been made, whether it extendeth to dominions acquired after, as the plantations have been.

By the statute 11mo. William, for preventing the further growth of popery, it is provided that, if any popish bishop, priest or Jesuit, whatsoever, shall say mass, or exercise any other part of the office or function of a popish bishop or priest, within this realm, or the dominions thereunto belonging, such person being thereof lawfully convicted, shall be adjudged to perpetual imprisonment, in such place within this kingdom, as her Majesty, by the advice of her Privy Council, shall appoint. I am of opinion this law extends to the plantations, they being dominions belonging to the realm of England, and extends to all priests, foreigners as well as natives.

As to the question, whether Her Majesty may not direct Jesuits or Romish priests to be turned out of Maryland, I am of opinion, if the Jesuits or priests be aliens, not made denizens or naturalized, Her Majesty may, by law, compel them to depart Maryland; if they be Her Majesty's natural born subjects, they cannot be banished from Her Majesty's dominions, but may be proceeded against on the last before-mentioned law.

October 18, 1705. EDW. NORTHEY.

(2.) *The letter of the Right Rev. Dr. Gibson, the Bishop of London, to the Duke of Newcastle.*

May it please your Grace;

I troubled your Grace lately with an account of what the Independent ministers in New England are doing, in order to obtain powers for holding a regular synod. To what I then mentioned as deserving, in my opinion, the consideration of the ministry, I desire to add, that it may be a doubt upon the act of union, between England and Scotland, whether the Independents in New England, are any more than a tolerated ministry and people.

The act of uniformity, 13, 14, Ch. II., extends no farther than the realm of England, dominions of Wales and Berwick-upon-Tweed; and therefore, left the Crown at liberty to make such worship and discipline as the King or Queen, for the time being, may think proper, the established worship and discipline of the other territories.

But by the act of union, 6 Ann, ch. 5, every King and Queen, at their coronation, "Shall take and subscribe an oath to maintain and preserve inviolably, the settlement of the Church of England, and the doctrine, worship, discipline and government thereof, as by law established, within the kingdoms of England, Ireland, the dominions of Wales, and town of Berwick-upon-Tweed, and territories thereto belonging."

If, by this clause, the ministers and people of the Church of England, in the plantations, be made the established church within the general governments, then all the rest are only tolerated, as here in England. And if so, this double ill use may be made of permitting the independent ministers of New England to hold a regu-

lar synod: the established clergy here may think it hard to be debarred of a liberty, which is indulged the tolerated ministers there, and the tolerated ministers here may think it equitable that their privileges should not be less than those of their brethren in New England.

I think it my duty to suggest these things for the consideration of your Grace, and the other ministers; and perhaps, it may not be judged improper to take the opinions of the Attorney and Solicitor-General upon the forementioned statute of the 6th of the Queen.

I am,

August 21, 1725. EDM. LONDON.

(3.) *The joint opinions of the Attorney and Solicitor-General, Yorke, and Wearg, in* 1725.

To their Excellencies, the Lords Justices.

May it please your Excellencies;

In humble obedience to your Excellencies' commands, signified to us by Mr. Delafaye, we have considered the several matters referred to us by letter of the 24th inst., transmitting to us the enclosed copies of some letters, which His Grace, the Duke of Newcastle, had received from the Lord Bishop of London, concerning an address from the General Convention of the Independent ministers in New England, to the Lieutenant-Governor, Council and House of Burgesses, there, desiring them to call the several churches in that province, to meet, by their pastors and messengers, in a synod, to which the said Council and House of Representatives have given their consent, and directing us to inquire into this matter, and report our opinions upon several questions proposed in the said letter.

And we humbly certify, your Excellencies, that, as to the several matters of fact contained in the said let-

ters and papers therewith transmitted, we have been obliged to take the same as they are therein stated, having at present, no opportunity of obtaining strict regular proof; and therefore, such parts of this report as arise out of those facts, are grounded upon a supposition that the relations, contained in those letters and papers, are true.

The address of the General Convention of Ministers is mentioned to be in these words, to wit:

"To the very Honorable William Dummer, Esq., Lieutenant-Governor and Commander-in-Chief, and to the Honorable the Councillors, to the Honorable the Representatives, in the great and General Court of His Majesty's Province of the Massachusetts Bay, assembled, and now sitting, a memorial and an address humbly presented.

"At a General Convention of Ministers from several parts of the Province, at Boston, 27th May, 1725.

"Considering the great and visible decay of piety in the country, and the growth of many miscarriages, which we may fear has provoked the glorious Lord in a series of various judgments, wonderfully to distress us; considering also, the laudable example of our predecessors, to recover and establish the faith and order of the Gospel in the churches, and provide against what immoralities might threaten to impair them, in the way of general synods convened for that purpose; and considering that forty-five years have now rolled away since these churches have now seen any such convention;--it is humbly desired that the honored General Court would express their concern for the great interests of religion in the country, by calling the several churches in the Province to meet, by their pastors and messengers, in a synod, and

from thence offer their advice upon that weighty case, which the circumstances of the day do loudly call to be considered: 'What are the miscarriages whereof we have reason to think the judgments of Heaven upon us call us to be more generally sensible, and what may be the most evangelical and effectual expedients to put a stop to those or the like miscarriages?' This proposal we humbly make, in hopes that if it be prosecuted, it may be followed by many desirable consequences, worthy the study of those whom God has made, and we are so happy to enjoy, as the nursing fathers of our churches."

Upon this address it is represented, that on the third of June last, the Council voted, "that the synod and assembly proposed in this memorial, will be agreeable to this Board, and the Reverend Ministers are desired to take their own time for the said assembly; and it is earnestly wished the issue thereof may be a happy reformation in all the articles of a Christian life, among His Majesty's good subjects of this Province."

That this resolution was sent down to the House of Representatives for concurrence, and in that House, June 11, 1715, it was read and referred to the next session, for further consideration.

That this resolution of the House of Representatives, was sent up to the Council for their concurrence, and in Council, June 19, 1725, read and concurred, and the Lieutenant-Governor subscribed his consent thereto.

It appears, that against this application of the Convention of ministers, for a synod, a memorial was presented by Timothy Cutler and Samuel Myles, Ministers of the Established Church of England, to the Lieutenant-Governor, Council and House of Representatives, in General Court assembled, a copy of which is hereunto annexed,

and contains several reasons against the address of the Convention of ministers.

Upon this memorial, the Council, on the 22d of June, 1725, resolved, that it contained an indecent reflection on the proceedings of that Board, with several groundless insinuations, and voted that it should be dismissed, to which resolution the House of Representatives agreed.

As to the questions contained in Mr. Delafaye's letter, we beg leave to submit our thoughts upon them, to your Excellencies' consideration, separately and distinctly.

The first question is: Whether such pastors and messengers have any power to meet in a synod, without the King's license.

In order to form an opinion upon this point, we have perused the Charter, which is the fundamental Constitution of this Province, and have looked into their printed Acts of Assembly, as far as the year 1722.

The Charter bears date 7° Octobris, 3° Will. et Mariæ, A. D. 1691, and recites two former Charters, one granted 3 Nov. 18 Jac. I. and the other 4 Mar. 4 Car. I., which was vacated, by judgment upon a *scire fac.*, in Trinity term 1684. In this Charter, nothing is contained, tending to the establishment of any kind of church government or ecclesiastical authority in this colony, but there is the following clause: For the greater ease and encouragement of our loving subjects inhabiting our said Province or Territory of Massachusetts Bay, and of such as shall come to inhabit there, we do, by these presents, for us, our heirs and successors, grant, establish and ordain that forever hereafter there shall be a liberty of conscience allowed in the worship of God to all Chris-

tians (except papists) inhabiting, or which shall inhabit or be resident within our said Province or Territory.

By the power given by this Charter to the General Court or Assembly to make laws and impose taxes, they are authorized to dispose of matters and things, whereby the subjects, inhabitants of the said Province, may be religiously, peaceably and civilly governed, protected and defended, so as their good life and orderly conversation, may bring the Indian natives of the country to the knowledge and obedience of the only true God and Savior of mankind, and the Christian faith, which King Charles I., in his said letters patent, declared was his royal intention, and the adventurers' free profession to be the principal end of the said plantation; and for the better maintaining liberty of conscience thereby granted to all persons, at any time being and residing within the said Province or Territory.

In the Acts of Assembly, we find nothing relating to ecclesiastical authority; but there are some Acts directing that every town shall be provided of one or more able, learned and orthodox minister or ministers, without defining what they intend by that description, and there are other Acts, appointing methods for maintaining them.

And in the second year of His Majesty's reign, an Act passed, whereby it is enacted, that upon representation made to the General Court or Assembly, that any town or district is destitute of a minister, qualified as by law is provided, or do neglect to make due provision for the support of their minister, the General Assembly shall provide and send an able, learned, orthodox minister, of good conversation, being first recommended by three or

more of the settled ordained ministers, or may lay a tax for the maintenance of the minister.

From these letters patent and laws, we cannot collect that there is any regular establishment of a national or provincial church in this colony, so as to warrant the holding of convocations or synods of the clergy; but if such synods might be holden, yet we take it to be clear, in point of law, that His Majesty's supremacy in ecclesiastical affairs, being a branch of his prerogative, does take place in the plantations, and that synods cannot be held, nor is it lawful for the clergy to assemble as in a synod, without his royal license.

The second question is: How far His Majesty's prerogative may be concerned, in which an application, not to the Lieutenant-Governor, as representing His Majesty's person, but to him and the Council and House of Representatives?

We conceive such application to be a contempt of His Majesty's prerogative, as it is a public acknowledgment, that that power resides in the legislative body of the Province, which by law is vested only in His Majesty; and the Governor, Council and Assembly intermeddling therein, was an invasion of his royal authority, which it was the particular duty of the Governor to have withstood and rejected.

The next question is: Whether the consent of the Council and House of Representatives be a sufficient authority for their holding a synod?

We are of opinion such consent will not be a sufficient authority; but we beg leave to observe, that it does not appear, by the papers transmitted to us, that the Council and Assembly have given their consent thereto, but that

the House of Representatives, upon reading the resolution of the Council, adjourned the further consideration thereof till the next session, to which resolution of adjournment, the Council concurred and the Governor subscribed his consent.

The next question is: If this pretended synod should be actually sitting, when the Lords Justices' directions in this matter are received by the Lieutenant-Governor, what can be done to put an end to their meeting?

We humbly apprehend, that in case such synod should be actually sitting, yet the Lieutenant-Governor, by order from His Majesty or your Excellencies, may cause them to cease their meeting; and that for this purpose it may be proper that he should be directed to signify to them, that their assembly is against law, and a contempt of His Majesty's prerogative, and that they do forbear to meet any more; and if, notwithstanding that, they shall continue to hold their assembly, that the principal actors therein be prosecuted, by information, for a misdemeanor. But we apprehend no formal act should be done to dissolve them, because that may imply that they had a right to assemble.

The principal difficulty in this case will be, if there should be an Act of the General Court or Assembly to warrant their meeting. And we conceive, that if such Act should pass in the nature only of the resolution above-mentioned, it will have no effect; but if it should have the regular form of a law, it will admit of great doubts, whether it will be agreeable to the powers granted by the Charter, and therefore, we humbly apprehend, it will be fit for His Majesty to disallow it. But it is difficult to give an opinion upon the effect

and consequence of such an Act, without seeing the Act itself.

The last question is: What authority those ministers have to meet in a General Convention, and being so assembled, to make and present addresses, or to do any other public act?

We apprehend that such meeting is not unlawful, provided they do not take upon them to do any authoritative act, being only a voluntary society; and they may lawfully make addresses, either to the Crown or to the General Court or Assembly, in case the subject matter of such addresses be lawful.

It being taken notice of in the address of the General Convention of Ministers, that such a synod as is now desired, was holden forty-five years ago; we cannot help observing to your Excellencies, that this computation falls in with the year 1680, and that the former Charter, upon which the government of this Province depended, was repealed by *scire facias*, in the year 1684, and the new Charter granted in the year 1691; from whence it appears, that such Synod or Assembly, was holden a short time before the repealing of their old Charter: but none since the granting of the new one.

All which is humbly submitted to your Excellencies' great wisdom.

September 29, 1725

P. Yorke.
C. Wearg.

(4.) *The opinion of Mr. West, in 1719, on the King's right to present to vacant benefices in Virginia.*

[Copy of an Act passed in the General Assembly of Virginia, the 23d March, 1662, upon which a right of patronage is pretended to be established in the vestries here.]

Ministers to be inducted.

That for the preservation of purity, and unity of doctrine and discipline in the Church, and the right administration of the sacraments, no ministers be admitted to officiate in this country, but such as shall produce to the Governor, a testimonial that he hath received his ordination from some Bishop in England, and shall then subscribe to be conformable to the orders and Constitutions of the Church of England, and the Laws there established, upon which the Governor is hereby requested to induct the said minister into any parish, that shall make presentation of him; and if any other person, pretending himself a minister, shall, contrary to this act, presume to teach or preach publicly or privately, the Governor and Council are hereby desired and empowered to suspend and silence the person so offending, and upon his obstinate persistence, to compel him to depart the country with the first convenience, as it hath been formerly provided by the 77th Act, made at James City, the 2d of March, 1642.

Vestries appointed.

That for the making and proportioning of the levies and assessments for building and repairing the churches and chapels, provision for the poor, maintenance of the minister, and such other necessary uses, and for the more orderly managing all parochial affairs; be it enact-

ed, that twelve of the most able men of each parish be, by the major part of the said parish, chose to be a vestry, out of which number the minister and vestry to make choice of two churchwardens yearly, so in case of the death of any vestryman, or his departure out of the parish, that the said minister and vestry make choice of another to supply his room; and be it further enacted, that none shall be admitted to be of the vestry that doth not take the oaths of allegiance and supremacy to His Majesty, and subscribe to be conformable to the doctrine and discipline of the Church of England.

[Copy of the powers granted by the King to the Governor of Virginia, for supplying vacant benefices. Clause in the Governor's Commission.]

And we do further give and grant unto you, full power and authority to collate any person or persons, to any churches, chapels or other ecclesiastical benefices, within our said colony, as often as the same shall happen to be void.

[Ninety-third article of the King's instructions to the Governor.]

You are not to prefer any minister to any ecclesiastical benefice, in that our colony, without a certificate from the Right Reverend Father in God, the Lord Bishop of London, of his being conformable to the doctrine and discipline of the Church of England, and of a good life and conversation; and if any person preferred already to a benefice, shall appear to you to give scandal, either by his doctrine or manners, you are to use the proper and usual means for the removal of him, and to supply the vacancy in such manner as we have directed.

N. B. The power of collating to benefices in Virginia

is expressly excepted out of the Bishop of London's jurisdiction, and by him also excepted in his commission to his Commissary.

All ministers bringing letters commendatory from the Bishop, desiring the Governor to prefer such minister or ministers to some vacant benefice, and accordingly the Governor sends the minister so recommended (after having seen his orders and testimonials) to such vacant parish as he thinks fit; also, it is to be noted, that every clergyman coming into America, receives £20 out of the treasury, as the King's chaplains employed in His Majesty's service.

Quære, Whether, by the power aforesaid, the King doth not claim the right of collation to all parishes here.

2d, Whether the right of the Crown is abridged by the act entitled, "Ministers to be inducted so as to entitle the vestries to a right of patronage"? And whether the Governor be thereby restrained from collating to vacant benefices, or granting induction, except only where the vestry present their clerk?

3d, If the vestry have the right of patronage, whether they can place in their parish any minister, without the license of the Governor, who, in this case is put in the place of the ordinary? Or can they remove such minister at their pleasure, without any offence proved before the competent judge having cognizance of such offence?

My Lords;

In obedience to your Lordships' commands, I have perused the above written clauses, and considered the questions arising thereupon; and since the prerogative of the Crown cannot be lessened or taken away by any general words whatsoever, but only by express terms, I

am of opinion that, notwithstanding any thing contained in them, the King's prerogative remains untouched and entire, as to his right of collating to vacant benefices. RICH. WEST.

June 27, 1719.

(5.) *Two opinions of the Attorney-General, Northey, relative to the clergy of Virginia.*

VIRGINIA, latter end of Nov. 1701.

Memorandum for Colonel Quarry, concerning the precariousness of the clergy. His Excellency to prevent the abuses in this matter, which are these, viz:

1st, That the vestries of this county who pretend to have the right of presentation, do seldom or never actually present, but force the ministers to enter into yearly agreements, after the nature of chaplains or lecturers, to serve the cure for so much.

2d, That upon any distaste taken up against the minister when his year is out, they take the opportunity to turn him out of his living, without any other formality than the refusing to renew the agreement, and without any, the least crime, either alleged or proved against him.

For remedy whereof, His Excellency desires the opinion of my Lords of Canterbury and London, and one or two of the best civilians: Whether the King or the vestry, are the patrons of the several churches, (here a a copy of the Virginia law about vestries is to be produced to such civilians)?

If the vestries are patrons, whether His Excellency, as ordinary, may present *jure devoluto*?

If a parish scruple in admitting a minister so presented: And

If the vestry, or any, by their order, shut the church

doors upon him, what is the punishment of such a fact?

Ministers to be inducted.

That for the preservation of purity, and unity of doctrine and discipline in the Church, and the right administration of the sacrament, no minister be admitted to officiate in this country, but such as shall produce to the Governor a testimonial that he hath received his ordination from some Bishop in England, and shall then subscribe to be conformable to the orders and constitutions of the Church of England, and the laws there established; upon which the Governor is hereby requested to induct the said minister into any parish that shall make presentation of him; and if any other person, pretending himself a minister, shall, contrary to this Act, presume to teach or preach, publicly or privately, the Governor and Council are hereby desired and empowered to suspend and silence the person so offending, and upon his obstinate persistence, to compel him to depart the country with the first conveniency, as it hath been formerly provided by the 77th Act, made at James City, the 2d of March, 1642.

Whether, if a parish do not present in a convenient time, the Commissary or the Governor, in case of this neglect, be not entitled to present to such living by lapse?

Whether, if any minister be elected by the parishioners, and allowed by them to serve the cure, is the Governor thereby enabled to give induction to such curate?

If the Governor should induct any minister so elected, can the parishioners remove him?

Provision being made for the building of the churches,

and for the setting out a glebe and other revenue, for the ministers of those churches, and the advowson or right of presenting to those churches being vested in the parishioners of each parish, and the Governor being constituted in the place of, and as the Ordinary or Bishop of the plantation, to admit and induct presentees, and to punish ministers preaching contrary to law, by the 1st, 3d and 4th Acts of Maryland, I conceive the advowson and right of presentation is subject to the Laws of England, there being no express law of that plantation made further concerning the same; therefore, when the parishioners present, and their clerk is inducted by the Governor, who is so, and must induct, he is in for his life, and cannot be displaced by the parishioners. If the parishioners do not present a minister to the Governor within six months after any church shall become void, the Governor, as ordinary, shall and may collate a clerk to such church by lapse; and the minister he shall so collate and place in by lapse, shall hold that church for his life. In inducting ministers by the Governor, on the presentation of the parishes, and on his own collation by lapse, he is to see the minister be qualified, according as the Act of Maryland requires; and in case of the avoidance of any church, the Governor, as ordinary of the plantation, is, according to the statute of 28th Henry VIII. c. 11. sec. 5, to appoint a minister to officiate till the parish shall present one, or the six months be lapsed; and such person appointed to officiate on the vacancy, is to be paid for his service out of the profits of the living, and the next incumbent is to have the overplus of the profit thereof, from the time the church became void, by the law above stated. In this case no minister is to officiate as such, though not as

incumbent, till he hath shewed to the Governor, that he is qualified to preach according to the law.

April 7, 1702. EDW. NORTHEY.

Memorandum. Colonel Quarry gave Sir Edward Northey ten guineas for the above report; but there being a mistake in the title of the laws, and naming them the Act of Maryland instead of Virginia, I sent a copy of the same queries by the Rev. Mr. Emanuel Jones, to get his further report, for which he gave him ten guineas, and a guinea to his clerk, upon which he made the following report:

On consideration of the laws of Virginia, provision being made by the Act entitled: "Church to be built, or Chapel of Ease, for the building a church in each parish"; and by the Act entitled: "Ministers to be inducted," that ministers of each parish shall be inducted on the presentation of the parishioners; and the churchwardens, being, by the Act entitled "Churchwardens," to keep the church in repair, and provide ornaments, to collect the minister's dues; and by the "Act for the better support and maintenance of the clergy," provision being made for the ministers of the parishes; and by the said Act for inducting ministers, the Governor being to induct the minister to be presented, and thereby he being constituted ordinary, and as Bishop of the plantation, and with a power to punish ministers preaching contrary to that law, I am of the opinion, the advowsons, and the right of presentation to the churches, is subject to the Laws of England, there being no express law of that plantation made further concerning the same; therefore, when the parishioners present their

clerk, and he is inducted by the Governor, (who is and must induct on the presentation of the parishioners,) the incumbent is in for his life, and cannot be displaced by the parishioners. If the parishioners do not present a minister to the Governor, within six months after any church shall become void, the Governor, as ordinary, shall and may collate a clerk to such church by lapse, and his collatee shall hold the church for his life; if the parishioners have never presented, they have a reasonable time to present a minister; but if they will not present, being required so to do, the Governor may also, in their default, collate a minister. In inducting ministers by the Governor, on the presentation of the parishes, or on his own collation, he is to see the ministers be qualified, according as that Act for inducting ministers requires. In case of the avoidance of any church, the Governor, as ordinary of the plantation, is, according to the statute of 28th Henry VIII. cap. 11, sec. 5, to appoint a minister to officiate till the parish shall present one, or the six months be lapsed; and such person appointed to officiate in the vacancy, is to be paid for his service out of the profits thereof, from the time the church becomes void by the law above stated. In this case no minister is to officiate as such, till he hath shewed to the Governor he is qualified, according as the said Act for induction directs; if the vestry do not levy the tobacco for the minister, the Courts there must decree the same to be levied.

EDW. NORTHEY.

July 29, 1703.

(6.) *The same Lawyer's opinion on Popery in Maryland.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, Jr., your Secretary, I have considered of the annexed extract of a letter from Colonel Seymour, Governor of Maryland, relating to the Jesuits and papists there; and the extract also sent me of the grant of the Province of Maryland to the Lord Baltimore, relating to the ecclesiastical power; and the questions proposed thereon: Whether the Laws of England against Romish priests, are in force in the plantations; and whether Her Majesty may not direct Jesuits or Romish priests to be turned out of Maryland?

And as to the said clause in the grant of the Province of Maryland to the Lord Baltimore, relating to the ecclesiastical power, I am of opinion, the same doth not give him any power to do any thing contrary to the ecclesiastical laws of England; but he hath only the advowsons of, and power to erect and consecrate churches, and such power as the Bishop of Durham had, as Earl Palatine, in his County Palatine, who was subject to the laws of England; and the consecrations of chapels ought to be, as in England, by orthodox ministers only.

As to the question: Whether the laws of England, against Romish priests, are in force in the plantations; by the statute of 27mo. of Elizabeth, cap. 2., every Jesuit, seminary priest, or other such priest, deacon or religious, or ecclesiastical person, born within this realm or any

other Her Majesty's dominions, made, ordained or professed, by any authority or jurisdiction, derived, challenged or pretended, from the See of Rome, who shall come into, or be, or remain in any part of this realm, or any other of her Majesty's dominions, is guilty of high treason. It is plain, that law extended to all the dominions the Queen had when it was made; but some doubt hath been made, whether it extendeth to dominions acquired after, as the plantations have been.

By the statute 11mo. William III., for preventing the further growth of popery, it is provided that, if any popish bishop, priest or Jesuit, whatsoever, shall say mass, or exercise any other part of the office or function of a popish bishop or priest, within this realm, or the dominions thereunto belonging, such person being thereof lawfully convicted, shall be adjudged to perpetual imprisonment, in such place within this kingdom, as her Majesty, by the advice of her Privy Council, shall appoint. I am of opinion this law extends to the plantations, they being dominions belonging to the realm of England, and extends to all priests, foreigners as well as natives.

As to the question, whether Her Majesty may not direct Jesuits or Romish priests to be turned out of Maryland, I am of opinion, if the Jesuits or priests be aliens, not made denizens or naturalized, Her Majesty may, by law, compel them to depart Maryland; if they be Her Majesty's natural born subjects, they cannot be banished from Her Majesty's dominions, but may be proceeded against on the last before-mentioned law.

October 18, 1705. EDW. NORTHEY.

(7.) *The Bishop of London's observations on a Law of Virginia for the suppression of Vice.*

SIR: I have carefully perused the Act that is come from Virginia, and am very much of the opinion of the Honorable Board, to whom my most humble service and excuse for not waiting upon them. I do think it is a very dangerous thing to exempt young people, from fifteen to twenty-one, from being liable to any punishment for their immorality. It will certainly be an inducement to them to take it for an indulgence to all licentiousness during that time.

That part of the Act, likewise, which makes the clergy liable to the same punishment with the lay offenders, is to expose them in the last degree, especially, since they are liable to be corrected by ecclesiastical censures.

H. LONDON.

FULHAM, January 2, 1707.

Mr. Popple,

Secretary to the Commissioners
for Trade and Plantations.

(8.) *The Attorney-General, Northey's, opinion on the granting of Letters of Administration on the same estate, both in England and in the Colonies.*

To the Right Hon., the Lords Commissioners, for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the enclosed extract of Lord Cornbury's instructions, and of his letter relating to the granting letters of administration; and your Lordships having required my opinion thereon,

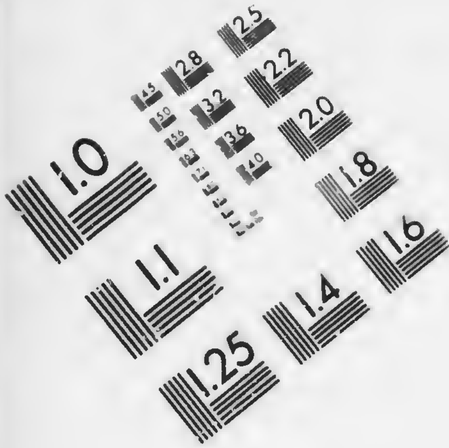
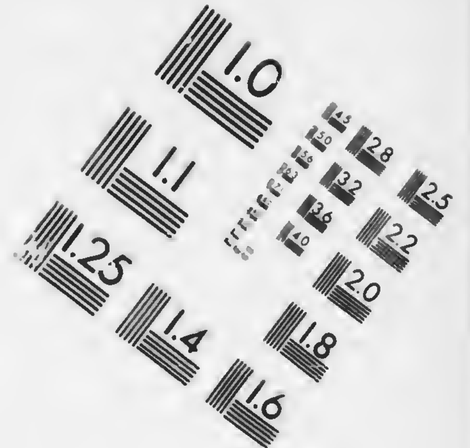
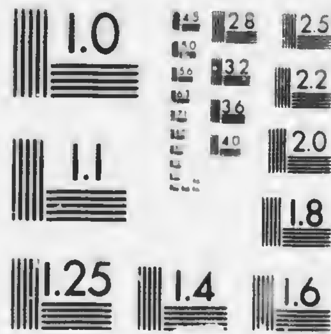
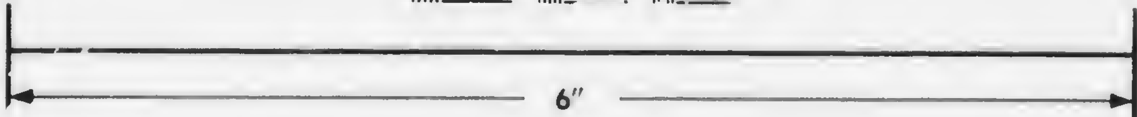
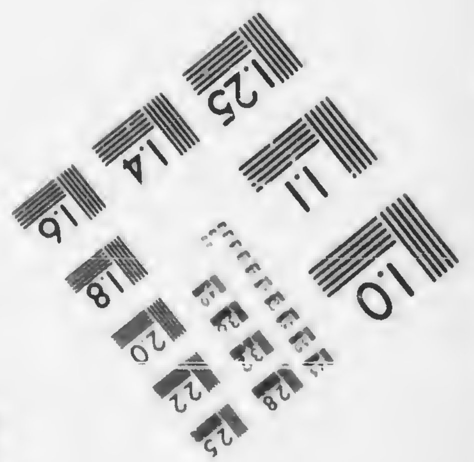



IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

and what may be fit for Her Majesty to do in all the plantations on the like occasions; and I do most humbly certify to your Lordships, that by law, where a man dies intestate in the plantations, having a personal estate there, and also any personal estate, or debts owing, here in England, the right of granting administration belongs to the Archbishop of Canterbury; and if administration be granted, in the plantations, also, (which may be), that administrator will be accountable to the administrator in England, but will be allowed the payment of just debts, if paid in the order the law allows of, that is to say, the whole personal estate, in England and the plantations, will be liable to all the intestate's debts in both places, and out of the whole, first, debts owing to Her Majesty, then judgments, statutes and recognizances, then bonds, then debts, without speciality, both there and in England, are to be satisfied; and the administrator in the plantations will not be allowed the payment of any debts, without speciality, if there be debts of a superior nature unsatisfied in England; for every administrator is bound to take care to apply the intestate's assets to discharge his debts, in the order the law directs, and it matters not whether the debts were contracted in England or the plantations. If there be debts of equal nature in England and the plantations, the administrator may discharge which he pleases, before he be sued for any other of the like nature. This, indeed, is some difficulty on administrators, but it is no more there than in England; and attempts have been made by Acts of Assembly, in some of the plantations, particularly, as I remember, in Pennsylvania, to appropriate the effects in the plantations, of persons dying there, to the discharging debts contracted

there; but those Acts have been repealed here, as being prejudicial to this kingdom. I am also of opinion, that when the letters of administration arrive at the plantations, under the seal of the Prerogative Court of Canterbury, they are to be allowed there, and the authority of the administration granted in the plantations, from that time ceases.

EDW. NORTHEY.

March, 1707.

II. The King's *Civil* authority abroad, may be subdivided into five several divisions: *First*, of the King's rights of property.

(1) *The Lord Chief-Justice Holt's opinion, 3d June, 1690, that the King might take away the Charter of Maryland, (Lord Baltimore's,) it being in a case of necessity.**

To the Marquis of Cærmarthen, the President of the Council, Earl of Danby.

My Lord;

I think it had been better, if an inquisition had been taken and the forfeiture committed by the Lord Baltimore, had been therein found, before any grant be made to a new Governor; yet since there is none, and it being

* The Privy Council, on the 21st of August, 1690, issued an order "That the Attorney-General do forthwith proceed, by *scire facias*, against the Charter of Lord Baltimore, the Proprietor of Maryland, in order to vacate the same." On the 5th of February, 1690–1, Lord Baltimore was heard, by counsel, against the King's appointment of a Governor for Maryland. On the 12th of February, 1690–1, there issued an order of Council, that the draft by a commission, which had been prepared by the Attorney-General, and approved by Lord Chief-Justice Holt, constituting Lionel Copley Governor-in-Chief of Maryland, be transmitted to Lord Sydney, the Secretary of State, for the Queen's signature.

in a case of necessity, I think the King may, by his commission, constitute a Governor, whose authority will be legal, though he must be responsible to Lord Baltimore for the profits. If an agreement can be made with Lord Baltimore, it will be convenient and easy for the Governor that the King shall appoint. An inquisition may at any time be taken, if the forfeiture be not pardoned, of which there is some doubt. J. HOLT.

SERGEANT'S INN, June 3, 1690.

(2.) *The opinion of the Attorney and Solicitor-General, Northey and Harcourt, that the Queen, having a right to govern all her people, may resume a Government under a Royal Charter that had been abused.*

May it please your Majesty;

In humble obedience to your Majesty's order in Council, we have considered of the annexed extract of a representation from the Lords Commissioners of Trade and Plantations, upon letters received from Colonel Dudley, your Majesty's Governor of Massachusetts Bay and New Hampshire, complaining of great inconveniences happening to him in that government, from disorders in Rhode Island, for want of good government there; and also, upon letters received from the Lord Cornbury, your Majesty's Governor of New York, complaining of like inconveniences from disorders in the Colony of Connecticut, that and Rhode Island being Charter Governments; and also, of the report of the Attorney and Solicitor-General of the late King William and Queen Mary, made in July, 1694; and we do concur with them in their opinions therein mentioned, that upon an extraordinary exigency, happening through the default or neglect of a proprietor, or of those appointed by him, or their

inability to protect or defend the Province under their government, and the inhabitants thereof, in times of war or imminent danger, your Majesty may constitute a Governor of such Province or Colony, as well for the civil as military part of government, and for the protection and preservation thereof, and of your Majesty's subjects there, with this addition only, that as to the civil government, such Governor is not to alter any of the rules of propriety, or methods of proceedings in civil causes, established pursuant to the Charters granted, whereby the proprietors of those colonies are incorporated; on perusal of which Charters, we do not find any clauses that can exclude your Majesty (who has a right to govern all your subjects,) from naming a Governor on your Majesty's behalf, for those colonies at all times.

EDW. NORTHEY.
SIM. HARCOURT.

(3.) *The opinion of the Attorney-General, Northey, on the Queen's prerogative to receive a surrender of the Pennsylvania Charter.*

To the Right Honorable Robert, Earl of Oxford, and Earl Mortimer, Lord High Treasurer of Great Britain.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Harley, I have considered the report of the Lords Commissioners of Trade and Plantations, upon the memorial of William Penn, Esq., Proprietor and Governor of Pennsylvania, proposing to surrender to Her Majesty the powers of government wherewith he is invested; and I have also perused the grant of that government to him by King Charles the Second, with

other deeds relating to Mr. Penn's title thereto, and to the government of the tract of land on Delaware River and Bay, now called the town or colony of Newcastle, alias Delaware; and he has made out to me his title thereto; and, according to your Lordships' commands, I have prepared a draft of a surrender of those powers from Mr. Penn and others, in whom the legal estate is, under him, to Her Majesty, reserving to Mr. Penn his right to the soil of those colonies. In the letters patent of King Charles the Second, there are granted to Mr. Penn all mines of gold and silver in Pennsylvania, which, he says, he cannot surrender to the Crown, having made several grants thereof to several people, which are not in his power; and therefore the surrender of them is not in the draft prepared, although, if it be insisted on, he may surrender and assign what is not granted.

There is, likewise, an instrument prepared for Her Majesty's accepting the said surrender; and in it Mr. Penn is an humble suitor to her Majesty, that she would be pleased thereby to declare that she will take the people of his persuasion, as well as the other inhabitants of those colonies, in Her Majesty's protection. I do not observe that there is any provision made for the support of the government there, by any act of Assembly or otherwise, without which the government will be a charge to Her Majesty; but the Council of Trade and Plantations, in their report, have represented that Mr. Penn affirms, he does not doubt but the Assembly will readily make provision for the same, and he acquaints me that the fines and forfeitures there, which have been and may be applied hereto, are considerable.

EDW. NORTHEY.

February 25, 1711-12.

(4.) *The opinion of the Attorney and Solicitor-General Ryder, and Murray, on the King's prerogative to receive the resignation of the Charter of Georgia, and to establish a Royal Government.*

To the Right Honorable, the Lords of the Committee of Council for plantation affairs.

May it please your Lordships;

In obedience to your Lordships' order of the 19th of December last, setting forth that His Majesty was pleased, by his order in Council of the 13th of May last, to refer unto your Lordships the memorial of the Trustees for establishing the colony of Georgia, in America, setting forth that His Majesty was pleased, by his royal Charter, dated the 9th of June, 1732, to make, erect and create the Colony of Georgia, and to constitute the memorialists to be one body politic and corporate, for establishing the said Colony, and to grant them power to elect their own successors forever; and also, to vest in them and their successors, forever, seven undivided parts of all the lands therein particularly described, as trustees for granting the same to such of His Majesty's indigent subjects, and persecuted foreign Protestants, as should desire to inhabit and reside there, and the powers of government over the said Colony were thereby vested in them for the term of twenty-one years; and further, setting forth (amongst other things,) the several steps they have taken from time to time, for the peopling, settling and establishing the said Colony, together with the present state and condition thereof; but that, as the said term of government will expire so soon as the 9th of June 1753, (though the power of granting lands is vested in them forever,) they humbly

pray that proper means may be soon provided for putting the government of the Colony on a more sure foundation than it is at present, through the uncertainty of the memorialists being enabled to support it, lest so great a misfortune should happen as the immediate desertion and loss of this important Colony; and that your Lordships had, that day, proceeded to take the said memorial into your consideration, and being informed that a committee of the said trustees was attending, and had some proposals to offer to your Lordships in addition to the foregoing memorial, they were called in, and the following proposal was delivered by them to your Lordships, viz: "We, whose names are hereunder written, being a Committee appointed by the Common Council of the trustees, for establishing the Colony of Georgia, in America, and fully authorized by them, do hereby signify, that we are ready and willing to make an absolute surrender of all the powers, rights and trusts vested in the said trustees by His Majesty's Charter, bearing date the 9th day of June 1732, without any conditions or limitations; humbly recommending the rights and privileges of the inhabitants of the said Colony to His Majesty's most gracious protection.

"December 19, 1751.

SHAFTSBURY,
ROBERT TRACEY,
JOHN FREDERICK,
SAML. LLOYD,
EDWARD HOOPER."

Which being taken into consideration, your Lordships were thereby pleased to refer the said proposal to us to consider thereof, and report to your Lordships, in what manner the same may be most effectually carried into execution.

We have considered the said proposal, and perused the said Charter of the 9th of June 1732, and the grant from Lord Carteret of the same year, and find that, by the Charter, the Colony of Georgia was made a separate Province, to be governed by its own laws, and not by the law or government of South Carolina.

That the memorialists were thereby made a corporate body, with perpetual succession, and that seven-eighths of the lands there were granted to them forever, to be held of the Crown, at the rents therein mentioned, with power for them, by their Common Council named, and to be named, according to the direction of the Charter, under their common seal, to distribute and convey portions of such lands to such subjects, natural born or denizens or others, that shall be willing to become subjects on such terms, and for such estates, and on such conditions as the same can be lawfully granted, and as to the Common Council shall seem fit; and that for the term of twenty-one years the memorialists should have power of making such laws, and appointing governors and officers as they judge proper. We find also, by the Lord Carteret's said grant, his one-eighth of the lands was vested in the same trustees on the same trusts. In consequence of those grants, we are humbly of opinion, that the memorialists have sufficient power to make such surrender and grant as is proposed.

The proper method of doing this, will be, as we humbly conceive, for the trustees, with the privity and by the direction of the Common Council, to execute a deed of surrender enrolled under their common seal, and thereby to surrender to His Majesty their said Charter, and all the powers, jurisdictions, franchises and privileges therein conveyed to them, and thereby to grant all

their lands and territories to His Majesty, as well the one-eighth derived from Lord Carteret's grant, as the seven-eighths included in His Majesty's said Charter, but subject to such estates and interests as the inhabitants there have in any of the lands, by virtue of grants from the corporation.

When such grant and surrender shall be made, we humbly conceive His Majesty will have both the government of the Colony in his own hands, and the lands and territories thereto belonging, subject to the grants of any part thereof now subsisting; and as to the said one-eighth, subject to the quit rents reserved in the Lord Carteret's grant, and may put the government thereof on such a foot as His Majesty shall, in his great wisdom, think proper.

D. RYDER.

February 6, 1752.

W. MURRAY.

(5.) *The opinion of the Attorney-General Northey, on the surrender of the Bahama Charter.*

WHITEHALL, Dec. 10, 1717.

SIR: The Lords Commissioners for Trade and Plantations command me to remind you of my letter of the 21st of the last month, which was to acquaint you, that there being six proprietors of the Bahama islands, whereof two are minors, the other four have executed a deed of surrender of their right of government to His Majesty, and to desire your immediate opinion, whether a surrender executed by four out of six, as aforesaid, be valid and effectual.

WM. POPPLE.

[The Attorney-General's report upon the surrender of the Proprietors.]

I am opinion, that a surrender by four where six are seized, can only convey and extinguish thereby, four

parts in six of what the parties enjoyed. However, His Majesty being entitled under four, to four parts of the government, which is entire, he may execute the whole. And I do not know, that the other two can be copartners with his Majesty in governing; for which reason, and that there might not be an extinguishment, by surrender, I apprehend, as this case is, a grant to the Crown of the four parts might be more proper.

December 10, 1717. EDW. NORTHEY.

(6.) *On the King's Right to the three lower Counties on Delaware, by Attorney and Solicitor-General, Northey, and Thompson.*

SIR: The Lords Commissioners for Trade and Plantations having, by your letter of the 13th February last, required our opinion on the petition of the Earl of Sutherland, praying for a Charter of certain lands lying upon Delaware Bay, in America, commonly called the Three Lower Counties, whether it be in the power of the Crown to dispose of those lands petitioned for; which petition had been referred to their Lordships by His Majesty; and His Majesty having been also pleased to refer the said petition to us, we have made our report thereon to His Majesty, and enclosed, have sent you a copy of the said report, which may serve for an answer to the question proposed to us by their Lordships.

October 28, 1717. EDW. NORTHEY,
W. THOMPSON.

To the King's most excellent Majesty.

May it please your Majesty;

In humble obedience to your Majesty's commands, signified to your Majesty's Attorney-General, by the

11

Lord Viscount Stanhope, when Secretary of State, on the memorial of the Right Honorable John, Earl of Sutherland, and your Majesty having been pleased also to signify your commands by Mr. Methuen, when Secretary of State, to refer the said memorial to your Majesty's Solicitor-General, we have jointly considered of the said memorial, whereby the said Earl of Sutherland represents to your Majesty: that there are considerable arrears due to him, since the revolution, amounting to above £20,000; that he has always testified his great zeal and activity for the Protestant succession, both before and since your Majesty's happy accession to the throne, and given singular proofs of his fidelity and affection to your Majesty, by his services in North Britain during the rebellion there; in consideration whereof your Majesty was pleased to express your favorable intentions of gratifying him upon any occasion: wherefore, he most humbly prays your Majesty will be graciously pleased to grant him a Charter of certain lands lying upon Delaware Bay, in America, commonly called the Three Lower Counties, which he represents he is ready to prove do belong to the Crown. And we have given notice thereof to the persons concerned for William Penn, Esq., and several mortgagees and purchasers under him; and also to the Lord Baltimore, who severally claim title to the said lower Counties, being called Newcastle, Kent and Sussex. And we have heard them and their agents, thereupon, and we do most humbly certify your Majesty, that the said William Penn is entitled, under the grant of King Charles the Second, to the plantation of Pennsylvania; but that these counties are not included in such grant, and his title to Pennsylvania is not now contested.

And as to your Majesty's title, which the Earl of Sutherland has undertaken to make out, to the said Three Lower Counties, he has insisted that the same were gained by conquest, by the subjects of your Majesty's predecessors, or granted to your Majesty's predecessors by the possessors thereof, and that thereby your Majesty's predecessors became entitled to the same; for that a subject of the Crown could not make foreign acquisitions by conquest, but for the benefit of the Crown; and that the length of possession will be no bar to the Crown; that for several years past Mr. Penn hath had the possession of the said Lower Counties, under a pretense of a grant thereof to him, made in the year 1682, by the late King James, when Duke of York, who then had the possession of New York and the said Three Lower Counties; but had no right to the said Lower Counties and therefore could not transfer any right in the same, to the said Mr. Penn, which appears; for that the said late King, afterwards, when Duke of York in the year 1683, obtained a warrant from the then King, Charles the Second, to pass a patent whereby the said Three Lower Counties should have been granted to the said then Duke of York, and a copy of the bill to pass into a grant in April 1683, to the said James Duke of York, of the said Three Lower Counties, has been produced by the said Earl of Sutherland; and it is alleged the same was never passed into a grant; and that if the same had passed into a grant, it would not have made Mr. Penn's title to the said Three Lower Counties to be good, the title of the said Mr. Penn under the Duke of York, being precedent to the title of the said Duke of York; but that the same did remain in the said Duke of York, and is, consequently, now in your Majesty.

And that your Majesty's title further appears; for that, after, in May 1683, when the then Lord Baltimore, by petition, opposed the passing the said bill under the great seal, Mr. Penn then appeared against the said Lord Baltimore, as agent for the Crown, and not on behalf of himself; and Mr. Penn, under his hand, has declared that your Majesty's royal approbation and allowance of the Deputy-Governor of Pennsylvania, and the Three Lower Counties on Delaware River, named by him, shall not be construed to diminish or set aside the right claimed by the Crown, to the said Three Lower Counties.

Besides, the said Earl of Sutherland insists, that in the grant of the said Duke of York, in 1682, to Mr. Penn, of the said Three Lower Counties, there is a reservation of an account to be made of one moiety of the profits of the lands thereby granted, touching which, no account has yet been rendered by Mr. Penn; and that, therefore, if the said grant, in 1682, were effectual, the said Mr. Penn is yet accountable to your Majesty, for the moiety of all the profits of the lands so granted, from the year 1682, according to the said reservation; and that, if the said Earl of Sutherland cannot, by your Majesty's favor, be entitled to the said Three Lower Counties, he humbly prays he may have the benefit of the said account.

In answer to which, on the behalf of Mr. Penn's mortgagees and other purchasers under him, it hath been alleged, that the late King James the Second, when Duke of York, was seized in fee of the said Three Lower Counties; and as one argument to prove such seizin, they have produced letters patent, dated the 29th day of June, 26 Car. II., whereby his said late Majesty, King

Charles the Second, granted to the said James, late Duke of York, his heirs and assigns, all that part of the main land of New England, beginning at a certain place called or known by the name of St. Croix, next adjoining to New Scotland, in America, and from thence extending along the sea-coast unto a certain place called Pemaquinue or Pemaquid, and so up the river thereof, to the further head of the same, as it tendeth northward, and extending from the river of Kinebequim, and so upwards by the shortest course, to the river Canada, northwards; and all that island or islands, commonly called by the several name or names of Matewaicks or Long Island, situate and being towards the west of Cape Codd, and the Narro Higansetts, abutting upon the main land, between the two rivers there called or known, by the several names of Connecticut and Hudson River, together, also, with the said river called Hudson's River, and all the lands from the west side of Connecticut River to the east side of Delaware Bay, and also, all those several islands called or known by the name of Martin Viniard and Nantacks, otherwise Nantukett, together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, hunting and fowling, and all other royalties, profits, commodities and hereditaments to the said several islands, lands and premises belonging and appertaining, with their and every of their appurtenances; and all his said late Majesty's estate, right, title and interest, benefit, advantage, claim and demand, of, in, or to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, together with the yearly and other rents, revenues and profits of the premises, and of every

part and parcel thereof; at and under the yearly rent of forty beaver skins, when they shall be lawfully demanded, or within ninety days after such demand, made with powers of government; within the descriptions of which grant it hath been agreed by both parties, that the said Three Lower Counties are not contained.

But, on the behalf of Mr. Penn, it hath been insisted, that by the general words, "together with all the lands, islands, soils, rivers, harbors, &c., and all other royalties, profits, commodities and hereditaments to the said several islands, lands and premises, belonging and appertaining, with their and every of their appurtenances," the said Three Lower Counties did pass as belonging to the premises expressly granted by the said letters patent; for that the Three Lower Counties were enjoyed by the said late Duke of York, together with New York, which was granted unto the said late Duke of York, until he granted the same to the said William Penn in 1682, by the grants hereinafter mentioned, which seems difficult to us to be maintained, since the abuttal in the said letters patent, exclude the Three Lower Counties; but they presume the said late Duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, being under a lunacy. And we do further humbly certify your Majesty, that by indenture dated the 24th day of August, 1682, made between the said late Duke of York of the one part, and the said William Penn of the other part, the said late Duke of York, for the considerations therein mentioned, did bargain, sell, enfeoff and confirm to the said William Penn and his heirs, all the town of Newcastle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the

same, situate, lying and being upon the river Delaware, and all islands in the said river Delaware; and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles, about the said town; together with all rents, services, royalties, franchises, duties, jurisdictions, liberties and privileges thereunto belonging, and all the estate, right, title, interest, powers, property, claim and demand whatsoever, of the said late Duke, of, in or to the same, or to any part or parcel thereof, at and under the yearly rent of five shillings, with a covenant for further assurance; and the said late Duke did thereby constitute and appoint John Moll and Ephriam Harmon, or either of them, his attorney, with full power for him and in his name and stead, to deliver seizin of the premises granted by the said last recited indenture, to the said William Penn, and his heirs. And the said late Duke of York, by another indenture bearing date the said 24th of August 1682, and made between the said late Duke of York of the one part, and the said William Penn of the other part, for the consideration therein mentioned, did bargain, sell, enfeoff and confirm unto the said William Penn and his heirs, all that tract of land upon Delaware River and Bay, beginning twelve miles south from the town of Newcastle, otherwise called Delaware, and extending south to the Whore Kills, otherwise called Cape Henlopen; together with free and undisturbed use and passage into and out of all harbors, bays, waters, rivers, isles and inlets, belonging to or leading to the same; together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays and inlets, situate in or belonging unto the limits and bounds aforesaid; together with all sorts of

minerals, and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever, of the said Duke of York therein, or in or unto any part or parcel thereof, at and under the yearly rent of one rose: in which said last-mentioned indenture is contained a covenant, on the part of the said William Penn, his heirs or assigns, within the space of one year next ensuing the date of the same indenture, to erect or cause to be erected and set up, one or more public office or offices of registry, in or upon the said last bargained premises, wherein truly and faithfully to account, set down and register, all and all manner of rents and other profits, which he or they, or any of them, shall by any ways or means make, raise, get or procure, of, in or out of the said last bargained premises, or any part or parcel thereof; and also, at the feast of St. Michael the Archangel, yearly and every year, shall well and truly yield, pay and deliver unto the said late Duke of York, his heirs and assigns, one full moiety of all and all manner of rents, issues and profits, as well extraordinary as ordinary, as shall be made or raised upon or by reason of the premises, or any part thereof; with power to the said late Duke of York, his heirs and assigns, in case the same shall be in arrear twenty days, to enter in and upon the same premises, or any part thereof, and there to distrain, and the distresses to detain, until payment of the said moiety and arrears thereof, together with all costs and damages for the same. And by the same indenture, the said John Moll and Ephriam Harmon, or either of them, were appointed in like manner, attorney or attornies, to deliver seizin of the last bargained premises to the said William Penn and his heirs; both which said indentures were entered in the office of records, for the

Province of New York, on the 21st November, 1682. Within which said grants the said Three Lower Counties are contained, but the covenant to account extends only to what is included in the last recited grant.

That by an order by the Commander-in-chief and Council of New York, dated at New York 21st of November, 1682, reciting the said two recited indentures, and reciting that the said Commander and Council were fully satisfied of the said William Penn's right to the possession and enjoyment of the premises, had therefore, thought fit and necessary to signify and declare the same, to the several justices, magistrates and other officers at Newcastle, St. Jones Deale, alias Whore Kill, at Delaware, or within any of the bounds and limits above mentioned, to prevent any doubt or trouble that might arise; and after having thanked the said magistrates for their good services, in their several offices and stations, during the time they remained under his said late royal highness' government, they declare they expected no further account, than that they should readily submit and yield all due obedience and conformity to the powers granted to the said William Penn, in and by the said indentures, which said order was, the 25th of October, 1701, entered in the Roll's Office, at Philadelphia.

It appears by the affidavit of Thomas Grey, who swears he lived in Pennsylvania, from the year 1699 to the year 1707, and that he made out and saw many patents, or grants and warrants, whereby considerable quantities of land lying in the said Three Lower Counties, which, as he deposes, are esteemed to belong to Pennsylvania, were granted to divers persons and their heirs; some of which grants or warrants were signed

by the said William Penn, and the rest by his agents or commissioners, and all sealed with the seal of the said Province; and that he hath seen great improvements in building and planting, by persons claiming under such grants. That many of the said inhabitants, who were reputed to have settled upon lands in the said Lower Counties, by virtue of grants, or patents and warrants, either from the Swedes or Dutch, when the said Counties were in their hands, respectively, or from the Governor of New York, under the said late Duke of York, when the same was in his hands, did, upon making their accounts up of quit-rents due from them to the said William Penn, for their lands, accept new patents from the said William Penn, or his agents, and have since much increased their improvements thereof, both in building and planting. That, he hath seen patents or instruments for conveying lands, in the said Lower Counties, to divers of the ancient inhabitants thereof, as well from the Swedes or Dutch, as the Governors of New York, under the said late Duke, as also, commissions under the hands of some one of the said Governors of New York, constituting magistrates and officers in the said Lower Counties. That, he believes, that the patents of land in the said Lower Counties, granted by the said Governors of New York, were registered at New York, and that, if search were made in the Secretary's office there, the same would appear so to be. That, he believes much the greatest part of the inhabitants of the said Lower Counties, who have land there, hold the same by title under Mr. Penn, and that several who hold land there by other title, have delivered the same up, and have accepted new grants from Mr. Penn. And it also appears, by the affirmation of Robert Hiscox, a Quaker,

that the Naval Store Company, in Bristol, have, by their agents, made several purchases of the said William Penn of 3120 acres of land in the County of Kent, and the said company hath expended for purchasing lands, building thereon, and other improvements, and in carrying on their manufacture for raising hemp, upwards of £2,000, and are, by their articles, obliged to lay out £5,000, of which the said £2,000 is part, and that he expects, in a short time, the greater part of the remaining £3,000 will be laid out in the management and carrying on the said manufacture; and that no benefit hath yet accrued to the said Company, for the money so expended; and that he believes other purchases are already made for the use of the said Company.

And as to the said Earl of Sutherland's objection, that the Duke of York, in 1682, had no title to the Lower Counties, and therefore, those grants then made to Mr. Penn were void, which appears by a copy of a bill, dated 13th of April, 1683, in order to be passed into a grant of the said Three Lower Counties to the said late Duke of York, which is after the grant by the Duke of York to the said William Penn, but never passed into a grant, and which bill recites a surrender of certain letters patent, bearing date 22d of March then last past, (which grant cannot be found) of the town of Newcastle, otherwise Delaware, and fort thereunto belonging, lying between Maryland and New Jersey, in America, and several other lands, tenements and hereditaments, therein mentioned, the said late King, Charles the Second, for the considerations therein mentioned, did grant to the said late Duke of York, and his heirs, all that the town of Newcastle, otherwise called Delaware, and fort therein or thereunto belonging, lying between Maryland and

New Jersey, in America; and all that river called Delaware, and soil thereof, and all islands in the said river; and all that tract of land upon the west side of the river and bay of Delaware, which lieth from Schoolkill Creek upon the said river, unto Bombey's Hook, and backwards into the woods so far as the Minqua's country, and from Bombey's Hook, on the said river and bay, unto Cape Henlopen, now called Cape James, being the south point of a sea warmet inlet, and backwards into the woods three Indian day's journeys, being formerly the claim or possession of the Dutch, (or purchased by them of the natives,) or which was by them first surrendered unto his said late Majesty's Lieutenant-Governor, Colonel Niccols, and which had been since surrendered unto Sir Edmond Andros, Lieutenant-Governor of the said James, Duke of York, and had for several years been in his possession, with the free use and continuance in, and passage into and out of all and singular ports, harbors, bays, rivers, isles and inlets belonging unto or leading to or from the said tract of land, or any part or parcel thereof; and the seas, bays and rivers, and soil thereof, bending eastward and southward on the said tract of land, and all islands therein; and also all the soil, lands, fields, woods, underwoods, mountains, hills, fens, swamps, isles, lakes, rivers, rivulets, bays and inlets, situate and being within the said tract of land; and any of the limits and bounds aforesaid, together with all minerals, quarries, fishings, hawkings, huntings and fowlings, and all other royalties, privileges, profits, commodities and hereditaments to the said town, fort, tract of land and premises, or to any or either of them, belonging or appertaining, with their and every of their appurtenances in America; and all his said late Majes-

ty's estate, right, title, interest, benefit, advantage, claim and demand whatsoever, of, in or to the said town, fort, tract of land and premises, or any part or parcel thereof, together with the yearly and other rents, revenues and profits of the premises, and of every part and parcel thereof, to hold to the said Duke of York and his heirs, at and under the yearly rent of one beaver skin, when demanded.

On the behalf of Mr. Penn, it is alleged, that it is probable the said bill in 1683 might have been passed into a grant, for that they produced from the Hanaper office, where entries are made of grants that pass the Great Seal, a certificate of an entry in that office, in the words following, viz: "April 6th, 1683, a grant to James Duke of York, of the town of Newcastle, alias Delaware, situate between Maryland and New Jersey, in America, to him and his heirs forever," such entries not having been made at the Hanaper office, but where letters patent do pass, which patent might happen not to be enrolled, as it is not, by the neglect of the six Clerk, called the Riding Clerk, whose business it was to see the same enrolled.

And as to the objection, that if the same were enrolled, that the same is a title subsequent to the grant to Mr. Penn, and that Mr. Penn appeared as agent for the Crown against the Lord Baltimore, they do humbly insist that Mr. Penn having a grant then so lately from the said late Duke of York, might make use of the name of the said Duke, with his leave in trust, for the said Mr. Penn and his heirs, which they the rather apprehend, for that the possession was always suffered to remain with the said William Penn; and that if the said grant was passed, and the said grant was in trust for the

said William Penn, the same extinguished the said covenant of Mr. Penn for accounting in the grant to him thereof.

Besides, in the said last grant to the Duke of York, it is recited, that the lands were formerly the claim and possession of the Dutch, and had been surrendered unto the Lieutenant-Governor of the said Duke of York, and had for several years been in his possession, which might enable him to make the grants, in 1682, to the said Mr. Penn.

And, on the behalf of the purchasers, it has been insisted, that it would be very hard to put them to any trouble who have bought under the title and enjoyment of Mr. Penn, and have laid out great sums of money in improving their purchases.

And as to the title claimed by the Lord Baltimore, we are humbly of opinion, that the same has already received a full and final determination; for that, 31st of May, 1683, Richard Burk, gent., servant to Charles, then Lord Baltimore, praying that the said bill of 1683 might not pass the Great Seal, until His then Majesty should be satisfied of the extent of the letters patent formerly granted to Cecil, Lord Baltimore, wherein the said town and adjacent country is alleged to be comprised; which said petition being referred to the then Lords Commissioners for Trade and Plantations, on the 13th of November, 1685, their Lordships made their report, wherein they report that: "Having examined the matters in difference between the Lord Baltimore and William Penn, Esq., on behalf of His then Majesty, concerning a tract of land called Delaware, they found the land intended to be granted to Lord Baltimore was only lands uncultivated, and inhabited by savages; and that the

tract of land then in dispute, was inhabited and planted by Christians at and before the date of the Lord Baltimore's patent, as it had ever been since, to that time, and continued as a distinct colony, from Maryland, so that their Lordships humbly offered their opinion, that for avoiding further differences, the tract of land lying between the river and the eastern sea, on the one side, and Chesapeake Bay on the other, be divided into equal parts, by a line from the latitude of Cape Henlopen to the 40th degree of northern latitude; and that one-half thereof, lying towards the bay of Delaware and the eastern sea, be adjudged to belong to his Majesty, and the other half to Lord Baltimore;" Which report his then Majesty was pleased to approve of, and to order the said lands to be divided accordingly, and the Lord Baltimore and William Penn required to yield due obedience thereunto; which report was also confirmed the 23d of June, 1709, by Her late Majesty, Queen Anne, in Council; however, this petition, on behalf of the Lord Baltimore, is a very great argument that the bill of 1683, to the late Duke of York, never passed the Great Seal, as on Mr. Penn's behalf is supposed; for that it being stopped, as must be presumed in that petition or grant, after that matter settled, which was in 1685, in the reign of the said Duke, when King of England, could not pass the Great Seal, in the name of King Charles, to the Duke of York, then being King of England; but the entry in the Hanaper office might have been made when the Privy Seal was brought to the Great Seal, to be passed into a grant.

On the whole matter, we humbly submit it to your Majesty's consideration, whether that it will not be reasonable, that your Majesty's title should be established

by the Court of Chancery, before any grant should be made of the premises; and if any grant should be made, we most humbly submit it to your Majesty, whether the claims of purchasers or grantees under Mr. Penn, who have improved part of the said Three Lower Counties, should not be established; but if Mr. Penn should have a title to the Three Lower Counties, by virtue of the two grants made to him by the late King James, in 1682, when Duke of York, we have not received any answer why he should not account, according to his covenant, in the last of the said deeds, for the moiety of the rents, issues and profits raised by virtue of that grant.

EDW. NORTHEY.
October 21, 1717. WM. THOMPSON.

(7.) *Of the King's authority over Guernsey and Jersey, by the Attorney and Solicitor, Ryder and Strange.*

To the Right Honorable, the Lords of the Committee of Council, for the affairs of Guernsey and Jersey.

May it please your Lordships;

In obedience to your Lordships' order of the 21st of July, 1736, hereunto annexed, whereby your Lordships were pleased to refer the memorial and papers hereunto annexed, to His Majesty's late Attorney and Solicitor-General, to consider the same, and report their opinion to your Lordships upon the general case of extents from the Exchequer, and of the process from the Courts of King's Bench, how the same can be legally executed, in the islands of Guernsey and Jersey, and if not, what other remedy is left to the Crown, for the recovery of their debts in those islands.

We have considered of the matters so referred, and

are humbly of opinion, that no writ of extent out of His Majesty's Court of Exchequer here, nor any process from the Court of King's Bench, can, as the laws of those islands now stand, be executed there, they being governed by laws of their own, subject to His Majesty's order in Council, and the subjects there are not amenable to the Courts here.

And we are of opinion, the only remedy the Crown has for the recovery of their debts in those islands, upon the foot of the present law, is by proceeding upon proper suits, to be instituted in the Courts there, according to the course of those Courts, and sending thither the proper evidence of the debt, unless His Majesty shall think fit to interpose, in his legislative capacity, and by an order in Council, make a new law concerning the method of recovering the Crown debts against the inhabitants there.

By this means, His Majesty may, if he think fit, give such force to extents and other processes out of the Courts here, as he shall judge convenient; but whether the single instance of inconvenience to the Crown, in the case of Carey's debt, mentioned in the memorial, is a sufficient ground to make any alteration in the laws of those islands, is humbly submitted.

D. RYDER.
J. STRANGE.

August 12th, 1737.

(8.) *Of the King's right to the islands in the river Delaware, by the Attorney and Solicitor-General Raymond and Yorke, in* 1721.

To the Right Hon., the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, by his letter of the 30th of June last, whereby he transmitted to us the annexed copy of two clauses, extracted out of the Charters of New Jersey and Pennsylvania, whereby the boundaries of those Provinces are ascertained, and thereupon desired our opinion, whether Delaware River or any part thereof, or the islands therein lying, are, by the said clauses, conveyed to either of the said Provinces, or whether the right thereunto doth still remain in the Crown? We have perused the said clauses, and have been attended by the agents of the parties, who claim the Province of Pennsylvania, and their counsel, who have laid before us a copy of the letters patent, granting the said Province, and have heard what hath been alleged on both sides; and upon consideration of the whole matter, are of opinion, that no part of Delaware River, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed extract of the grant of New Jersey; but, we conceive, that the right to the same still remains in the Crown.

ROBT. RAYMOND.
PHIL. YORKE.

August 5th, 1721.

(9.) *Of the King's right to certain waste lands in New Hampshire, by the Attorney and Solicitor-General, Ryder and Murray.*

[State of the case with respect to the property of the waste and unimproved lands in the Province of New Hampshire, within the limits of the grant made by the Council of Plymouth to John Mason, in the year 1629.]

King James the First, by letters patent, dated the 3d of November 1620, granted all that tract of country, since called New England, lying between the latitude of 40 and 48 degrees north, to Sir Ferdinand Gorges, and thirty-nine others, under the name of the Council established at Plymouth, in the county of Devon, for the planting, ruling and governing New England, in America.

The Council of Plymouth, by indenture under their common seal, dated 7th November, 1629, granted unto Captain John Mason, his heirs and assigns, all that part of the main land, in New England, lying upon the sea-coast, beginning from the middle part of Merrimack River, and from thence to proceed northward along the sea-coast to Piscataway River, and so forwards up within the said river, and to the furthest head thereof, and from thence northward until three-score miles be finished from the first entrance of Piscataway River, and also from Merrimack through the said river, and to the furthest head thereof; and so forward up into the land westward until three-score miles be finished, and from thence to cross overland, to the three-score miles' end, accounted from Piscataway River.

This tract of country was, in consequence, and by ex-

press direction of the patent, called New Hampshire; and the grantee obliged himself to establish such government therein, as should be agreeable, as near as might be, to the laws and customs of the realm of England, with liberty, for any person aggrieved, to appeal to the said Council of Plymouth.

In consequence of this grant, Captain Mason was (as is alleged by him,) at considerable expense in sending over persons to plant and settle in this country, and in erecting forts and other buildings and habitations; and it does appear, from several testimonies made use of, in some actions brought by his grandson against the very persons he had sent over, that considerable improvements were made.

In 1635, the Council of Plymouth, by letters patent dated the 22d of April, confirmed their former grant of New Hampshire to Captain Mason, with an extension of the limits, which, in the said letters patent, are described in the following words: "All that part, purpart and portion of the main land of New England, beginning from the middle part of Naumkeck River, and from thence to proceed eastwards along the sea-coast to Cape Ann, and round about the same to Piscataway Harbor, and so forward up within the river of Newwickwannock, and to the furthest head of the said river, and from thence northward till sixty miles be finished, from the first entrance of Piscataway Harbor, and also from Naumkeck through the river thereof, up into the land west, sixty miles, from which period to cross, overland, to the sixty miles' end, accounted from Piscataway, through Newwickwannock River, to the land north-westward, as aforesaid."

The eastern limits of the second grant appear to be

the same as those described in the first, but are extended to the south-west as far as the river Naumkeck, which is about twenty miles to the westward of Merrimack, the western limit of the former grant, which tract of country lying between the said two rivers, and extending to three miles north-east of Merrimack, had been granted by the Council of Plymouth, to the Massachusetts Colony, in the year 1728, prior to the first grant to Mr. Mason, and is now part of that colony.

It is alleged, that this last grant to Mr. Mason was ratified and confirmed by the Crown, by a Charter dated the 19th of August 1635, with full power of civil jurisdiction and government; but no such Charter as this appears on record.

In the same year 1635, Captain Mason, having no immediate issue then living, (his only daughter, who had married Joseph Tufton, Esq., being dead,) by his will, dated the 26th of November, devised, amongst other things, to his grand-child, John Tufton, and his heirs, all his manor, messuages, lands, tenements, and hereditaments, in New Hampshire, except some inconsiderable legacies, upon condition of his changing his name to Mason, the remainder to Robert Tufton, the brother of John Tufton, and other persons mentioned in the will.

Upon the death of Captain Mason, in the same year, or soon after, New Hampshire, by virtue of the aforementioned devise, came to his grand-son, John Tufton, but he dying without issue, the limitation over to Robert Tufton took effect; but he being at that time a minor, and not coming of age till 1650, the servants and agents, which his grand-father, John Mason, had sent over to New Hampshire, taking advantage thereof, and of the confusion of affairs in England at that time, when

no redress could be had, embezzled, and sold his stock and effects, and put themselves under the government of the Massachusetts colony, who then exercised jurisdiction in New Hampshire.

Soon after the restoration, Mr. Robert Mason (for Robert Tufton, the younger brother, had now taken upon him that name, in compliance with his grand-father's will,) presented a petition to King Charles the Second, setting forth the unjust and illegal encroachments of the Massachusetts colony over his property, and praying that justice might be done him; which petition was referred to Sir Geofry Palmer, then Attorney-General, to consider of his title to the country, who reported that his title was good; and nevertheless, in the year 1675, we find Mr. Mason presenting a second petition, to the same effect as the former, upon which his title was again referred to the consideration of Sir William Jones, and Sir Francis Winnington, the then Attorney and Solicitor-General, who, upon consideration of the several patents under which Mason claimed, reported, that he had a good and legal title to the lands conveyed by them.

In 1679, the Crown took the government of the province of New Hampshire into its own hands; a Commission passed the Great Seal, appointing a President and Council to govern the Province, in which Commission Mr. Mason's title is mentioned in the following words: "And whereas, the inhabitants of the country have long been in possession, and are said to have made considerable improvements on the lands they hold, but without any other title than what hath been derived by the government of Boston, in virtue of their imaginary line, which title, as it has, by the opinion of the Judges here, been alto[illegible]er set aside, so the agents of Boston have

consequently disowned any right, either in the soil or government, from the three miles' line aforesaid; and as it appeared that the ancestors of Mr. Mason obtained grants, from the great Council at Plymouth, for this tract, and were at very great expense upon the same, till molested and finally driven out, which hath occasioned a lasting complaint for justice by the said Mr. Mason, ever since the restoration; however, to prevent, in this case, any unreasonable demands which may be made by Mr. Mason, for the right he alleged to the soil, we have obliged Mr. Mason, to declare under his hand and seal, to demand nothing for the time past, until the 24th of June 1679, nor molest any in their possession for the time to come, but make out titles to them and their heirs forever, provided they would pay unto him by fair agreement, in lieu of all rents, sixpence in the pound, according to the just and true yearly value of all houses built by them, and of all lands, whether gardens or orchards, arable or pasture, which have been improved by them, which he will agree should be bounded out unto every of the said parties concerned, and that the residue might remain to himself, to be disposed of for his best advantage; but if, notwithstanding this overture from Mr. Mason, which seems so fair to us, any of the inhabitants there should refuse to agree with his agents upon these terms, you are empowered to interpose and reconcile all differences, if you can; but if not, you are to send home such cases fairly and impartially stated, together with your opinions, that we may, at our Council Board, with due regard to Mr. Mason's ancient right, and the long possession, improvements or any other title of the inhabitants, determine therein according to equity.

In 1680, Mr. Mason went over to the Province to prosecute his title, and although many of the inhabitants at first appeared willing to submit to it, yet, as the members of the Council were proprietors of the greatest part of the cultivated lands, they made use of all their interest and the influence which their situation and character gave them, to prevent his getting possession; and they so far prevailed, that he was at length obliged to commence suits in the Courts there, against some of the principal proprietors. While these suits were depending, Mr. Mason, in order to strengthen his interest at home, made a surrender to the Crown of all fines and forfeitures in New Hampshire, and of one-fifth of the rents and revenues for the support of government.

In 1781, a commission passed the Great Seal, appointing Edward Cranfield, Esq., Lieutenant-Governor of New Hampshire, in which Robert Mason, styled therein proprietor, and eight others are appointed Councillors; and there is a clause inserted in it, recognizing Mr. Mason's title, in the same words as that inserted in the former commission.

It does not appear, that the authority or influence, which it might be supposed would be derived to Mr. Mason, from this commission, had any effect to reinstate him in possession of his property, the inhabitants still continuing to contest his title, though several judgments were given in his favor in the Courts there, one of which was, upon an appeal, confirmed by His Majesty in Council.

In or about the year 1685, Mr. Mason returned to England, where he died, leaving the Province of New Hampshire to his two sons, John and Robert Mason,

who, in 1690, sold it to Samuel Allen, of London, for two thousand seven hundred pounds, having first sued out a fine and recovery, in Westminster Hall, in order to bar the entail.

The first mention made of Mr. Allen's title after this purchase, is the Charter granted by King William to the Massachusetts Bay, in 1691, where his right is reserved in the following words, viz: "Provided also, that nothing herein contained shall extend or be understood, or taken to impeach or prejudice any right, title, interest or demand, which Samuel Allen, of London, merchant, claiming from and under John Mason, Esq., deceased, or any other person or persons, hath or have, or claimeth to hold and enjoy, of, in, to or out of any part or parts of the premises situate within the limits above-mentioned, but that the said Samuel Allen, and all and every such person and persons, may and shall have, hold and enjoy the same, in such manner, and no other, than as if these presents had not been had or made.

In 1691, Mr. Allen was appointed Lieutenant-Governor of this Province, who brought many actions in the Courts of Justice there, against the inhabitants in possession of the lands he claimed; but a verdict was given against him by the jury in every action.

In 1697, Lord Bellomont was appointed Governor of all New England, by which Mr. Allen's commission, as Governor of New Hampshire, was superseded.

In 1702, Colonel Allen brought an appeal to Her Majesty in Council, from a verdict and judgment given against him in the Superior Court of Judicature, in New Hampshire, the 13th of August 1700, in favor of Richard Waldron, who, at that time, possessed the largest

quantity of land in New Hampshire, which said judgment was, upon a hearing of all parties, affirmed; but, in regard, the judgment was not final in its nature. The order directed, that the defendants should be left at liberty to bring a new action in ejectment, in the Courts in New Hampshire, in order to try his title to the propriety of the lands in question, or certain quit-rents, payable out of the same; and that in case, upon such trial, any doubt in law should arise, the jury be directed to find the matter specially, that is, what title the appellant and defendant do severally make out to the said lands in question, and that the points in law should be reserved to the Court before which the same should be tried, or if, upon such trial, any doubt should arise concerning the evidence given at such trial, such doubts should be specially stated and taken in writing, to the end, that, in case either party should think to appeal to Her Majesty in Council from the judgment of the Court therein, Her Majesty might be more fully informed, in order to a final determination of the said case.

While this appeal was depending before Her Majesty in Council, Mr. Allen presented a petition, praying to be put in possession of the waste and unimproved lands in the said Province; and, on the 28th of January 1702-3, his petition was referred to the Attorney-General for his opinion: *first*, whether Mr. Mason had a right to the waste lands in the Province of New Hampshire; *second*, what lands in that Province were to be reputed waste lands; and *third*, by what methods Her Majesty might put him in possession. Upon the 5th of April, 1703, the Attorney-General reported his opinion, "that Samuel Allen had a good title to the waste lands of the Province of New Hampshire; that all lands lying

uninclosed and unoccupied, were to be reputed waste; and that Mr. Allen might enter into and take possession of the same; and that, if he should be disturbed in the possession thereof, it would be proper for him, (Her Majesty having Courts of Justice within the said Province,) to assert his right, and punish the trespassers by legal proceedings in those Courts; and that it would not be proper for Her Majesty to interpose in this matter, unless the question concerning the right should come before Her Majesty by appeal from the judgments that should be given in the Courts in the said Province, save it might be reasonable, as he conceived, to direct (if Mr. Allen insisted on it,) on the trials, that might be had for settling his right to the said Province, that the matters of fact relating to his, and the title of others claiming the same lands, might be specially found by the juries that should be impannelled in the same trials, that the matters of fact might appear before Her Majesty, if appeals should be made from the judgments that should be given in the said Province."

In consequence of this opinion of the Attorney-General, Colonel Dudley, then Governor of New England, was directed by a letter from the Queen, that in case Mr. Allen should be opposed by the inhabitants, and hindered from entering quietly into possession of the waste lands, or should be disturbed in the possession thereof, whereupon any trial or trials should be brought before Her Majesty's Courts there for settling the title to waste lands, and that on such trial or trials the said Allen did insist that the matters of fact should be specially found by the juries, that he should do all which in him lay that the matters of fact should be specially found accordingly.

On the 20th of February, 1703-4, Colonel Dudley acquainted the Assembly of New Hampshire with the orders he had received relative to Mr. Allen's title; upon which the Assembly addressed him to represent to Her Majesty, that they were sensible of her regard to justice in the late trial between Mr. Allen and Mr. Waldron, which had forever obliged them to a sense of, and resolution in, their duty and obedience to Her Majesty; that they only claimed the property of such land as was contained within the bounds of their towns, which was less than one-third part of the Province, and had been possessed by them and their ancestors for more than sixty years, and that they had no objection to the other two-thirds being adjudged to Mr. Allen.

On the 3d of May 1705, the inhabitants and terre tenants of the Province, at a general meeting held at Portsmouth, came to the following resolutions with respect to Mr. Allen's title.

"That they had not, on behalf of themselves, nor any the inhabitants of this Province, (whom they represented,) any challenge or claim to any part of this Province extra the bounds of the four towns of Portsmouth, Hampton, Dover and Exeter, with the hamlets of Newcastle and Kingston, &c., appertaining, which were all comprehended by a line on the western part of Dover, Exeter and Kingstown, already known and laid out, and should be forthwith revised; but the said Samuel Allen, Esq., his heirs and assigns, might peaceably hold and enjoy the said great waste, containing forty miles in length, and twenty miles in breadth, or thereabouts, at the heads of the towns aforesaid, if so should please Her Majesty; and that the inhabitants of this Province, at all times, should be so far from giving interruption

to the settlement thereof, that they declared on their behalf, and by the power given them, that they desired, by all means, that the waste might be planted and filled with inhabitants, the lands being very capable thereof, to whom they would all give their assistance and encouragement as far as they were able.

"That in case Samuel Allen should, for himself, his heirs, executors, &c., forever quit-claim unto the present inhabitants, their heirs and assigns, forever, of all that tract of land, and every part and parcel thereof, with all privileges &c., situate, lying and being within the several towns in this Province, to the extents of the bounds thereof; and also warrant and defend the same to the inhabitants against all manner of persons whatever, free from mortgage, entailment and all other manner of incumbrances, and that this agreement, and the lands therein contained, should be accepted and confirmed by Her Majesty; then, and in such case, they agreed to allot and lay out unto Samuel Allen, his heirs and assigns, forever, five hundred acres of land out of the townships of Portsmouth and Newcastle, 1500 acres out of the township of Dover, 1500 acres out of the townships of Hampton and Kingstown, and 1500 acres out of the township of Exeter; all which lands should be laid out to him, the said Samuel Allen, out of the commonages of the respective towns, in such place or places (not exceeding three places in a town) as should be most convenient for Mr. Allen, and least detrimental to the inhabitants of the town.

"And further, they agreed to pay to Samuel Allen, his heirs or assigns, two thousand pounds current money of New England, (that is to say,) [illegible] thousand pounds within twelve months after the receipt of Her

Majesty's confirmation of this their agreement, and the other thousand pounds within twelve months after the first payment.

"And further, that all contracts and bargains formerly made between Mr. Mason and Mr. Allen, with any the inhabitants, or other Her Majesty's subjects, which were *bona fide*, for lands or other privileges, in the possession of their tenants, in their own just right, besides the claim of Mr. Mason or Mr. Allen, and no other, should be accounted good and valid by these articles; but, if any, the purchasers, lessees or tenants, should refuse to pay their just part of what money should be agreed to be paid, referring to this affair in equal proportion with the rest of the inhabitants, according to the land they hold, then their share should be abated by Mr. Allen out of the two thousand pounds payable to him by this agreement.

"And further, that upon Mr. Allen's acceptance and underwriting of these articles, they promised to give good personal security for the payments abovesaid.

"And further, that all actions and suits in the law depending, or thereafter to be brought, concerning the premises, should cease and determine, and be void, until Her Majesty's pleasure should be further known therein."

These propositions having been finally settled and agreed to, were ordered to be presented to Mr. Allen for his acceptance; but his death, which happened on the next day, prevented it.

Upon the death of Colonel Allen, his son, Thomas Allen, petitioned the Crown that an appeal brought by his father to the Governor and Council against a judgment given in the inferior Courts in favor of Waldron,

might be revived; which petition having been referred to the Attorney-General for his opinion, whether it might be proper for Her Majesty to grant the prayer thereof, the Attorney-General, on the 23d of March, 1705–6, reported his opinion, that, by the plaintiff's death, the writ of error was abated, and could not be revived.

Upon Mr. Allen's suing for writs of ejectment in his own name, he was cast with costs, whereupon he appealed to Her Majesty in Council; but died before the appeal was determined, having first, by deed of sale dated the 28th of August, 1706, conveyed one-half of his lands to Sir Charles Hobby, of Boston, in New England.

Upon the death of Mr. Allen, the half of New Hampshire which remained unsold, devolved to two infant sons, but it does not appear that any application was ever made since that time by them, or any one in their behalf, or by any claiming under them, to be put in possession; and in the year 1716, Colonel Shute was appointed Governor of New England, with a power, in his commission, of granting lands in New Hampshire: in consequence whereof, several townships were laid out, nor does it appear that any claim of property was set up until the year 1746, when John Tufton, who had taken upon him the name of John Mason, and who is one of the surviving grand-sons of Robert Mason, pretending th the fine and recovery, sued out in Westminster Hall by John and Robert Mason, in 1691, previous to the conveyance by them to Samuel Allen, was illegal, as it ought to have been done in the Courts there, himself sued out a common recovery in the Courts of New Hampshire, in consequence whereof the sheriff put him

in possession, and he sells his right by deeds to sundry persons in the Province, who have taken upon them to grant lands, and lay out townships.

Question.—Whether the uniform silence and discontinuance of all sort of claim to the waste and unimproved lands, within the Province of New Hampshire, for more than forty years successively, during the greater part of which time the Crown has occasionally made several grants of the unimproved lands of the said Province, without exception or complaint from any person or family, does not prescriptively vest the waste lands of the Province in the Crown? And how far can any private claim to these lands, so long deserted, be now revived against such an exercise of power over them in the Crown? If these waste lands are not in the Crown, to whom do they belong? And what will be the regular and best method of bringing this matter to a final legal determination?

It is impossible to give an answer to this *quære* without knowing many circumstances not appearing upon the state of this case.

First, It is asked to whom these lands belong? They were originally granted to Mason; they were afterwards conveyed to Allen. Whether that conveyance be good, depends upon the will of John Mason, not particularly stated; upon the fine and recovery said to have been levied and suffered, not particularly stated; upon the usage or laws in New Hampshire, in relation to barring estates tail, not stated at all; upon the infancy or other disability of the issue in tail; his acquiescence; the acts of limitation in New Hampshire, none of which matters are before us.

Second, It is asked, whether they belong to the

Crown? We suppose, upon this ground, that neither the Masons nor Allens, for forty years past, have done anything till 1746. This depends upon a variety of circumstances: the nature and causes of the acquiescence; the acts done by the Crown in the meantime; the kind of possession taken in 1746; and what has been done since. We can only say, that where persons, under grants from the Crown, have quietly possessed and improved, so great regard is always had to persons who have settled lands in America, that it is hardly possible for a stale title to be so circumstanced as to prevail against them; and here, the length of time during which they have been permitted to improve, is extremely material.

Upon the whole, we cannot advise anything so proper, as that the parties, if any suits are commenced in New Hampshire, should take care to have the evidence so laid before the Court, as to be transmitted over to England, in case of an appeal to the King in Council.

August 7, 1752.

D. RYDER.
W. MURRAY.

(10.) *Mr. West's opinion, how far the King has a right to grant ceded lands.*

Case. By the treaty of Utrecht, the King of France gave up the French part of Newfoundland to Great Britain; but the French inhabitants were allowed to remain there and enjoy their estates and settlements, provided they qualified themselves to be subjects of Great Britain; and those who would not do it, had leave to go elsewhere, and take with them their moveable effects.

But by Her late Majesty's letter, in consideration of the King of France's releasing a number of Protestant slaves out of his gallies, she did permit the French inhabitants at Placentia, in Newfoundland, who were not willing to become her subjects, to sell and dispose of their houses and lands there.

Quære.—Whether the Queen, by her said letter, could dispose of lands granted to the Crown by treaty?

I am of opinion that the Queen could not, by her letter, dispose of lands granted to the Crown by treaty; but if she entered into any regular agreement with the Crown of France for that purpose, she was, by the law of nations, engaged to do everything in her power to enable the French to have the benefit of it; which might be done by her confirming the title to such of her subjects as should pay the French a consideration, in money or otherwise, for their lands or houses, &c.

RICH. WEST.

March 10, 1719–20.

(11.) *The opinion of the Attorney and Solicitor, Yorke and Talbot, whether the King's right to the lands of Pemaquid remain in the Crown.*

To the Right Hon., the Lords Commissioners, for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, referring to us the state of a case hereunto annexed, concerning the right to a tract of land lying between the rivers Kennebeck and St. Croix, and directing us to hear both parties, and report our opinion, in point of law, thereupon, to your Lordships; and also, in obedience to your Lordship's commands, sig-

nified to us by Mr. Popple, referring to us the several annexed petitions of Sir Bibye Lake, Baronet, and others, and of Samuel Waldo, merchant, on behalf of Elisha Cook, Esq., and others, and directing us to report our opinion upon the same to your Lordships; we have considered the said state of a case and petitions, and find that the said state of a case sets forth, that, by the Massachusetts Charter, it is ordained, that the territories and colonies commonly called and known by the name of the Colony of Massachusetts Bay, and the Colony of New Plymouth, the Province of Maine, the territory called Acadia or Nova Scotia, and all that tract of land lying between the said territories of Nova Scotia and the said Province of Maine, be erected, united and incorporated into one real Province, by the name of the Province of the Massachusetts Bay, in New England.

And that their Majesties do, thereby, grant unt the inhabitants of the said Province or Territory of the Massachusetts Bay, and their successors, all that part of New England, in America, lying within the boundaries in the said Charter particularly mentioned; and also, the lands and hereditaments lying and being in the country or territory commonly called Acadia or Nova Scotia; and all those lands and hereditaments lying and extending between the said country or territory of Nova Scotia and the river of Sagadahock or Kennebeck, or any part thereof; and all lands, grounds, places, soils, woods and wood grounds, havens, ports, rivers, waters, and other hereditaments and premises whatsoever, lying within the said boundaries and limits aforesaid, and every part and parcel thereof; and also, all islands and islets lying within ten leagues directly opposite the main land, within the said bounds, and all mines and mine-

rals, as well royal mines of gold and silver as other mines and minerals, whatsoever, in the said lands and premises, or any part thereof, to have and to hold the same with their and every of their appurtenances to the said inhabitants of Massachusetts Bay, and their successors, to their only proper use and behoof, forevermore, be holden of their Majesties, as of their manor of East Greenwich, &c., yielding therefore, yearly, one-fifth part of all gold and silver ore, &c.

That in the clause in the said Charter, directing the choice of the councillors or assistants of the said Province, who are to be twenty-eight in number, it is ordered that eighteen of them, at least, shall be inhabitants or proprietors of lands within the territory formerly called the Colony of the Massachusetts Bay, and four, at least, of the inhabitants or proprietors of lands within the territory formerly called New Plymouth, and three, at the least, of the inhabitants or proprietors of land within the territory formerly called the Province of Maine, and one, at the least, of the inhabitants or proprietors of land within the territory lying between the river of Sagadahock and Nova Scotia.

That there is power given to the Governor and Council to impose taxes, &c., upon the estates and persons of the inhabitants or proprietors of the said Province.

That in the said Charter is the following proviso: provided that it shall and may be lawful for the said Governor and General Assembly, to make or pass any grant of lands lying within the bounds of the colonies, formerly called the colonies of the Massachusetts Bay and New Plymouth, and Province of Maine, in such manner as heretofore they might have done, by virtue of any former Charter or letters patent, which grants of lands

within the bounds aforesaid, we do hereby will and ordain to be, and continue forever, in full force and effect, without our further approbation and consent; and so as, nevertheless, and it is our royal will and pleasure, that no grant or grants of any lands lying or extending from the river of Sagadahock to the Gulf of St. Lawrence and Canada Rivers, and to the main sea northward and eastward, to be made or passed by the Governor and General Assembly of our said Province, be of any force, validity or effect, until we, our heirs and successors, shall have signified our or their approbation of the same.

That within the tract of land lying between St. Croix and Sagadahock, is a place called Pemaquid, where there was a fort built by James, then Duke of York, to whom that tract was granted by King Charles the Second, in 1664, in order to preserve it from the Indians; but the Indians afterwards, assisted by the French, made an incursion into the said tract of land, and not only demolished the said fort, but also, destroyed many families, then in a flourishing condition, which had been settled there under the said grant to the Duke of York.

That soon after the said Charter was granted, Sir William Phipps was appointed Governor of the Massachusetts, in whose time, the said fort of Pemaquid was rebuilt, which was done for a show of their government over that tract of country, but no settlement of families were made therein, and the place being in a naked and defenceless condition, it was, in 1696, taken by the French, who demolished the said fort at Pemaquid, and the French King put that part of the country under the

government of his Governor of Nova Scotia, where his next garrison then was, and it remained in possession of the French, after the peace of Reswick.

That the French, as a testimony of their right to, and possession of, the said tract, built a church at the river Kennebeck or Sagadahock.

That Joseph Dudley Esq., (then Governor of the Massachusetts,) several times, by orders from Her then Majesty, pressed the House of Representatives to rebuild the fort and restore the fortifications at Pemaquid; upon which the House of Representatives, in their address to the Queen, expressed themselves as follows:

"As to the building a fort at Pemaquid, the expenses already made on our fortresses, garrisons, marches and guards by sea, amounting to more than eighty thousand pounds, a great part whereof is in arrear and unpaid, besides the daily growing charge for our necessary defence, and the prosecution of the war, is become almost insupportable, and has brought us under very distressing circumstances; and were the building a fort at Pemaquid superadded thereto, it would render the charge far beyond our ability, and, we humbly conceive, would be no security to our frontiers, or bridle to the Indians, the situation thereof being so much out of their ordinary road, and upwards of one hundred miles distant from any part of this Province, at present inhabited by the English, and of little or no advantage to this Province; although the expense in building and supporting the late fort at Pemaquid, cost not less than twenty thousand pounds, which was not lost by any neglect of the government, it being fully supplied for the defence and sup-

port thereof, but by the cowardice or treachery of the then commanding officer upon the place, who received his trial, but was acquitted."

That the said tract of land continued in the possession of the French to the year 1710, when it was retaken by General Nicholson, with some troops sent from hence to take Nova Scotia, which, together with the said tract, was then surrendered to the said General by the French Governor, and which was afterwards yielded to the Crown of Great Britain, by the twelfth article of the treaty of Utrecht.

That Colonel Shute, Governor of the Massachusetts, by His late Majesty's orders, recommended to the House of Representatives the refitting the fort at Pemaquid, or the building some fort near that place, that might be a greater security to their frontiers, upon which the said House of Representatives sent the following message to the Governor:

"That, upon a further consideration of His Excellency's speech to the Court, at the beginning of last sessions, the House are humbly of opinion, that, considering the low circumstances of this Pro ..ce, and the heavy debts that are upon it, that His Majesty's subjects here are not able to come into so great a charge as the rebuilding the fort at Pemaquid would be, and that, in case of a rupture, a fortification there would be no great security to the lives and estate of His Majesty's subjects here, as our past experience has abundantly convinced us, by reason that Pemaquid is at so great a distance from our English settlements; but that, at all times, what shall be necessary for the defence and preservation of the governments here, we, as good and loyal subjects, shall readily and cheerfully comply with.

That this tract of land, which is reputed part of Nova Scotia, did thus lie waste and uninhabited, though capable of very great improvements, and by the situation thereof, the lands in those parts, with respect to their produce, harbors and fisheries, are of more value than any others in that part of America, and would produce considerable quit-rents, if the right thereto is in the Crown, so that the title to the government, as well as to the property in the soil, is of very great consequence; and therefore, upon a representation to His Majesty in Council, some Protestants from Ireland and from the Palatinate, were desirous to settle upon the said tract of land, lying between the rivers St. Croix and Kennebeck (Sagadahock), extending about one hundred and eighty miles in length on the sea-coast, His Majesty directed that his surveyor of the lands of Nova Scotia should assign them lands, according to their desire, which he accordingly did about a year ago, and several families are now settled thereon, and improving the same, which were afterwards to be ratified to them.

That the inhabitants of Massachusetts Bay, who, till this time, always neglected the said tract of land, as very inconsiderable, and not worth their notice, claim not only a right to the government, but also, to the lands in the said tract, and the government there threatens to drive the families (now settled there,) immediately out of the same.

That the inhabitants of the Massachusetts do not now pretend any right to that part called Nova Scotia, which is likewise included in their Charter, and the said tract of land is reputed part of Nova Scotia, though it is differently described in the Charter.

Upon this state of the case, the questions proposed to

us were: *First*, Whether the inhabitants of the Massachusetts Bay (if they ever had any right to the government of the said tract of land lying between St. Croix and Kennebeck, or Sagadahock,) have not, by their neglect and even refusal to defend, take care of and improve the same, forfeited their said right to the government, and what right they had under the Charter, and now have to the lands?

Second, Whether, by the said tract being conquered by the French, and afterwards reconquered by General Nicholson in the late Queen's time, and yielded up by France to Great Britain by the treaty of Utrecht, that part of the Charter relating thereto, became vacated; and whether, the government of that tract and the lands thereof, are not absolutely revested in the Crown; and whether, the Crown has not, thereby, a sufficient power to appoint governments, and assign lands to such families as shall be desirous to settle there?

The said petition of Sir Bibye Lake and others, sets forth, that the said Captain Thomas Lake, the petitioner's late grand-father, and the said Major Thomas Clark, joined in making several purchases of the Indian Sagamores or Chiefs, and others in the eastern parts of Massachusetts Bay, in New England, of and in all those lands lying on the river Kennebeck, extending from the northernmost part of Cape Sacantry, on both sides of the said river Kennebeck, reaching ten miles into the woods on each side of the said river, east and west, and so extending southward into a certain place, called by the name of a Swome, all which is about four leagues in length, south and north, together with all ponds, creeks, cones, woods, underwoods, mines, minerals, privileges and appurtenances; and all those lands lying on

both sides the said river Kennebeck, namely, from the lower end of a certain place called Neaguamkot, which is a little below some islands in the said river Kennebeck, and so going up the river four miles above the falls of Tokonock, and reaching ten miles into the woods on both sides of the said river Kennebeck, with all woods, underwoods, mines, minerals and privileges thereunto belonging; and also, free passage for vessels up and down the said river Kennebeck, and all that tract of land lying near or about Waksrong, with all rights and privileges thereunto belonging; and all that tract of land lying near or about Agnascorongau, adjoining to Kennebeck River on the north-west, and so south-west to the southernmost island of Neguomkay, and six miles from Toconock falls north-eastward, and for fifteen miles all along from the said river Kennebeck into the main land south-eastward, together with all rights and privileges, as well by water as by land, thereto belonging; and all that island, lying on the east side of the said river Kennebeck, called Arrowsick or Richard's Island, and all houses, woods, underwoods, ponds, waters, swamps, mines and profits thereunto belonging, and all that place or seat of ground, called Negwassey, lying between the bounds of Sagadahock River on the western side, and Sheepscott River on the eastern side, one great pond on the north side, and Negwassey River on the south-west side, with Wigwam or Indian House; and all that other house wherein James Cole dwelt, with all out-houses and inclosed grounds, and all waste ground bounded as followeth, viz: Sagadahock River on the west or westerly, and so to Merry-Meeting Creek, and from thence to the northward eight miles up into the country, and from thence and easterly to Sheepscott River,

and from thence to a place called Tepenegine, southerly, and from thence all along Monswaggen Bay, and so along to Russeck, and from Russeck to Tirseck, and from thence to Merry-Meeting, all along Sagadahock River as aforesaid, together with all rivers, ponds, brooks, coves, inlets, meadows, underwoods, mines and all other privileges, advantages and profits, as by authentic copies of the original deeds of purchase, acknowledged by the said Indian Sagamores, and entered and recorded at Boston, in New England aforesaid (according to the laws of the said Province,) then in the petitioner's custody, and ready to be produced, might appear.

That the said Thomas Lake and Thomas Clark, being equally interested in and entitled as tenants in common to the said land and premises, did, in or about the year 1650, and from and after that time, erect and build several houses and out-houses, and several saw-mills on the said Arrowsick Island, Negwassey, and other places on the main land between the said Kennebeck River and the river Penobscott, and cleared and made new inclosures, and brought and encouraged many families to come and inhabit the same, and had several large farms, whereon were very great stocks of cattle, and built and made several grist-mills, bake-houses, smiths' shops, coopers' shops, and other conveniences for handicraft trades, and caused to be built several ships, boats and vessels, which they fitted out and victualled, and loaded them with the produce of the said premises, for Boston and other parts, wherein the said Thomas Lake and Thomas Clark expended between them to the amount of twenty thousand pounds and upwards.

That in the years 1673, 1674 and 1675, the General

Court, assembled at Boston, for government of the Province of the Massachusetts Bay, in New England, did order that the said eastern parts within their jurisdiction, whereof the aforesaid lands and premises are part, should be called Devonshire, and by reason of the great distance of those parts from Boston, aforesaid, did empower the Governor of the said Province, with four more of the assistants of the said General Court, to appoint proper and fit persons to be Commissioners to hold a County Court and Courts, for ending of small causes; and that such Commissioners should have magistratical power to punish criminal offences, to marry and to settle the militia at Pemaquid, Cape Nawaggon, Kennebeck, Negwassey, Sagadahock, Damarillis Cove, Monhegin, and other places within the said county of Devon, and to administer oaths to constables and other officers, and to exercise all necessary jurisdiction, both military and civil, for the better government and protection of the said county of Devon, within the line of their patent; and that the said Thomas Lake and Thomas Clark were appointed Commissioners, with others, for the purposes aforesaid, as by authentic copies of the orders of the said General Court, then in the petitioner's custody, ready to be produced, might appear.

That in the latter end of the year 1675, or in the beginning of the year 1676, a war broke out with the Indians, who invaded the said county of Devon, and killed the said Thomas Lake, in defence of the said settlements; and afterwards burnt, ruined or destroyed all, or the greatest part of the said settlements, and killed or drove away their tenants and cattle therefrom.

That the said Major Thomas Clark, escaping the Indians, survived the said war, and afterwards returned to

said lands, and with the concurrence and assistance of the widow of the said Thomas Lake, the petitioner's late grand-mother, endeavored, with a very great expense, to resettle the premises, and to repair and rebuild the several settlements ruined or destroyed by the Indians as aforesaid, and proceeded therein until such time as a new war broke out with the Indians, who again invaded, burnt, ruined, or destroyed all such, their new works and settlements, and killed or drove away their tenants and cattle from off the premises, after which no further attempt could be made to resettle the same, by reason of the frequent incursions of the Indians, and of the continued war, or hostilities, between them and the English in those parts, until the peace was concluded at Utrecht: upon which, hostilities ceasing, the petitioner, in conjunction with the said Josiah Walcot, and Colonel Hutchinson, did, after the said peace of Utrecht, in the year 1714, send over from hence Mr. John Watts, a very careful and understanding person, to Arrowsick Island, and the other premises, in order to resettle the same, and did empower him to settle there one hundred families; and the said Mr. Watts did, accordingly, go over for that purpose with his family, and the petitioner did advance to the said Mr. Watts the sum of two thousand pounds, and upwards, towards his proportion of the charge to be expended by him, the said Mr. Watts, in making such intended settlements, exclusive of what the said Colonel Hutchinson and Mr. Walcot did advance for that purpose; and the said Mr. Watts was very industrious in making several settlements and buildings, and making several mills, houses, and other improvements, for convenience and defence against insults from the Indians, and had settled there upward of twenty families, but

died before he had completed all the intended settlements: upon whose death Mr. Penhallow, marrying his widow, lived there, and looked after and took care of the said settlements, in the best manner he could, till a new war broke out with the Indians, in or about the year 1722 or 1723, when the Indians again invaded those parts, and came down in a great body, and burnt, ruined, or destroyed all such mills, and settlements, as the said Mr. Watts had made, except a fortified house, which the said Mr. Watts had caused to be built on the Island of Arrowsick, for protection against them, which, together with some other houses which were under the defence thereof, the said Indians several times attacked, and attempted also to burn or destroy, but were repulsed and forced to retire from the same, and which houses are now standing; but the Indians killed or drove away their cattle from thence, and also the tenants and cattle, from their other settlements.

That since this last war ended, the petitioner, with the said Colonel Hutchinson and Mr. Walcot, were endeavoring to repair and resettle the premises, and to encourage several families to go and settle thereon; but were prevented by Colonel Dunbar, Surveyor-General of His Majesty's woods, in America, who pretended some instructions, or a commission from His Majesty, to make settlements within the limits of their lands, and in other places in the eastern parts, in the Province of Massachusetts, and to erect the same into a separate government, from that Province, although the same is included in the Charter granted to the subjects of the said Province; and notwithstanding the said Colonel Dunbar hath, since his arrival there, been waited upon and made fully acquainted, by the said Colonel Hutchinson, with

the matters aforesaid, and with his, Mr. Walcot's and the petitioner's title to their said lands and premises, yet he insists, that he shall be obliged to enter upon and make settlements therein, unless His Majesty shall be graciously pleased to forbid or restrain him from so doing.

That Dunbar's pretensions have not only discouraged all persons from going to settle the premises, but have terrified such tenants as the petitioner and the said Colonel Hutchinson and Mr. Walcot have there, from enlarging or improving their settlements; all which the petitioner apprehended to be his duty humbly to represent to His Majesty.

That the petitioner, the said Colonel Hutchinson and Mr. Walcot, being entitled to the said premises, by purchase from the Indian Sagamores or Sachems, allowed of and approved by the General Court, for the government of the Massachusetts Province, and confirmed by the several Charters granted to the subjects of the said Province, and they and their ancestors having endeavored, all that in them lay, to settle the premises at such great pains and expense, and having, from time to time, sustained such great losses therein, as aforesaid, and being resolved to complete the same with all possible speed, which they humbly apprehend will be of great advantage to the trade of this kingdom; the petitioner, therefore, in behalf of himself, and of the said Colonel Hutchinson and Mr. Walcot, most humbly prayed His Majesty to send the necessary orders or instructions to the said Colonel Dunbar, not to intermeddle or molest the petitioner and the said Colonel Hutchinson and Mr. Walcot, in the said premises, to which they are entitled as aforesaid; and that the said Colonel Dunbar do not

obstruct or disturb them, their tenants and agents, in carrying on their settlements, on any pretense whatsoever, and that the petitioner and the said Colonel Hutchinson and Mr. Walcot, may be quieted in the possession thereof, under the government of His Majesty's Province of the Massachusetts, and may be at liberty to proceed in settling the premises, without molestation.

The said petition of Samuel Waldo, on behalf of Elisha Cook, Esq., and others, sets forth, that the Council established at Plymouth, for the planting, ruling, ordering and governing New England, in America, by deed-poll, under their common seal, and signed by Robert, then Earl of Warwick, did grant, bargain, sell, enfeoff, allot, assign and confirm unto John Beauchamp and Thomas Leveret, their heirs, associates, and assigns, all and singular, those lands, tenements, and hereditaments whatsoever, with the appurtenances thereof, in New England, aforesaid, which are situate, lying and being within or between a place there, commonly called or known by the name of Muscongus, towards the south or south-west, and a straight line extending from thence directly ten leagues up into the main land and continent, towards the great sea, commonly called the South Sea, and the utmost limits of the space to ten leagues on the north-north-east of a river in New England, aforesaid, commonly called Penobscott, towards the north and north-east and the great sea, commonly called the Western Ocean, towards the East, and a straight and a direct line extending from the most western part and point of the said straight line, which extends from Muscongus aforesaid, towards the South Sea, to the uttermost northern limits of the said ten leagues on the north side of the

said river of Penobscott towards the west, and all lands, grounds, woods, soils, rivers, waters, fishings, hereditaments, profits, commodities, privileges, franchises, and emoluments, whatsoever, situate, lying and being, arising, happening or renewing within the limits and bounds aforesaid, or any of them, together with all Islands that lie and be within the space of three miles of the said lands and premises, or any of them, to have and to hold, all and singular, the said lands, tenements, hereditaments and premises, whatsoever, with the appurtenances, and every part and parcel thereof, unto the said John Beauchamp, and Thomas Leveret, their heirs, associates and assigns, forever, to be holden of the then King's most excellent Majesty, his heirs and successors, as of his manor of East Greenwich, by fealty only, and not in capite, nor by knight's service, yielding and paying unto his said Majesty, his heirs and successors, the fifth part of all such ore of gold and silver, as should be gotten and obtained in or upon the premises.

That, under this grant, the said John Beauchamp and Thomas Leveret entered on, and were actually possessed in their demesne, as of fee of, and in, the said tract of land thereby conveyed to them, and made very considerable settlements and improvements thereon; but on the breaking out of the great war with the Indians, in 1675, their said settlements, together with all that part of the country, were destroyed, and which war held till the time of the treaty of Utrecht, saving only, that there might be, during that time, some intermissions therein, but as the same were very short and precarious, there was no possibility of attempting any settlements, during such intervals.

That the said Thomas Leveret survived the said

John Beauchamp, by virtue whereof he became solely entitled to the benefit of the said grant; and on his decease, all the said lands and premises became vested in the said John Leveret, son of the said Thomas Leveret, the surviving grantee, to whom the petitioner, Mary Rogers, is heir at law.

That Sir William Phipps, then Governor of New England, not knowing, as it is presumed, of the said John Leveret's right to the said land, treated and agreed with Madakowando, who was Sagamore, or Chief Sachem, r King, of the Penobscott Indians, for the purchase thereof, and accordingly the said Madakowando, for a valuable consideration, by his deed-poll, dated the 9th of May, 1691, granted, released, confirmed, enfeoffed, bargained and sold the said lands and premises, to the said Sir William Phipps in fee, which deed was afterwards, viz: the 10th of May, 1694, personally acknowledged by the said Madakowando, before two of the members of his then Majesty's Council of Massachusetts Province, and has been since acknowledged and allowed of by the Chief Sachems of the Indians, and their tribes, and particularly was shown to, and acknowledged, and allowed of, by them, so lately as the 4th day of August, 1726.

That after the peace of Utrecht, which was also attended by a peace with the eastern Indians of New England, the said John Leveret formed to himself an intention of resettling the said land, with all possible vigor and dispatch; but, in regard, all the old settlements were demolished; apprehending the undertaking too extensive for a single person, he invited and agreed with several gentlemen of considerable substance and fortune, to associate and join with him therein; and having brought his designs to a degree of maturity, in the year 1719,

that nothing might lie in his way, and to remove all possible obstructions, and, as an additional strength to, and confirmation of his title, and thereby the more to encourage his associates to carry on the said settlements with spirit and vigor, the said John Leveret treated and agreed with Spencer Phipps, Esq., adopted son and heir, and also devisee of the said Sir Wm. Phipps, to purchase out his interest in the said premises; and, accordingly, the said Spencer Phipps, by his deed-poll, endorsed on the said Indian purchase-deed, and bearing date the 13th day of August, 1719, for a full and valuable consideration, released, assigned, conveyed and confirmed to the said John Leveret, as well the said deed from the said Madakowando to the said Sir Wm. Phipps, as also all the tracts and parcels of land thereby granted and conveyed to the said Sir Wm. Phipps, and which are mentioned in the said deed, to be then in the seisin and possession of the said Leveret, his heirs and assigns, to his and their only proper use and benefit, forever.

That the said John Leveret having thus a secure title in him to the said tract of land, both by grant from the Crown, and by purchase from the Indians, which is always held inviolable in these parts, and having associated several gentlemen of considerable fortune to join with him in settling and improving these lands, for the better effecting the same, the said John Leveret, by deed of association, bearing date the 14th day of August 1719, admitted and joined the petitioners, Elisha Cook, Nathaniel Hubbard, Hannah Davis, Rebecca Lloyd, Sarah Byfield, John Radford and Spencer Phipps, as associates, to and with himself, in the said lands and premises, conveying to each of them such parts and shares of the said land, as in the said deed is particularly men-

tioned; and by another deed of association, bearing date the 15th day of the same month of August, between the said John Leveret and the last named petitioners of the one part, and the petitioners, Jahaleel Brenton, John Clark, Samuel Brown, Thos. Fitch, whose right is vested in the petitioners, John Fitch, Adam Winthrop, Samuel Thaxton, Oliver Noise, Stephen Minott, Anthony Stoddard, Thomas Westbrook, Thomas Smith, John Smith, Joseph Appleton, whose right is now vested in the petitioners, Nathaniel Appleton, Thomas Fairweather, Henry Franklyn, Gilbert Bant, Benjamin Bronsdon, William Clarke, John Oulton, Jonathan Waldo, Cornelius Waldo and John Jeffries, of the other part, reciting the several deeds aforesaid, the said last named petitioners and those under whom they claim, as aforesaid, are admitted and joined together, as associates in the said land and premises, and such parts thereof allotted to them, as in the said last deed is particularly mentioned, the whole to be divided into thirty equal parts, to be holden by all the said petitioners, and those under whom they claim, as aforesaid, their respective heirs and assigns forever, as tenants in common, and to be no survivorship, with proper covenants, each obliging the other to procure people to plant, settle and inhabit two towns, of eighty families each, in a christian manner, in and upon the said tract of land, under such limitations, conditions and reservations, as in the said deed is expressed; and to erect two saw-mills on the said land; and for the better ordering and regulating the said designed settlements, it was covenanted and agreed that the extent of the said two towns should be described, and that the same should be laid out in a regular and defensible manner, upon St. George's River, and that proper lots in

each town should be set apart for a minister and a school unalie able, and that lands should also be set apart, to be bestowed on the settlers in the said townships, with covenants for the association to do the utmost for the completing and perfecting the said designed settlements.

That the rest of the petitioners have since purchased several parts of shares from the other petitioners in the said lands.

That, hereupon, the petitioners and those under whom they claim immediately, began on making the said settlements, and soon after they agreed to have as much land broke up and cultivated as would accommodate a sufficient number of families for two more towns, to consist each of eighty families at least, and the houses for their reception to be made comfortable; and in order to prosecute and effectually bring forward the said intended settlements, they built and finished two strong, large block-houses, with a covered way from them to the water side, to secure the men from the incursions and injuries of the Indians, who daily resorted there in great numbers, and ofttimes threatened those employed in building and clearing the land, who used several stratagems to get them from off those lands; and the petitioners also built a double saw-mill to facilitate the settlements, and bought a sloop, and hired men to transport people and their effects, besides several other sloops employed by them in the said undertaking; and had, for about twelve months, a captain and 20 soldiers, whom they paid and subsisted in the said block-houses, and who were provided with great and small artillery to defend themselves and the workmen from the attacks of the French Indians, at the sole charge of the said association.

That by this means, notwithstanding the great many disturbances they received from the French Indians, the petitioners very vigorously pushed forward in settling and bringing those lands into a capacity of receiving and securing a number of inhabitants, and actually built and erected several houses thereon.

That in June, 1721, the French Indians, to the number of 200, surprised, took and burnt, one of the petitioners' sloops, and killed one of their men, and took six captive, and then immediately made up, in a body, to the block-houses, and the next day attacked them with fire-arms for several hours, and used several devices to have burnt the block-houses, but were defeated by the courage of the men employed by the petitioners; but in this attack the petitioners were great sufferers, the Indians having killed one and taken six prisoners, burnt their saw-mill, a large sloop and sundry houses, and killed many of their cattle; but notwithstanding this great destruction made on the petitioners, they still kept and maintained the two block-houses with men and warlike stores and provisions, for several months afterwards, although the government of the Massachusetts had proclaimed war with these Indians, and the other eastern tribes.

That the petitioners, being by this war incapacitated from pursuing the settlements they had so successfully begun, were obliged to desist therefrom; but they yet held the two block-houses, and defended the same against a siege laid to it by the Indians, for twelve days together, and killed twenty of the enemy; and apprehending the same might be of great service to the Massachusetts government, in carrying on the war, they made a tender of them to the government there, during the war,

and until the petitioners should have occasion to use them for the purposes at first designated; which offer the government accepted, and to whom they proved of great service in the war, and were the sole means of keeping that part of the country from falling into the hands of the Indians, and have ever since continued under the protection of the government; and since the war ended, a truck-house is erected in the block-houses, which are used as magazines, or store-houses, for Indian goods.

That, on the ending of that war, the petitioners again resolved to continue and go on with their said settlements, and for that purpose they applied for and obtained a letter from Samuel Shute, Esq., then Governor of the Massachusetts Bay, to the Chief of the said Penobscot Indians, to facilitate the petitioners' going on with, and finishing their said settlements. But soon afterwards another war broke out with those Indians, which then prevented the petitioners' proceeding further in their intended settlements; but a peace being again concluded with them, some short time before Mr. Burnet's coming to that government, the petitioners, being still intent and resolved on bringing forward and finishing the said settlements, obtained a like letter from Governor Burnet, as they had before done from Governor Shute, and were going on to settle and improve those lands with all possible vigor and despatch, and had actually got a minister and 120 families ready to go and settle in one of the said intended towns. But to their great surprise, disappointment and loss, the petitioners have met with an interruption herein, from David Dunbar, Esq., Surveyor-General of His Majesty's woods in America; who, being waited on by a number of the petitioners, hath for-

bid the petitioners from going on with the said settlements, and informed the petitioners, that he could not permit their going on with their settlements, on any other terms, but their taking grants from him, in the same manner as if they had not already any title thereto; upon which the petitioners informed Mr. Dunbar, that they thought it their duty to lay before His Majesty, the matters aforesaid, and Mr. Dunbar promised the petitioners not to intermeddle with the said lands, till His Majesty's pleasure should be known.

Therefore, and as the petitioners have so clear a title to their lands, both by grant from the Crown and purchase from the natives, and have had the possession thereof for so many years, and been at a very great expense in erecting the block-houses and several other buildings thereon, and defending the same in the manner before stated, and their endeavors and attempts to improve and settle the same, which had been long since completed by the petitioners, but from the unavoidable interruptions given them by the wars; but have always, by means of their block-houses, kept the possession thereof, and thereby guarded and protected all that part of the country; and as the petitioners are determined to complete the said settlement with all possible despatch, which being of great advantage to the Province of the Massachusetts, and His Majesty's interest there; the petitioners, in consideration of the premises, most humbly prayed His Majesty, that His Majesty would be pleased to send the necessary order or instructions to the said David Dunbar, not to intermeddle with the said tract of land to which the petitioners are so entitled, as aforesaid; and that he do not interrupt, obstruct or disturb the petitioners, in carrying on their settlements

there, on any pretense whatsoever; that so the petitioners may be quieted in the enjoyment thereof, and carry on the settlements intended by them, without molestation.

And we certify your Lordships, that we have been attended by Mr. Paxton, Solicitor for the affairs of His Majesty's Treasury, and by the respective agents of the Province of the Massachusetts Bay, in New England, and of the petitioners, and have heard counsel on behalf of the Crown, and of all the said parties; at which hearing, was laid before us, a copy of the Charter granted by their late Majesties, King William and Queen Mary, on the 7th day of October, in the third year of their reign, to the inhabitants of the said Province of the Massachusetts Bay, and the several affidavits hereunto annexed, together with copies of divers conveyances, of particular parcels of land lying within the tract in question, which were certified under the seal of the said Province.

Upon considering the said case and petitions, and the evidence laid before us, and what was alleged on all sides, it appears to us, that all the said tract of lands, lying between the rivers of Kennebeck and St. Croix, is (amongst other things,) granted, by the said Charter, to the inhabitants of the said Province, and that, thereby, power is given to the Governor and General Assembly of the said province, to make grants of land within the said limits, subject to a proviso, that no such grants should be of any force, until their said late Majesties, their heirs or succcessors, should have signified their approbation of the same.

It appears also, by the said Charter, that the right of

government, granted to the said Province, extends over this tract of land.

It doth not appear to us, that the inhabitants of the said Province have been guilty of any neglect or refusal to defend this part of the country, as can create a forfeiture of that subordinate right of government of the same, or of such property in the soil as was granted to them by the said Charter; it being sworn by several of the said affidavits, that a fort was erected there, and for some time defended at the charge of the Province, and that magistrates and Courts of Justice have been appointed within this district, and that one of the Counsel of the Province hath always been chosen of this division; and though it is certain, that this part of the Province hath not been improved equally with other parts thereof, yet, considering the vast extent of country granted by this Charter, and the great improvements made in several parts of it, we conceive that will not create a forfeiture, because, in such cases, it is not to be expected, that the whole should be cultivated and improved to the same advantage; and whether there hath been such a neglect, or non-user of any part, as may amount to a forfeiture, must be judged of, not upon the particular circumstances attending that part only, but upon the circumstances of the whole.

And if the Province had incurred any forfeiture in the present case, no advantage could be taken thereof, but by a legal proceeding, by *scire facias*, to repeal their Charter, or by inquisition, finding such forfeiture.

As to the question, stated in the case, upon the effect of the conquest of this tract of country by the French, and the reconquest thereof by General Nicholson, we

conceive that the said tract, not having been yielded by the Crown of England to France, by any treaty, the conquest thereof by the French, created, according to the law of nations, only a suspension of the property of the former owners, and not an extinguishment of it; and that, upon the reconquest by General Nicholson, all the ancient right, both of the Province and of private persons, subjects of the Crown of Great Britain, did revive, and were restored *jure postliminii.* This rule holds the more strongly in the present case, in regard, it appears by the affidavits, that the Province joined their forces to those which came thither, under the command of General Nicholson in this service.

For these reasons, we are of opinion, that the said Charter still remains in force, and that the Crown hath not power to appoint a particular Governor over this part of the Province, or to assign lands to persons desirous to settle there; nor can the Province grant those lands to private proprietors, without the approbation of the Crown, according to the Charter.

As to the case of the petitioners, in the two petitions referred to us, who insist [illegible] particular titles in themselves, to certain parcels [illegible] lying within the district in question: we have examined into their claims, and find, by the above-mentioned copies of deeds and writings produced by them, that several of the petitioners and those under whom they claim, have had conveyances made to them, of several of the said parcels of land, some from the Council of Plymouth, which was constituted by Charter in the reign of King James the First, and whose grants were confirmed by the Charter of King William and Queen Mary, and others from Indians, pretending to be the owners thereof, un-

der which large sums of money appear, by the said affidavits, to have been laid out in endeavoring to settle and improve the lands therein comprised, several of which sums were expended not many years ago; particularly a sum of £2,000 by Sir Bibye Lake, in the year 1714, and other sums of money by others of the petitioners, in the years 1719 and 1720. And though these settlements and improvements have been in great measure interrupted and defeated by frequent wars and incursions of the Indians, yet several of the petitioners, or their tenants, appear to be still in the possession of some parts of the said tract of land.

Some objections were made before us, to the nature of the grants and conveyances under which the petitioners claimed, and the manner of deducing down their titles; but we conceive, that in questions of this kind, concerning rights to lands in the West Indies, and upon enquiries of this nature, the same regularity and exactness is not to be expected as in private suits concerning titles to lands in England, but that in these cases, the principal regard ought to be had to the possession and the expenses the parties have been at, in endeavoring to settle and cultivate such lands.

Therefore, upon the whole matter, we are of opinion, that the petitioners, their tenants or agents, ought not to be disturbed in their possession, or interrupted in carrying on their settlements in the lands granted to them, within the district in question.

P. YORKE.

August 11, 1731. C. TALBOT.

(12.) *Of the King's right to the woods in the Province of Maine, by Mr. West.*

To the Right Hon., the Lords Commissioners, for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered of the several papers relating to the memorial of John Bridger, Esq., Surveyor-General of His Majesty's woods in America, and I do find that the title which Mr. Elisha Cook doth, by his memorial, claim to be in the Province of Massachusetts Bay, in opposition to the right of His Majesty, to all trees fit for masts, of the diameter of twenty-four inches and upwards at twelve inches from the ground, growing within the Province of Maine, in America, is founded upon a supposed purchase of the said Province of Maine, by the Province of the Massachusetts Bay, of and from the assignees of Sir Ferdinando Gorges, the person to whom the said Province was originally granted from the Crown.

I must beg leave to observe to your Lordships, that King Charles the First did incorporate the assignees of the patent, which King James the First did, in the eighteenth year of his reign, grant to the Council established at Plymouth, in the county of Devon, by the name of the Governor and Company of the Massachusetts Bay, in New England, by which Charter the said King did grant unto the said corporation, power, to have, take, possess, acquire and purchase any lands, tenements or hereditaments, or any goods or chattels, and the same to lease, grant, demise, alien, bargain, sell and dispose of, as other our liege people of this our realm of England,

or other corporation or body politic of the same, may lawfully do.

In the fifteenth year of King Charles the First, the Province of Maine was granted to Sir Ferdinando Gorges, his heirs and assigns, which Province did descend unto Ferdinando Gorges, son and heir of John Gorges, who was son and heir of the said Sir Ferdinando Gorges, which Ferdinando Gorges did, in the year 1677, in consideration of the sum of one thousand [illegible] hundred and fifty pounds, give and grant all his right and title in and to the said Province, unto John Usher, of Boston, merchant, his heirs and assigns; but whether it was by way of absolute sale, or way of mortgage, doth not appear; and the said John Usher did, afterwards, in the year 1678, convey the same unto the said corporation, as appears by the printed journal of the House of Representatives of that Province which was sent to me by Mr. Dummer, their agent. It may, my Lords, be made a question in law, whether that corporation, which was created by King Charles the First, could legally purchase the said Province of Maine, inasmuch as the clause of license does go no further than that they might purchase lands, &c., as any other corporation or body politic in England might lawfully do; and take it to be clear law, that no corporation whatsoever, in England, can purchase any lands which shall inure to themselves, unless an express license for that purpose be inserted in their Charter of incorporation, or otherwise. Your Lordships will be pleased to observe, that this corporation is, by the Charter, only subjected to the same laws as the corporations in England are; and that there is no license to purchase lands granted to them by express words. I need not observe to your

Lordships, that nothing but express words is, in law, sufficient to take away the King's prerogative; but, indeed, I should not have made use of any argument of this nature, did I not think the maintaining the royal prerogative, in relation to the naval stores in America, of the utmost consequence to the kingdom; and that, therefore, any advantage in point of law, ought to be taken, which does not injure any private persons.

But, admitting that corporation was fully enabled to purchase lands, yet that corporation is now extinguished, for the patent 4° Caroli primi, was, in the year 1684, reversed in Chancery, by a judgment upon a *scire facias*, and consequently the Province, which was granted to that corporation, and all lands purchased by that corporation, were revested in the Crown; and, therefore, the inhabitants of New England can be no otherwise entitled unto the Province of Maine, than by some new title which must have accrued unto them subsequent to their incorporation by King William, which it is impossible ever should have been, since there is no license granted unto them to purchase lands in or by their last Charter. Their last Charter was granted by the late King William, in the third year of his reign, in which Charter, it is observable, that there is not a variation, in the name of the incorporation, but in the thing itself. And so far is the old corporation from being revived, that, by this Charter, they are not so much as erected into a corporation or body politic, so as to be able to sue or be sued, &c.; but the very terms of the Charter are, that the King does erect and incorporate the several countries mentioned in the patent, into one real province, by the name of our Province of the Massachusetts Bay, in New England. It is plain, to demonstration, that King William

did, at the time of granting this patent, consider all the countries therein named, and particlarly the Province of Maine, as vested in himself, in the right of his Crown, and, therefore, he does unite and incorporate all those countries, which were before several and distinct, into one real Province, and does then grant all the lands included in that Province, unto the inhabitants of the Province of the Massachusetts Bay, in which denomination and grant, the inhabitants of the Province of Maine, &c., are as much included and concerned as grantees, as the inhabitants of that part of the country, which was originally and singly known by the name of the Massachusetts Bay; all these Provinces, therefore, are now to be considered as one; neither is it possible, that one part of the Province should be the private property of another.

It is true, that the King does grant a power unto the General Assembly of the said Province, to make grants of lands, uncultivated, lying within the bounds described in and by the Charter; but that grant does noways extend to one part of the Province more than another, but is equal to them all; and, therefore, subject to the last clause in the Charter, by which all trees of the before-mentioned size, are reserved to the Crown, and, consequently, the General Assembly of that Province cannot make any grant of lands to private persons, without their being subject to that clause of reservation.

The act of Parliament, Nono Anne, page 387, extends no further than the reservation in the Charter does, only that prerogative, which before subsisted singly on the Charter, is now confirmed and established by authority of Parliament; and therefore, upon the whole matter,

I am of opinion, that the King is legally entitled to all trees of the prescribed size, growing in the Province of the Massachusetts Bay, as it is described and bounded in the Charter of King William, and particularly in the Province of Maine, excepting only those trees situated in lands which were legally granted to private persons before the Charter 4° Caroli Primi was reversed; and which I humbly certify to your Lordships.

RICH. WEST.

November 12, 1718.

(13.) *Mr. Fane's opinion on the King's right to the Woods in New England.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In ol .dience to your Lordships' commands, signified to me by Mr. Popple's letter of the 21st of June, whereby your Lordships are pleased to desire my opinion, in point of law, whether the Act of the eighth year of His present Majesty, for the further encouragement of naval stores, and other purposes therein mentioned, whereby it is enacted, for the preservation of white pine trees for masting the royal navy, that no persons within the colonies of Nova Scotia, New Hampshire, the Massachusetts Bay, and Province of Maine, Rhode Island and Providence Plantation, the Narraganset Country or King's Province and Connecticut, in New England, and New York and New Jersey, in America, shall cut, fell and destroy any white pine trees, not growing in any townships or the bounds thereof, under particular penalties, whether this Act does, in any manner, take away the right the Crown hath expressly reserved to themselves

in the Massachusetts Charter, of all trees, of the diameter of twenty-four inches and upwards at twelve inches from the ground, growing upon any soil or tract of land in the said Province, not heretofore granted to any private persons.

I have considered the Act of Parliament and the Massachusetts Charter, and I apprehend it can never be supposed, that an Act of Parliament, made on purpose to guard, by severe penalties, the King's right and property, in one particular instance, should, by a strained and distant implication, take away and diminish that right, in a matter noways the design or in the intention of the Legislature. The King, by a general severation in his Charter, was to have all trees of such a growth, not expressly given away in townships, or out of them; now the only provision made by the Act of the eighth of the King, and that, I think, a very reasonable and necessary one, was to prevent his trees, out of townships, from being cut down; it goes no further. The danger and mischief was, that such trees as lay out of townships, might, without any discovery, be cut down and carried away, and, therefore, the penalty is applied and proportioned to the ease and practicableness of doing it, and the difficulty of having evidence to convict the offender. This is the scope and design of that clause, and it meddles with nothing else, but leaves the King's right unimpeached as to trees in townships, which could not, probably, be cut down without the knowledge of the King's officers, and where there could be no likelihood to cut down such trees, being such as, perhaps, were very necessary for shelter or ornament. If the words of the Act had been, no license shall be required but for trees growing out of townships, that, perhaps,

had made the case different; but the words are, no person shall fell, cut and destroy any white pine trees, not growing in any townships, so that the cutting of trees out of townships, without license, subjects them to the punishment inflicted by this law, whereas the cutting of white pine trees in townships makes them now (the Act of the 9th of Queen Anne being repealed by this Act,) only liable to an information for the trespass, or an account for the value and profits of the trees; and all the difference is, the King's property is better secured out of the townships than within them; but still the King's right to such trees remains, and it has the protection and guard of the common law, not only in giving a remedy for the violation of it, but in preventing all attempts upon it, by that known rule of law, that no implication shall prevail against the Crown's interest and prerogative.

FRAN. FANE.

July 19, 1726.

(14.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the King's right to the woods in New England.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

We received a letter from Mr. Popple, written by your Lordships' commands, importing that in the Charter of Massachusetts Bay, granted by King William and Queen Mary, in the third year of their reign, there is an express reservation to the Crown, of all trees of the diameter of twenty-four inches and upwards at twelve inches from the ground, growing upon any soil or tract of land in the said Province, not heretofore granted to any private persons;

that this reservation in behalf of the Crown, is entirely destroyed by the construction which the people of New England put upon the 5th section of an Act passed, in the eighth year of His Majesty's reign, entitled an Act giving further encouragement for the importation of naval stores, and for other purposes therein mentioned, whereby it is enacted, for the preservation of white pine trees for masting the royal navy, that no persons within the colonies of Nova Scotia, New Hampshire, the Massachusetts Bay and Province of Maine, Rhode Island and Providence Plantation, the Narraganset Country, or King's Province, and Connecticut, in New England, and New York and New Jersey, in America, shall cut, fell and destroy any white pine trees, not growing in any township, or the boundaries thereof; that the construction they put upon this paragraph is, that trees growing within any township are not the King's property, and, consequently, that the Surveyor-General of the woods has no power to prevent the people from cutting them for their own use; that, in order to prevent this for the future, your Lordships desired our opinion, in point of law, whether the words of the fore-mentioned Act of Parliament can be construed to take away the right reserved to the Crown, by the fore-mentioned Charter, of trees of the diameter of twenty-four inches at twelve inches from the ground, growing in any township?

We humbly certify your Lordships, that we are of opinion, nothing contained in the said Act of Parliament, can be construed to take away the right reserved to the Crown, by the said Charter, as to trees of the diameter of twenty-four inches at twelve inches from the ground, whether the same are growing within or out of any township, the intention of the said act appearing to

us to be, to make a larger provision, for preservation of white pine trees, than was done by the Charter, by prohibiting, under severe penalties, the cutting down such trees growing without the limits described in the Act, notwithstanding they might happen to be the property of private persons, and of dimensions different from those described in the Charter, without His Majesty's license; but we conceive, that this is so far from having weakened or prejudiced any particular right, vested in the Crown, to such trees, that the same is rather secured thereby; since, if any white pine trees shall be cut down, which shall happen to be both within the reservation of the Charter, and the prohibition of the Act of Parliament, the King may have a new remedy against the offenders, by suing for the penalties inflicted by the Act, in the summary method thereby directed.

P. YORKE.
December 23, 1726. C. TALBOT.

(15.) *Of the King's right to mines in New Jersey, by the Attorney and Solicitor, Raymond and Yorke.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, and requiring us to consider the annexed extract of a letter from Mr. Burnet, Governor of New Jersey, dated the twelfth day of December, one thousand seven hundred and twenty-two, in relation to gold and silver mines said to be found there, and to report our opinion, in point of law, what right and title is remaining to His Majesty, in the said gold and silver

mines, and how far the present proprietors have the right in the said mines, according to their several grants. We have considered the case, as stated in the said extract of the letter transmitted to us, and have looked into the Charter granted to the proprietors of New Jersey, and do certify your Lordships, that we are of opinion, that by the said Charter, only the base mines within that Province, passed to the grantees, and that the words of the grant are not sufficient to carry royal mines, the property whereof still remains in the Crown, notwithstanding anything that has appeared to us; but we beg leave to inform your Lordships, that we have not heard the proprietors, or any person on their behalf, upon the subject matter of this reference, not being directed by your Lordships so to do.

ROBT. RAYMOND.
November, 30, 1723. P. YORKE.

(16.) *Of the royal right of Escheats in Virginia, by the Attorney and Solicitor-General, Somers and Trevor.*

May it please your most excellent Majesty;

In obedience to an order of Council, hereunto annexed, we have considered of the question: Whether escheats in Virginia may be granted before they actually accrue? And it does appear to us, that the tenure, by which the lands in Virginia are holden of the Crown of England, is in free and common soccage, as of the manor of East Greenwich. The consequence of this tenure is, that where any person dies without heirs, his land will escheat to the Crown, as having the immediate seigniory; and we are of opinion, that escheats of

this nature cannot be granted, before they happen, otherwise than by a grant or alienation of the seigniory itself, which, we suppose, is not intended to be done.

There are other escheats upon attainder of treason, which are not incident to the tenure, but belong to the Crown, (as a prerogative royal,) of whomsoever the land be holden. It seems to us to be very doubtful, whether such royal escheats may, in any manner, be granted before they happen; but, if that might be done, we are humbly of opinion, that it is not advisable for the Crown to part with such a right, and to put the forfeitures for treason in other hands.

J. SOMERS.
THOS. TREVOR.

(17.) *Of the peculiar Escheats in New Jersey, which was in the hands of Proprietaries, by the Attorney-General Northey.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In humble obedience to your Lordships' commands, signified to me by Mr. Popple, Jr., your Secretary, I have considered of the annexed letter and papers therewith sent, and have perused the letters patent and surrender, mentioned in the said letter; and am of opinion, that the fines, forfeitures and escheats in New Jersey belong to Her Majesty, and not to the proprietors of the soil of that Colony; for, as to the fines and forfeitures for offences, they were not granted to His late Majesty, King James the second, when Duke of York, by the letters patent granted to him of the Jerseys and other

lands, under which grants the present proprietors claim. And, as to the escheats, the whole tract was granted in fee to the Duke of York, to be holden of the King in common soccage as of his manor of East Greenwich; and the inheritance of part being granted away, by the assignees of the Duke, to other persons in fee, they hold of the Queen, and not of the proprietors; and, therefore, the escheat must be to Her Majesty.

As to the appointing of rangers of the woods, the inheritance of those woods being in the proprietors, assignees of the Duke of York, I am of opinion, the right of appointing rangers in them, belongs to the owners of those woods, and not to Her Majesty.

EDW. NORTHEY.

October 19, 1705.

(18.) *On the escheat of negroes in Jamaica, by the Solicitor-General Mortague.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, Jr., in his letter of the 12th of March, I have considered of the petition of Mr. James Whitechurch, and the several papers thereunto annexed; and in answer to the *quære* he sends me, from your Lordships: Whether the limitation of five years' possession, mentioned in the Act of Assembly for confirming and securing titles to estates, does bind the Crown? I do humbly certify to your Lordships, that it is my opinion, that the Crown's title is not bound by anything in the said Act, because the plea of five years' possession is

only to bar a plaintiff or demandant that is not a minor, or under coverture, both which disabilities, or rather protections, are in no wise applicable to the person that wears the Crown, which shows the design of the said Act to be only to bar such demandants and plaintiffs as are sometimes liable to those incapacities.

But, notwithstanding the petitioner cannot make title against the Crown, by force of that Act of Assembly, yet I do humbly conceive the inquisition, which finds the Queen's title, is not valid in law, and consequently, Mr. Whitechurch's right to the negroes mentioned in said writ, is not thereby set aside; for the inquisition does not find the negroes mentioned in the writ, to be the same as Charles Delamain died seised of, but only says, that the jurors do believe them to be the same; and, therefore, since it is asserted that the negro woman from whom the rest have issued, was, many years ago, sold to the wife of the petitioner, by the administrator of Wroth Delamain, whose property she was at the time of his decease, for a debt owing *bona fide*, from the said Wroth Delamain, and that the said Charles Delamain was never seised of her, or any of her offspring, which, if true, will take away all pretence to an escheat, and, after so long and uninterrupted enjoyment, every thing ought to be presumed, that can be thought of, in favor of the possessor; and since this inquisition was set on foot in the absence of the petitioner, even when he was out of the Isle, after all his papers had been destroyed by the fire at Port Royal, my humble opinion is, that it will be more for Her Majesty's service, to direct a grant to be made *ad corroborandum titulum* of the petitioner, than to give any countenance to the grant which Brigadier Handisyd has made, of the eleven ne-

groes to the Provost Marshal, and Secretary, Mr. Rigby.

JAMES MONTAGUE.

April 2, 1708.

(19.) *On the escheat of ambergris, in Jamaica, by the same lawyer.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships ;

In compliance to your Lordships' desires, signified to me by Mr. Popple's letter of the 12th of this instant, November, I have perused the extract of Brigadier Handisyd's letter, sent me enclosed in Mr. Popple's letter, relating to some ambergris seized in Jamaica, and the prosecution thereupon, and am humbly of opinion, that the Governor and Queen's Council there have done all that by law can be done, for recovery of this ambergris for the Queen ; for a jury have it in their power, whether they will give a general verdict, or a special verdict, and the most that the Queen's counsel can do, is to desire them not to take upon them the determination of matters, which, in point of law, are disputable, but find the facts specially, and submit the points of law to the judgment of the Court ; and this, I understand, was done by the Queen's Attorney-General and Mr. Brodrick ; but the jury refused to give a special verdict, and found generally for the defendant, against the Queen. This refractoriness in the jury is often times seen in our Courts here, in England ; and when it does happen, the Queen's counsel are forced to submit, unless they can hope to get a more favorable jury returned, and then indeed they move for a new trial ; but in this grand Court of Jamaica, I understand it usually goes against the Crown, where there is

the least shadow for so doing; and, therefore, I much question whether granting a new trial will be of any avail; in all likelihood, it will only run the Queen into greater charges and expenses; for which reasons I cannot advise anything further to be done, than what has been already directed and attempted.

JAMES MONTAGUE.

Nov. 23, 1709.

(20.) *On the escheat of lands and negroes in Jamaica, by the Attorney-General Northey.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the enclosed account of escheats, which your Lordships received from the Lord Archibald Hamilton, with his observations thereon, and I do most humbly certify your Lordships, that, by an act passed 21st November, 1703, entitled an act for raising a revenue to Her Majesty, &c., it is provided, that as well her Majesty's quit-rents, fines, forfeitures, and escheats, arising within the Island of Jamaica, as the impost and revenue thereby granted, shall be applied and appropriated to the suppert of the government of that Island, and the contingent charges thereof, and to no other use, intent or purpose, whatsoever; but not to lessen Her Majesty's power of pardoning and remitting such fines and forfeitures, and (£1250 thereof paid,) and is appropriated to the fortifications.

As to the new instruction of the 19th of February, 1708-9, to the Governor, restraining him from selling escheats, till an account thereof shall be transmitted to

Britain, and directions received from thence, I cannot say anything concerning that complaint which occasioned it, or how that complaint was supported, having no account of it, except what appears in the order, by which it appears to have arisen from persons, whose titles had been questioned on such writs of escheats, and avoided; their complaints being, as stated in that order, that their titles to their lands and negroes had been so questioned, notwithstanding they had held and enjoyed the same many years, which, if without title, as by the determinations on those writs it appears to have been, it was not a disturbance or oppression, but a just prosecution for the rights of the Crown. Another grievance was, that when the title of the Crown had been established, the escheated estates had been granted to the prosecutors and informers, which I think also not an objection; for they, that had discovered the title of the Crown, had reason to have a preference in purchasing the same, which could not, by the act mentioned in the statute, be for less than they were valued at by the jury finding the escheat; and, in regard, the profits of those escheats are, by that Act (approved by Her Majesty,) appropriated for supporting the government of that Island, which by the representation, is stated not to be sufficient for that purpose. I do not see any objection against altering that instruction, and permitting the Governor to sell from time to time, as he is allowed to do by that Act, which hath been confirmed; he being satisfied that the value found is a reasonable value, remitting account thereof, from time to time, to Her Majesty.

EDW. NORTHEY.

August 6, 1713.

(21.) *On the Queen's right of quit-rents, in New York, by the same lawyer.*

To the first *quære*, I am of opinion, the second patent, confirming the grant and reserving a quit-rent, is to be taken, the quit-rent by the first grant; and, therefore, that must be accounted for from the first grant, the land being charged with it.

To the second *quære*, I am of opinion, this will be the same as the other, and will ascertain the quit-rent, but not discharge the arrears; and the words, in lieu of all other quit-rents, &c., import no more than that the lands are to be holden under that rent, and under no other rent, service, &c.; and, therefore, no other duties, &c., but that quit-rent, and the arrears thereof, can be demanded for those lands.

To the third *quære*, I am of opinion, the writ of cessavit is only where a tenure is created by the grant in fee-farm, which could not be by the grants before King James the Second came to the Crown, he being a subject; but where there is a tenure, as by the Crown,) the Crown not being within the statute of *quia emptores terrarum*,) the writ of cessavit lies. However, the statutes of Westminster 2, and Gloucester, which gave the writs of cessavit, not having been put in practice on the settling that colony, nor enacted there since, I am of opinion, those laws are not the laws of that colony.

Edw. Northey.

July 30, 1713.

(22.) *Mr. Fane's opinion on the King's right to treasure-trove, in the Bahamas.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered the two cases mentioned in the letter of Governor Fitzwilliams, dated the 12th day of November last; one relating to the right of administration to John Sims, a mulatto, who died intestate, leaving a wife, without any relations; the other relating to some treasure found at Providence, by one of the inhabitants: and I beg leave to say, as to the first case, that John Sims, dying intestate, without any relations, the moiety of such estate, which it is stated he died in the possession of, becomes the right of the Crown; the other moiety, his wife will be entitled to, as he left no children.

As to the other case, if no person can legally prove a property in the treasure found, it will be deemed the property of the Crown.

FRAN. FANE.

Feb. 27, 1736-7.

(23.) *The Attorney-General Northey's opinion of the Queen's right to royal fish, at New York.*

The pleading is informal on both sides, for, first the plea of the defendant, alleging a prescription in the inhabitants of the town of Southton, to take whales on the high seas and coasts of the same, and convert them to their own use, is ill; for although royal fishes may be claimed by prescription, yet a prescription cannot be laid

in the inhabitants, and New York being gained to the Crown of England within time of memory, no prescription can be there against the Crown; next the traversing the day and year laid in the information, and the whales coming to his hands by finding and his conversion, is ill. The prosecutor's replication is also a mistake, that royal fish cannot be claimed but by grant, and the traverse of the prescription, which should have been demurred to, because not well alleged.

The rejoinder, denying the Queen cannot be divested but by grant, being taken by protestation is well enough, that being matter of law, and not fact; and joining issue on the traverse of the prescription, was well, and no occasion for the prosecutor's demurrer; however, the plea of the defendant being ill, I am of opinion, judgment ought to be given for the Queen.

EDW. NORTHEY.

July 30, 1713.

(24.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the Kings right to the territory of Avalon, in Newfoundland, which had been granted to Sir George Calvert, in* 1623.

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

Pursuant to your Lordships' desire, signified to us by Mr. Pownall, your Lordship's Secretary, in his letter of the 20th of November last, enclosing the copy of a petition presented to His Majesty by Lord Baltimore, and referred to your Lordships by order of the Lords of the Committee of Council for Plantation affairs, and informing us that, as it appeared to your Lordships a matter of

great importance, you desired our opinion upon it; and Mr. Pownall, at the same time, was pleased to send us two books of your Lordships' office, the one containing a representation made by the Board of Trade to His Majesty, in 1718, relative to the state of Newfoundland; the other containing a variety of authentic papers, some of which are referred to in the said petition, and which appeared to be necessary for our information upon this occasion, which books and papers are herewith returned.

We have taken the said petition, books and papers, into our consideration, and we have been attended by Lord Baltimore, and his agents, and heard what they had to offer in support of the said petition; as, notwithstanding the determination, in 1660, in favor of the grant in 1623, there is no evidence of any actual possession of the province claimed, or exercise of any powers of government there, by the Baltimore family; on the contrary, it is most probable that, at least from the year 1638, they have been out of possession. And as from the year 1669, there have been many proceedings, which appear from the said books and papers, and even an Act of Parliament, passed in the reign of King William the Third, inconsistent with the right now set up, without taking the least notice thereof, and without any claim or interposition on the part of the Baltimore family; and as the King's approbation of a governor ought to be in consequence of a clear title of proprietorship, we are humbly of opinion, that it is not advisable for His Majesty to comply with the said petition.

D. RYDER.

April 5, 1754. W. MURRAY.

(25.) *The opinion of the Attorney-General Harcourt, on the Queen's right of escheat, to an estate in Jamaica.*

My Lord;

In obedience to your Lordship's commands, I have perused an Act, passed in Jamaica, to enable Cary Bodle and others, to sell lands &c., and am humbly of opinion, that Act is not fit to be confirmed.

The Act recites that King Charles the Second granted two parcels of land, containing one thousand one hundred acres, and four hundred acres to Dorothy Bannister, and her heirs forever; and that Dorothy Bannister conveyed the same to Dorothy Wait and her heirs forever; and that Dorothy Wait afterwards married with Theodore Cary, Esq.

The Act likewise recites, that King Charles the Second granted five hundred acres of land to Theodore Cary and his heirs, and that Theodore Cary died without heirs; and that King James the Second, by his letters patent of escheat, dated the 14th day of January, in the fourth year of his reign, granted to Dorothy Cary, and John Bodle, and their heirs, the said five hundred acres.

The Act likewise recites, that John Bodle intermarried with Elizabeth, the grand-daughter of the said Dorothy Cary, and had issue by her (Cary) John and Thomas, and that Dorothy Cary, by her will, gave to John and Thomas six hundred pounds each, at their ages of one-and-twenty, and all the rest of her estate, lands, tenements &c., to the said Cary Bodle, for his life, and to the heirs of his body, lawfully to be begotten, with such remainders over, in default of issue of Cary, as in the will are mentioned. The Act likewise recites, that John Bodle, the father of the said Theodore, had con-

tracted great debts in endeavoring to improve the estate; and that Cary Bodle, by reason of the entail in Dorothy's will, could not sell, without an act of the Assembly for that purpose; and, thereupon, trustees are appointed to sell one thousand one hundred, four hundred, and five hundred acres, and the purchasers are, by the Act, secured in the enjoyment thereof. This Act I take to be liable to the following objections:

1st, The five hundred acres are recited to have been escheated to the Crown, on the death of Theodore Cary without heir, and the grant thereof, by King James, is mentioned to be after his abdication, viz: on the 14th day of January, in the fourth year of his reign. If no sufficient grant has been made since the escheat, the title remains still in Her Majesty.

2d, Supposing Dorothy Cary to have a good title, and the three several parcels well devised by her will, yet I see no necessity for an Act of Assembly to enable Cary Bodle to sell; for though the first words in her will devised the estate to him during his life only, yet the immediate following words (and to the heirs of his body lawfully to be begotten,) enlarge his estate, and make him tenant entail, and, consequently, he has power to sell without the aid of an Act.

3d, I conceive the want of a saving clause in this Act, to be a further objection against Her Majesty's approving the same.

SIM. HARCOURT.

July 12, 1707.

(26.) *The opinion of Mr. Jackson on the King's right to the white pine trees growing on the Kennebeck River.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In humble obedience to your Lordships' commands, signified to me by Mr. Pownall's letter of the 16th instant, I have taken into consideration the paragraph extracted from a letter of the Surveyor-General of His Majesty's woods, in America, inserted therein, together with the two law reports accompanying the same.

The paragraph states a claim made by the proprietors of an extensive tract of land upon both sides of Kennebeck River, on which there is an abundant growth of the best pine timber, and which tract the proprietors allege to be private property; not, as I conceive, because it is parcel of the province of Maine,(within which only part of it lies,) but because it is not the property of the Province of the Massachusetts Bay, nor indeed of any other corporate body, but is the property of a set of private parties.

I have, likewise, considered the question stated in Mr. Pownall's letter, namely, whether, by the provisions of the statute of the second of George the Second, Cap. 35. white pine-trees, of the diameter of twenty-four inches or upwards at twelve inches from the ground, growing upon any tract of land possessed under a grant of the Council of Plymouth, may or may not be felled, without a licence from the Crown: and am humbly of opinion, that in case the soil or tract on which such white pine trees grow was private property before the 7th of October, 1690, they may be cut without a licence from the

Crown, notwithstanding any provision of the statute of the 2d of George the Second.

That Act appears to me to have been intended to obviate the doubt that gave occasion to the question stated in 1726, to the then Attorney and Solicitor-General for their joint opinion, whose answer is contained in one of the reports transmitted to me: that doubt arose upon the 8th Geo. I., which was alleged to amount to a release of the Crown's right to part of the reservation contained in the Charter of the Massachusetts Bay. This doubt is now totally removed, and the single question that can occur on the 2d Geo. II., is, whether the soil in question was actually private property, before the 7th of October, 1690; not whether it is within, or not within a township.

The claim of the Kennebeck company (the proprietors mentioned in the Surveyor-General's letter) is founded on a grant from the Council of Plymouth, long antecedent to the 7th October, 1690, and I am, therefore, of opinion, that in case their title be well derived, (of which I do not pretend to judge,) they are exempt from the penalties of the 2d Geo. II. I should have been inclined to think so, had that company been a corporation, but this is not now the question, as they are a mere partnership.

But I think it my duty to remark to your Lordships, that although white pine-trees, growing upon the soil possessed by private persons, under a grant of the Council of Plymouth, are not the objects of preservation under the 2d of Geo. II; yet, in case they do not grow within the limits of some township, they seem to come within the provisions of the 8th of Geo. I., Cap. 12.

May 23, 1771. RICH. JACKSON.

(27.) *The opinion of the same counsel on the construction of the 8 Geo. I., for the preservation of the white pine trees in New England.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

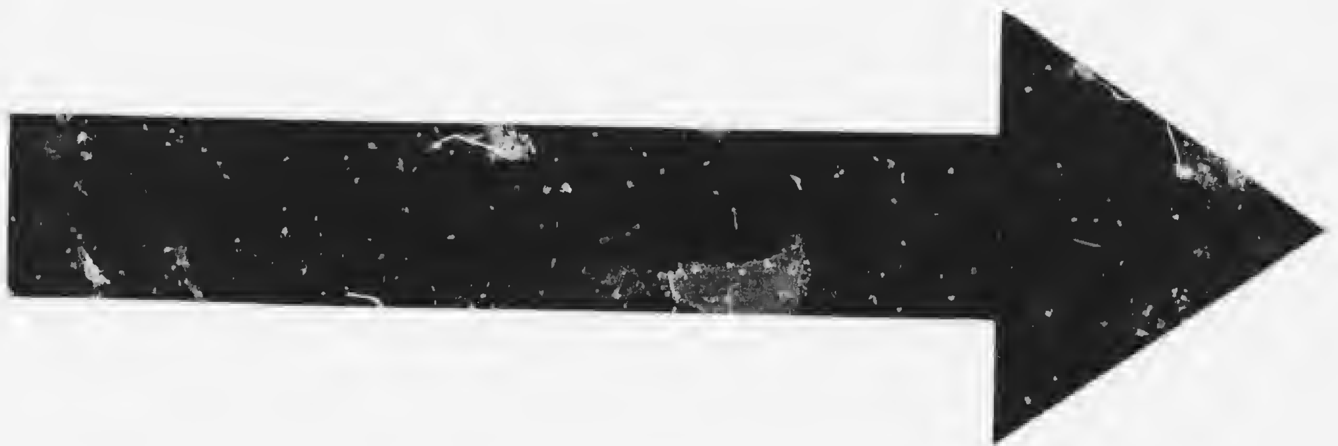
In obedience to your Lordships' commands, which I had the honor to receive from Mr. Pownall the 30th of last month, I have considered the clause of the Act of the 8th of Geo. I., Cap. 12, intended for the preservation of white pine trees, in several Provinces therein named, in America, and am of opinion, that white pine trees, growing on any lands in the Province of Massachusetts Bay, not erected into a township, cannot, under the provisions and reservations of that statute, be, in any case, cut, felled or destroyed, without a licence from the Crown.

I beg leave to add, that I conceive the statute of 2d Geo. II., Cap., 35, has not removed the restrictions imposed by the former Act, but has, on the contrary, still narrowed the right of felling, to such white pine trees only, as grow on private property: and (by an explanation of the Province Charter) in the case of trees of a certain description, to such as grow on land that was private property, before the 7th of October, 1690, I take it, that as the law now stands:

1, No man can cut white pine trees in any part of America, without a license, unless they grow on private property.

2, Not in Nova Scotia, New England, New Jersey, or New York, unless they grow within a township.

3. That in the Province of Massachusetts Bay, no man



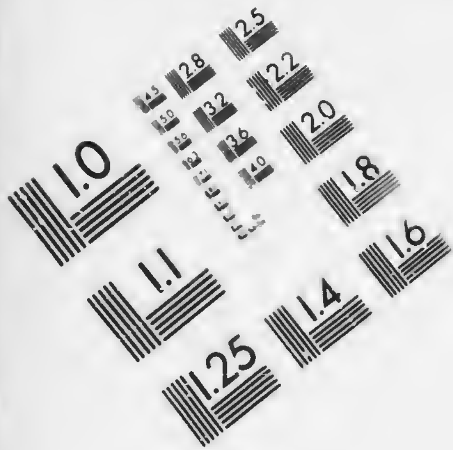
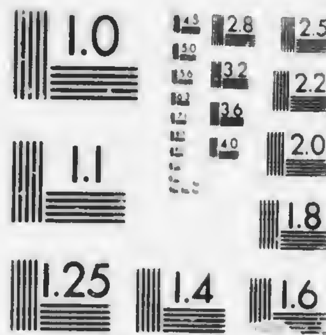
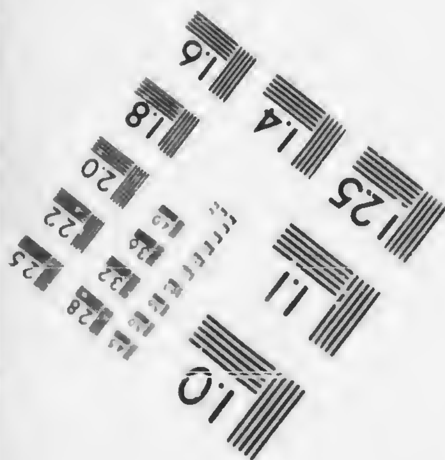
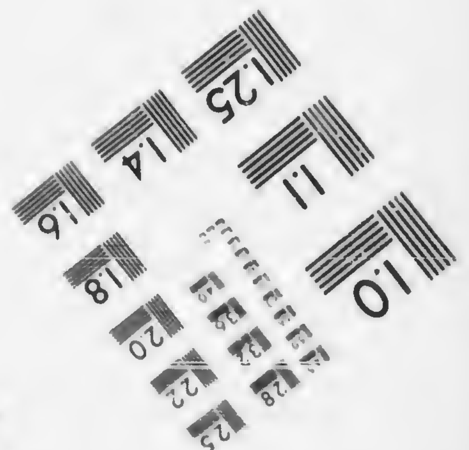


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

can legally cut white pine trees, twenty-four inches diameter twelve inches from the ground, unless they both grow within a Township, and on land that was actually private property, prior to the 7th of October, 1690.

How far it may be expedient to continue, or remove the restriction, as to property without the bounds of a Township, or in any other respect, is for the consideration of your Lordships and the Legislature. It is certainly obvious, that though the law gives a protection to such trees growing on private property, which they would not otherwise have had, it deprives them, at the same time, of another protection (the vigilance and care of the owner) that might, perhaps, have been more efficacious, as experience has shown it to be in most other cases.

RICH. JACKSON.

June 5, 1771.

Second. Of the King's power of Taxation.

(1.) *The opinion of the Attorney-General Northey, that the Queen might direct to be levied a tax on the conquered part of St. Kitt's in* 1704.

In obedience to your Lordships' commands, signified to me the 4th inst., by Mr. Popple, I have considered of the annexed presentment of the Commissioners of Her Majesty's Customs, and also of the extract of Col. Codrington's instructions, and am of opinion, that those instructions are not material, in any sort, to the matter contained in the presentment, it being only a power to let and dispose of lands. As to the presentment of the Commissioners of the Customs, I am of opinion, that the officers of the English part of St. Christopher's had no authority, by

virtue of the Plantation Act, made there for the four and a half per cent. on goods, to levy the same for goods exported from that part of St. Christopher's lately gained by conquest from the French, that law extending only to such part of St. Chistopher's as belonged to the Crown of England, when that law was made; but Her Majesty may, if she shall be so pleased, under her great Seal of England, direct and command that the like duty be levied for goods to be exported from the conquered part; and that command will be a law there, Her Majesty, by her prerogative, being enabled to make laws, that will bind places obtained by conquest, and all that shall inhabit therein.

Jan. 13, 1703-4. EDW. NORTHEY.

(2.) *The same lawyer's opinion, that the Queen might legally take off the duty of five shillings per ton, on French ships, when the English ships should be exempted from paying the duty of fifty sols per ton, in France.*

To the Queen's most excellent Majesty.

May it please your most excellent Majesty;

My Lord Viscount Bolingbroke having signified your Majesty's commands to me, to consider of the business of the duty of five shillings per ton, laid upon French ships here in England, and the imposition of fifty sols per ton, on English shipping in France, and to report to your Majesty my opinion, whether the said duty of five shillings per ton, being unappropriated money, your Majesty is not at liberty, by law, to take it off, at the same time that the French take off fifty sols per ton, on English shipping, if your Majesty shall think fit; or

whether the words of the Act must be literally observed, and the duty of five shillings per ton, on French shipping, cannot be taken off till three months after the taking off fifty sols per ton in France. And I am humbly of opinion, that the duty of five shillings per ton, being unappropriated, and the French having effectually taken off the fifty sols per ton, on English shipping, your Majesty may lawfully direct the Commissioners of the Customs, to forbear taking the said five shillings per ton, on French shipping for three months, and then, by the Act of navigation, laying that duty, the same will determine.

EDW. NORTHEY.

Sept 30, 1713.

(3.) *See the opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the King's power of Taxation over conquered countries.**

Third. Of the King's Grants.

(1.) *The opinion of the Attorney-General Treby, in 1689, on a grant, for life, of Auditor of the Virginia revenue.*

[A letter to the Attorney-General, with Mr. Ayleway's patent.]

Council Chamber, June 21, 1689.

Sir,—The Right Honorable the Lords of the Committee for Trade and Plantations, having considered the petition of Mr. Robert Ayleway, referred to their Lordships by His Majesty's order of the 3d of May last, praying to be admitted to the office of Auditor-General of Virginia, pursuant to letters patent in that behalf, their Lordships have ordered a copy of the said letters patent

*Third head, II. No. 7

to be sent to you for your opinion, whether the petitioner be legally stated in the said office, and whether he be not obliged to give his personal attendance in the execution thereof, in Virginia, at least if His Majesty shall require it.

WM. BLATHWAYT.

The petitioner, Mr. Ayleway, brings you the original patent with this.

June 25, 1689.

I have perused the letters patent of January 16, in the twentieth year of the reign of King Charles the Second, whereby the said King grants to Robert Ayleway the office and place of Auditor-General of Virginia, for his life; and I conceive the same to be a good grant in law; and that he may execute the place by deputy, without personal attendance, provided his deputy be sufficient.

GEO. TREBY.

(2.) *Mr. Lamb's opinion on the appointment of Sheriffs in New Jersey.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands signified to me by Mr. Hill's letter of the 18th of July last, I have reconsidered an Act passed in New Jersey, in January, 1747, entitled: "An Act to oblige the several sheriffs in this Colony of New Jersey, to give security, and take the oaths or affirmation therein directed, for the due discharge of their offices, and to prevent their too long continuance therein."

I find in my report made to your Lordships the 23d

of January last, that I made no objection to this Act in point of law, as it appeared to me that Acts of the like nature, in regard to sheriffs, have passed in some of the neighboring Provinces, which have been confirmed here, and it is upon the plan of those Acts, that this Act seems to have been framed.

As for the reasons of this Act being passed within this Province, the Governor, who gave his assent thereto, I suppose has informed your Lordships, pursuant to his instructions, and it seems very proper he should have done so, as, by this Act, the limiting the time of the continuance of a sheriff in his office, is, in some respect, restraining the power he derives from the Crown of appointing sheriffs, which, before this Act passed, was without limitation, and so was the power of the Crown in England, formerly; but by several Acts that have been passed here, the Legislature have limited the time of a sheriff serving in his office: Therefore, it appears to me, that as some of the neighboring Provinces have found reason to pass Acts of this nature, which are now subsisting, and as the Legislature here have also found reason heretofore to pass Acts limiting the time of a sheriff's continuance in his office, that there may have been reasons to induce the Legislature of this Province to do the same; all which must be submitted to your Lordships, and from the information you have received, how far you think proper to recommend the confirming of this Act.

MAT. LAMB.

LINCOLN'S INN, Sept. 30, 1749.

(3.) *Mr. Fane's opinion on the King's power to confirm the titles to land in Connecticut.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter transmitting to me copies of the Charter of Connecticut, and the petition of the agents of that Colony; and also, the memorial of Mr. Winthorp; and desiring my opinion, whether His Majesty can, by virtue of his prerogative, and without the assistance of Parliament, gratify the said Colony in their request? I have considered of the same, and beg leave to observe to your Lordships, that I cannot pretend to say whether the King, by virtue of his prerogative, can do what is desired by the petitioners. But I must submit it to your Lordships' consideration, supposing the King had a power, by his prerogative, of gratifying the request of this Colony, whether, under the circumstances of this case, it would not be more for His Majesty's service, to take the assistance of Parliament, as that method will be the least liable to objection, as well as the most certain and effectual manner of gratifying the request of the petitioners.

FRAN. FANE.

November 24, 1730.

(4.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the King's right to make new grants of land in New Hampshire.*

[New Hampshire.—State of the case with respect to certain townships and tracts of land granted by the governments of the Massachusetts Bay and Connecticut, in New England, which townships and tracts of land are now part of the Province of New Hampshire, by the determinination of the boundary line between that Province and the Province of the Massachusetts Bay, in the year 1738.]

Disputes having for a long time subsisted between the Provinces of the Massachusetts Bay and New Hampshire, with respect to their boundaries, in 1733 a petition was presented on behalf of the Province of New Hampshire, praying that Commissioners might be appointed to ascertain the boundaries.

Upon hearings of both parties before the Attorney and Solicitor-General, the Board of Trade and the Council, His Majesty was pleased, by his order in Council of the 9th of February, 1736, to direct that a commission should be prepared and pass under the Great Seal, authorizing Commissioners to mark out the dividing line between the Provinces of the Massachusetts Bay and New Hampshire, giving liberty to either party therein, who thought themselves aggrieved, to appeal therefrom to His Majesty in Council. In pursuance of His Majesty's said commission, Commissioners met and reported their determination specially, upon which both Provinces appealed to His Majesty in Council; and afterwards their Lordships reported to His Majesty, as their opinion, that the northern boundaries of the Massachu-

setts Bay are and be, a similar curve line, pursuing the course of Merrimac River, at three miles distance from the north side thereof, beginning at the Atlantic Ocean, and ending at a point due north of a place in the plan returned by the said Commissioners, called Pantuket Falls, and a straight line drawn from thence due west, crossing the said river till it meets with His Majesty's other governments; and that the rest of the Commissioners' said report or determination, be affirmed by His Majesty. In 1738, His Majesty was pleased, with the advice of his Privy Council, to approve of their Lordships' report, and to confirm it accordingly; in consequence whereof, the line has been marked out.

In the years 1735 and 1736, while the appeals from both the Massachusetts Bay and New Hampshire were depending before His Majesty, the General Assembly of the Massachusetts Bay granted above thirty townships between the rivers Merrimac and Connecticut, which townships, upon the running of the boundary line in 1738, fell within the Province of New Hampshire. The conditions of these grants were, that the grantees should settle the said townships within three years after the date of their respective grants; but this condition has been performed by very few, if by any, of the grantees; no obligation to pay quit-rents, or a reservation of pine trees fit for the service and supply of His Majesty's navy, are inserted in any of these grants, although no grant ought, in good policy, to be made of any lands in any part of North America, without both these provisions, which have been thought of so much importance, and so absolutely necessary for the public service, that Mr. Wentworth, His Majesty's Governor of New Hampshire, was particularly instructed, in the year 1741, never

to pass any grant of lands, without enjoining express conditions of cultivation, the reservation of quit-rents, and the preservation of such pines, as are of size for the use of His Majesty's navy.

There are, also, about sixty thousand acres of land situated on the west side of Connecticut River, which were purchased by private persons from the government of Connecticut, to whom that land had been laid out by the government of the Massachusetts Bay, as an equivalent for two or three townships which the Massachusetts Bay purchased from Connecticut government. This tract of land, by the determination of the boundary line in 1738, is become a part of New Hampshire, but the proprietors of it are subject to no conditions of improvement, and the land lies waste and uncultivated.

Question.—Whether the Crown can resume the lands granted by the Province of the Massachusetts Bay, under condition of cultivation, those lands being now become a part of New Hampshire, by the running of the boundary line in 1738, in cases where the proprietors have not performed the condition of their grants? and if the Crown can, what is the most advisable and regular method of making such resumption? Whether, in the case of the lands granted away by the Province of the Massachusetts Bay, to particular persons, without any condition of cultivation, the Crown can now enforce the proprietors of such lands to cultivate them, or oblige them to take these lands under new grants, upon the said lands being made a part of the Province of New Hampshire, by the determination of the boundary line in 1738?

We are clearly of opinion, the Crown may resume the

lands granted, on condition of settling within three years, where there has, in fact, been no settlement. With regard to lands granted by the Massachusetts Bay, without any such express condition, where there has been no settlement, as they appear now to have been no part of that Province, their grants are in themselves void, as against the Crown, and there appears no ground to support them, but on the foot of the direction, which we find to have been given in an order of Council of the 22d of January 1735, when the commission for marking the dividing line between the two Provinces was first directed, viz: "that due care should be taken, that private property might not be affected by it." We do not find that this direction was continued, either in the order of the 9th of February, 1736, on which the present commission issued, or in the commission itself; or that the Commissioners have, in their report, taken notice of any such private rights; or that they are saved in the order of Council, that establishes the boundary line. However, considering the manifest intent of these sort of grants, whether appearing from the general nature or the particular recitals or considerations of them; that the country may be settled and inhabited, and the tacit condition attendant upon them; that the lands should be settled in a reasonable time; we think due care will be taken of the private property arising from these grants, if His Majesty shall be pleased to give these sort of proprietors a reasonable time to come in, and accept new grants upon terms of settling the lands within a certain time, reserving the old quit-rent, and pines fit for His Majesty's navy; and in case of their not accepting these terms, His Majesty may resume the lands.

The proper manner of making such resumption, after such default, is, by making new grants to such as shall be willing to accept them, at such rents, and on such terms as shall be thought most advisable.

D. RYDER.
August 14, 1752. W. MURRAY.

(5.) *The opinion of the Attorney-General, Yorke, on the manner of discussing objections to the King's grants.*

LINCOLN'S INN, Dec. 23, 1725.

SIR: I received your letter to Mr. Solicitor-General and myself, reminding us of the reference from the Lords Commissioners of Trade and Plantations, upon the papers transmitted by Major Drisdale, Lieutenant Governor of Virginia. We have long ago considered those papers, so far as it was possible for us to do, without being attended by the agents of parties concerned; but a caveat having been entered in my office, on the behalf of Colonel Spotswood, who claims a property in the matters in question, against any report being made without his being heard, according to the common course of proceeding, no report could be made till he had an opportunity of laying his objections before us. The method of doing this is, for the agent of the Province to summon the party entering the caveat to attend, to make out his objections at a time appointed, and then both sides may be heard; or if nobody attends on the behalf of the person entering the caveat, a report will be made *ex parte.* The want of doing this has occasioned the delay, for the agent of the Province has never applied for a report, or for a summons to call Colonel Spotswood or his agent before us. I do not mention this so as to blame

the agent for any neglect, for it does not appear to me, that he has received any orders from his principals concerning this affair; but if you know where to send to him, I beg you would direct him to call at my chambers, in order to summon Colonel Spotswood, or his agents, to attend upon his caveat, and then this matter may soon be brought to a conclusion. You will be pleased to lay this letter before the Lords Commissioners, that their Lordships may be apprised of the reasons why they have not received our report before now.

P. YORKE.

(6.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the question between the King and the Proprietors of the Northern Neck, in Virginia.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us, by a letter from Mr. Popple, referring us the state of the case, between His Majesty and the Proprietors of the Northern Neck, in Virginia, together with the copies of two Charters granted by King Charles the Second, and King James the Second; and a letter from Major Drisdale, late Lieutenant Governor of Virginia, hereunto annexed; we have considered the same, and the queries proposed in the said letter.

The first of which queries is: What shall pass by the grant of felons' goods, in the said letters patent of King

23

James the Second; and whether the goods of a *felo de se* shall not pass thereby?

As to which, we are of opinion, that by the grant of felon's goods, all goods in possession, belonging to any felon, convicted, which are within the district described in the grant, do pass; but it hath been determined, that those words do not extend to any debts or rights of action, nor to any leases for years, or other chattels real, belonging to such felon, nor to any goods or chattels, whatsoever, of a *felo de se.*

The second question is: Whether fines imposed by the King's Court, upon persons residing within the said territory, for contempt or otherwise, shall not pass by the said letters patent; and what fines pass thereby?

As to this, we are of opinion, that no other fines pass thereby, but such as are imposed by the King's Courts, held within the said territory; the fines imposed at the Courts, let of the grantees, are expressly granted to them by the letters patent of King Charles the Second; and the fines imposed by the King's Courts, held without the said territory, cannot, with propriety, be said to arise or accrue with the same.

The third question is: What shall pass by the word forfeitures, in the said letters patent?

As to this, we are of opinion, that all goods and chattels, real and personal, in possession, being within the said territory, and forfeited by reason of any judgment or conviction for misdemeanor or felony, and all interests in any lands lying within the said territory, forfeited

to the Crown by any attainder of felony, do pass by the word forfeitures; but this word is so general and extensive, and the cases which may arise upon it so various, that it is impossible to give an opinion thereupon, which may answer every event, without having the particular facts stated.

The only question contained in Major Drisdale's letter is: How far the Governor of Virginia may exercise the authority given him by His Majesty, in pardoning offences and remitting forfeitures, arising in the Northern Neck.

As to which, we are of opinion, that nothing contained in the said letters patent, restrain him from exercising the authority of pardoning such offences, and if the pardon be granted before any forfeiture incurred by judgment, in cases of misdemeanor, or by flight, conviction or judgment, in cases of felony, the pardon will prevent any forfeiture; but if the pardon be granted after the forfeiture actually incurred, by any of the means aforesaid, though the offence will be thereby discharged, the right of the grantees to the things forfeited will continue.

P. YORKE.
August 12, 1727. C. TALBOT.

(7.) *The opinion of the Attorney and Solicitor, Ryder and Strange, concerning the grants of lands in Carolina, before and after the purchase, by the King, of the Proprietors' rights.*

Quære 1st,—Whether any of the patents granted after their Lordships had ordered the land-office to be shut up, can be deemed valid, other than such as were granted by order in London?

We are of opinion, that such patents may be good, notwithstanding that order to shut up the land-office, if the Lords Proprietors were either made privy to those grants, or after they were made, received the consideration for them; otherwise we think they cannot be supported.

2d,—Whether such patents as were granted after the King's purchase, by the Lords Proprietors' Governor, before the new Governor arrived from the Crown, particularly such as appears to have been entered in the Secretaries' books, after advice received in the Province of the King's purchase, are to be deemed good?

We are of opinion, that none of the patents mentioned in the second quaere can be deemed good.

3d,—Whether, as the Act of Parliament made upon the Crown's purchase from the Lords Proprietors, that clause in it, that was for quitting possessions of grants, takes notice of such only, as bore date before 1727. If it does not give room for a strict examination into all such as were issued subsequent to that time, and if such grants appear to have been irregularly made, they ought not to be voided, but as to such as were granted for defraying the expense of running the boundary line, if the Crown, in such case, ought not to bear the expense?

We think it proper to observe, that the clause referred to in this quære, does not put it upon the patents bearing date, but being actually made before 1st January, 1727; and considering the extraordinary circumstances attending these grants, and that the Crown had no notice of them, at the time of the purchase, there is great reason for a strict inquiry into the validity thereof, and to avoid them for such irregularities. But as those that

were granted for defraying the expense of the boundary line, seem to stand in a much more favorable light, we think it reasonable some indulgence should be shewn to such purchasers, by re-granting on the terms of the purchase what they or their assigns have actually cultivated, and by re-paying a proportion of the consideration money for the rest.

4th,—Whether such patents as were drawn up and signed with blanks, and not registered in the Secretaries' office for some years afterwards, shall be deemed good; if their not being registered, is not an evidence of fraud?

We are of opinion, that in general, such patents as were executed with such blanks as are mentioned in the case, though filled up afterwards, are void; but if they have been attended with a long possession, and not obtained fraudulently or irregularly in any other respect, we think they ought to be now supported; and as to the circumstance of not being registered in the Secretaries' office for some years afterwards, it not being stated how far or within what time such registry is necessary to the validity of such grants, nor for how long it was neglected, we cannot form any judgment, what influence that will have upon the patents.

5th,—Whether such patents as were given out without any description of the boundaries, and not preceded by regular surveys, returned into the Secretaries' office, are to be deemed valid.

We are of opinion, that the want of a description of the boundaries, or of preceding regular surveys, is not, of itself, sufficient to destroy such patents, unless such circumstances were the known requisites, necessary to such grants, and even in that case, if the proprietors

have had the consideration, and the lands have been enjoyed accordingly, without fraud, we think such grants ought to be deemed valid.

6th,—Whether those grants issued by virtue of warrants that had lain by many years, are to be deemed good, notwithstanding the grants assigned them were taken out irregularly, and particularly those after 1727?

We are of opinion, that the circumstance of there having been warrants many years before the grants issued, is not, of itself, sufficient to support grants that would, otherwise, be irregular and void; though upon the general question of fraud, that circumstance may, probably, be of some service to the grantees, according to the particular circumstances of each case, whether such grants issued before or after the year 1727.

7th,—As it is alleged by the Governor, that many of the people that hold lands by virtue of the patents, formerly granted under the Lords Proprietors, possess much greater quantities than they ought to hold, by the words of the said grants, has not the Crown power to re-survey such lands? and, in case any fraud should appear, what steps must the Crown take to recover its right?

We are of opinion, that whoever possesses a much greater quantity than they ought to hold, by the words of a grant made since 1st of January, 1727, is liable to have the same re-surveyed on behalf of the Crown. But, as to grants made before 1727, upon surveys actually made, we apprehend (if they were otherwise good in law,) they are excepted by the Act 2 Geo. 2., out of the sale to the Crown, and, therefore, not liable to be new re-surveyed; and as to such cases, wherein

a re-survey is proper, and yet the grants are valid in law, we are of opinion, that the proper remedy is by information, in the name of the Attorney-General of the Province, in a Court of Equity there, in order to have the real quantity set out, and the excess pared off for the benefit of the Crown.

8th,—In case any of these grants appear to be voidable in law, what is the proper method to have the same vacated ?

We are of opinion, that the proper method for the Crown to recover its right, (except in the instances mentioned in the answer to the last quære,) is by an information of intrusion, in the proper Court of the Province, and in case of error there, by appeal to His Majesty in Council.

February 11, 1737.

D. RYDER.
J. STRANGE.

(8.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on grants that are void for uncertainty.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by letter from Mr. Popple, informing us that your lordships, having had under consideration several papers relating to the settlement of Carolina, and observing that some grants were made by the late Lords Proprietors, of large tracts of land, without any limitation therein as to the place where or time when the said land is to be taken up and seated; and transmitting to us the enclosed copy of a grant of that kind, made to

Sir Nathaniel Johnson, in 1686, which hath never yet been put in execution, together with the enclosed copy of the original grant, from the Crown to the Lords Proprietors of Carolina, for our further information; and desiring us to consider the same, and report our opinion, in point of law, whether such grants are legal and of force. We have considered the patent, whereby the said Lords Proprietors did grant to Sir Nathaniel Johnson, the honor and dignity of a *Cassique, cum duabus baroniis quarum singula contineat duodecim mille acras terræ*; and are of opinion that, in regard, the place where the said lands lie is not described, nor any method provided by which the same may be ascertained, such grant of the two baronies is, by reason of the uncertainty thereof, absolutely void in law.

P. YORKE.

July 28th, 1730. C. TALBOT.

(9.) *The opinions of Mr. Fane; and of the Attorney and Solicitor-General, Willes and Ryder, on the question of patenting lands, under old grants from the Proprietories of Carolina.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, desiring my opinion, in point of law, whether the townships of Purrysborough, in Carolina, being, pursuant to His Majesty's instructions, set out for the use of certain people; and His Majesty having declared that all the land within six miles thereof, shall not be taken up by any person claiming a right under old grants which have not been taken up, shall not be

deemed such an effectual taking up of the said land, for His Majesty's use, as to invalidate the claim of any person who shall, subsequent to the said instructions and proclamation, take up land there. And, I humbly certify to your Lordships, that I think the grantees of the late Lords Proprietors, under the general power granted to them, of taking such quantities of land in such places as they shall think fit, since they neglected to do it previous to His Majesty's instructions and declaration, shall not now be permitted to pitch upon lands already settled; but must have the effect and operation of their grants upon lands now unsettled.

July 23, 1734. FRAN. FANE.

The grant being general of 12,000 acres of land, and the same being not described therein, nor ascertained by any survey, before the proclamation of Governor Johnson, we are of opinion, that such grantee cannot now take up lands, within six miles of Purrysborough. For the right of the Lords Proprietors is now vested in the Crown, and such general grant could certainly not have prevented the Lords Proprietors from making subsequent grants of any particular lands, provided there was still sufficient land left to satisfy such precedent grant; and yet this would be the necessary consequence, if such general grantee might, at any time before his lands are let out, take them wherever he pleases, and disturb the possession of any subsequent grantee. This would not only be a great invasion of His Majesty's right, but would create very great confusion, and would tend very much to the disturbance of the peace of the country.

J. WILLES.
August 12th, 1734. D. RYDER.

(10.) *The opinion of the same lawyers, on the nullity of a similar grant to Mr. Hodgson.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, we have considered the letters patent (a copy of which you was pleased to send us) from the late Lords Proprietors of Carolina, in 1715, to William Hodgson, Esq., and we are of opinion, that the words are too general to pass lands, and that Mr. Hodgson hath no right to any land in Carolina, by virtue of the said patent.

J. WILLES.
November 24th, 1735. D. RYDER.

(11.) *The opinion of Mr. Fane, on the validity of the grant of the Secretary's office in South Carolina.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands signified to me by Mr. Hill, I have considered the case of Mr. Hammerton, relating to his claim of the office of Registrar of the Province of South Carolina, and I beg leave to say, that I think he is well entitled to it, by virtue of his grant from the Crown; and, notwithstanding there does not appear to be any commission of Registrar granted by the Lords Proprietors till the year 1700, yet, as the Acts of 1694 and 1698 have directed what is to be done by such an officer, I think it is very probable that such an officer was appointed before, or at the time those

Acts were passed. I think, therefore, it appears to be an ancient office, and held and exercised by the Secretary during the Lords Proprietors' time; and by the Acts of 1694 and 1698, it was his duty to register all patents and grants for lands, sales, conveyances and mortgages of land, and all other writings that were required to be registered.

By the grant of the Lords Proprietors to Mr. Bertie in 1725, he is empowered to do and perform, not only the particular matters and things therein mentioned, but also all other acts usually done by the former Secretaries. The present grant to Mr. Hammerton pursues the very words of Mr. Bertie's grant, as to the description of the office, and empowers the grantee, not only to do and perform the several matters and things therein particularly specified, but also all other acts usually done by the former Secretaries; and it appears, by the papers referred to me, that the whole business of Registrar and Secretary, was exercised by the Secretary without any molestation, from 1700 till Mr. Johnson was appointed in 1733. This being the case, I think Mr. Hammerton is entitled to hold and enjoy his grant, in as full an extent as any of his predecessors have done, in the time of the Lords Proprietors.

FRAN. FANE.

June 8th, 1739.

(12.) *The opinion of the Attorney-General Willes, on the right of the Proprietor of Maryland, to appoint to offices, under the King's Charters.*

Quære 1.—Whether, by the Charter of Maryland, the Lord Proprietor has not a right to the nomination of all officers in general, civil as well as military?

Answer.—I am of opinion, that by the Charter of Maryland, the Lord Proprietor has a right to nominate and appoint all officers in general, as well civil as military.

Quære 2.—Whether there is anything particular in the nature of the office of Treasurer, of either shore, to exempt it from the said nomination?

Answer.—It does not appear to me, that there is any thing so particular in the nature of the office of Treasurer, of either shore, as to take the right of nomination to this office from the Lord Proprietor, and to give it to any other persons.

Quære 3.—Whether a few precedents in this case, of a Treasurer being appointed by tripartite concurrence of both Houses of Assembly and the Governor, can or do overthrow His Lordship's right.

Answer.—All the precedents, except one, being between 1692 and 1716, when my Lord Baltimore was out of possession, I am of opinion, that they will not overthrow his Lordship's right, founded upon such plain words in the Charter.

Quære 4.—Whether the precedents, hereunto annexed, do divest the Lord Proprietor of his right of nomination to the office of Treasurer or Treasurers, so nominated, they giving the security the law directs?

Answer.—The Treasurer or Treasurers, when nominated by the Proprietor, must give such security as the law directs. To the other part of this *quære*, I have given an answer already.

J. WILLES.

January 22, 1736-7.

Fourthly.—Of an anomalous exclusion of the King's right of granting a colonial office.

(1.) *The opinion of the Solicitor-General Montague, on the exclusive right of the Governors, to appoint naval officers.*

WHITEHALL, June 11, 1708.

SIR; Her Majesty, having been pleased to refer to the Lords Commissioners of Trade and Plantations, a petition from Mr. Samuel Cox, complaining of his having been turned out of his place of naval officer, in Barbadoes, by Mr. Crow, Governor of the said Island, and praying to be restored to his said place; their Lordships have commanded me to send you the enclosed papers, viz:

A clause in an Act of Parliament, passed in the 15th year of the reign of King Charles the Second, entitled "An Act for the encouragement of trade;"

A clause in an Act of Parliament, passed in the seventh and eighth years of His late Majesty's reign, entitled "An Act for preventing frauds and regulating abuses in the plantation trade;

Copy of a clause in Her Majesty's instructions to Mr. Crow, relating to the Acts of Trade and Navigation;

Copy of a clause in Mr. Crow's instructions, relating to the government of Barbadoes.

Upon consideration of which papers, their Lordships desire your opinion: Whether, by the forementioned Acts, the power of appointing the naval officer be vested solely in a Governor of the Plantations, exclusive of the Crown?

In case the sole right be in the Governor, yet the said office being filled by virtue of letters patent from the

Crown, granted and enjoyed during the time of two preceding Governors, (which is the case of Mr. Cox, the petitioner): *quære*, Whether the present Governor can dispossess him of the said office, without any crime or mismanagement alleged against him ; or whether the right of the Governor accrues only in case of vacancy during his government.

W. POPPLE, JUN.

July 13th, 1708.

My Lords ;

In obedience to your Lordships' commands, signified to me by Mr. Popple, the 11th of June last, I have considered the several clauses in the Acts of Parliament, made the fifteenth year of King Charles the Second, for encouragement of trade, and the seventh and eighth years of His late Majesty King William, for preventing frauds and regulating abuses in the Plantation Trade ; and I have perused the clauses in Her present Majesty's instructions to Mr. Crow, relating to the Acts of Trade and Navigation, and to the Government of Barbadoes.

And in answer to the first *quære* your Lordships have made thereupon, viz : Whether, by the aforementioned Acts, the power of appointing the naval officer be vested solely in a Governor of the Plantations, exclusive of the Crown? my humble opinion is, that since the statute of the fifteenth of Cha. II. does expressly require all masters of ships coming to the Plantations, to make known their arrival and give in an inventory of their goods to the Governor there, or such officer as shall be by him hereunto authorized and appointed, before any goods be unladen, that the appointment of this officer, who is now called the Naval officer, does solely belong to the

Governor of such Plantations; and, therefore, if the Crown constitute a person to execute this office, and the Governor appoint another person, I think all masters of ships will be obliged to apply to the naval officer appointed by the Governor, and the patentee will not be, in such case, empowered to do the things required by such officer, mentioned in the said Act of Parliament.

This being my opinion concerning the authority such officer has, when constituted as before is mentioned, I hold, consequently, that the said office can never be said to be full by virtue of letters patent from the Crown, which is the answer I return to the second *quære.*

And to the third *quære,* I beg leave to say, that I do not think the present Governor can be said to have dispossessed Mr. Cox of the said office, by appointing a naval officer; because, if Mr. Cox was not appointed by the Governor, he never was the officer mentioned in the Act of Parliament, who is described to be one that is authorised and appointed by the Governor; but, in regard the Governors of the Plantations are put in by the Crown only during pleasure; I take it for granted, no one will make any difficulty in appointing such naval officer as the Crown shall best approve of.

JAMES MONTAGUE.

Fifth.—Of the King's general jurisdiction over his territories abroad.

(1.) *The opinion of the Attorney and Solicitor-General, Raymond and Yorke, on the King's power to establish a Civil Jurisdiction at Gibraltar.*

To the Right Honorable the Lords of the Committee of His Majesty's most Honorable Privy Council.

May it please your Lordships;

In humble obedience to your Lordships' order, of the 25th day of July last, referring to us a petition of several merchants and traders to the town and garrison of Gibraltar, for establishing a Court of Civil Judicature there, and commanding us to consider thereof, and to prepare a draft, or proper heads, for the forming a scheme for establishing the same, and to present the same to your Lordships for your consideration, we have considered the said petition, which sets forth, that the petitioners, concerned in trade, are greatly prejudiced already, and discouraged to continue the same, for the want of a form of Civil Government established there,(it being at present under that of a military one,) whereby the petitioners are not secure in their properties; that His Majesty had been pleased to grant his royal letters patent for that purpose; it is yet, notwithstanding, in the hands of military magistrates.

That the settling a Civil Judicature there would contribute very much to the advantage of trade in general, and to the entire satisfaction of all His Majesty's trading subjects, as well as to the great advantage of His Majesty's revenues; the petitioners, therefore, humbly prayed, that His Majesty would direct that a Civil Ju-

dicature might be forthwith appointed, and proper persons be nominated to go from hence, and a competent salary to be allowed them, as to His Majesty, in his great wisdom and goodness, should seem meet.

And we humbly certify your Lordships, that none of the persons whose names are subscribed to the said petition, have, either by themselves or their agents, made application to us in relation thereunto. But we have been several times attended by Mr. William Hayles, who solicits this affair, and once by Peter Godfrey, Esq., one of the members of Parliament for the city of London, upon which attendances we have endeavored to inform ourselves of the present condition and circumstances of the town and territories of Gibraltar, for which purpose, two papers have been laid before us, one of them marked (A), by Mr. Godfrey, and the other marked (B), by Mr. Hayles. The substance of the first (*inter alia*) is, that there were at Gibraltar, when it was taken, one nunnery, two convents, (one of Franciscans, and the other of the Cathedral Church,) an hospital of Franciscans, the convent of our Lady of Europa, four chapels, and one thousand families.

That, if a Civil Government was established there, as in the American Colonies, or in some such form as followeth, the place would defray the charges of maintaining itself, and in a few years would bring a surplus revenue, viz:

A Mayor, Aldermen, Common Council, to be annually chosen out of the English residing there; two Sheriffs, to be out of the Common Council; two Bailiffs, to be appointed by the Sheriffs; a Town Clerk; a Judge of the Admiralty; a Chamberlain; a Treasurer for the Colony; a Muster-Master, to be appointed by the Mayor

and Aldermen, to muster the militia and the garrison, whenever the garrison is mustered, and to sign the muster-rolls with the Major; the militia to guard the two towers next the land, to prevent the soldiers deserting; a house to be settled for the town hall, where the records shall be kept, and the Courts of Justice act, and the magistrates assemble; a house to be settled for the Governor and officers of the garrison; the private sentinels to have proper barracks assigned them; no Consuls of any nation, or Jews, to reside there.

The substance of the latter paper is, that at least two hundred of His Majesty's subjects, inhabiting in Gibraltar, suffer for want of a Court of Civil Judicature being established there, being more ill treated than strangers.

That the want of a Civil Court not only affects His Majesty's subjects inhabiting there, but all merchants in general, trading from Great Britain and Ireland up the Mediterranean, great numbers of whom would build houses, cellars &c., upon the ruins where there is space enough, so that there would be a spacious town, and well inhabited by His Majesty's subjects, if the indulgence of a Civil Court was granted, and His Majesty's gracious permission for their building there.

That the Spaniards who inhabit there, have a Spanish Consul and a Spanish lawyer, who decide all differences that arise between them.

That the French who dwell there, are governed after the same manner as the Spaniards, who pay large rents to the Governor, monthly, for their houses, which, if applied, would contribute in a great measure towards the subsistence of His Majesty's forces in that garrison.

That the Genosese who live there, have, likewise, a Consul and a lawyer of their own nation, to decide their disputes.

That the Dutch who are there, have, also, a Dutch Consul, &c., who determine their differences.

And we beg leave to take notice to your Lordships, that the Lords Commissioners of Trade and Plantations, in obedience to an order of the Lords Justices in Council, referring to them the petition of the said Mr. William Hayles and others, praying that a Court of Justice may be erected at Gibraltar, for deciding disputes between merchants and traders, by their report of the 2d of August, 1720, represented to their Excellencies, that they conceived Courts at Gibraltar, erected after the manner practiced according to the Common Law in Great Britain, or in imitation thereof, or such as are established in His Majesty's colonies abroad, would be very dilatory and expensive, and, consequently, not well adapted to the decision of transitory and mercantile disputes in a free port, where there are but few inhabitants; therefore, they proposed to their Excellencies, that a more summary Judicatory should be established at Gibraltar, and submitted to their Excellencies, whether the Judge-Advocate of the garrison, for the time being, might not be authorized, upon any dispute that might arise there, to call to his assistance two merchants, disinterested persons, by whose advice he should decide between the two parties contending, from which judgment an appeal might lie to the Governor; and in case of a considerable value, another appeal from the Governor's decision, to His Majesty in Council, as the last resort.

That their Excellencies, the Lords Justices, having

approved the report of the said Lords Commissioners of Trade and Plantations, by their order in Council of the 11th of August, 1720, were pleased to order, that we should, forthwith, prepare a draft of such powers as might be fitting for His Majesty to grant upon the said occasion; together with proper regulations to be observed in the execution of the said new Judicature at Gibraltar, and to report the same to their Excellencies in Council.

In obedience to which order, we prepared a draft of an instrument, to pass the Great Seal of Great Britain, for erecting a Court of Judicature in Gibraltar, which, being laid before their Excellencies, they were pleased to approve the same, after some few alterations made therein; after which a commission passed the Great Seal, directing and empowering the Judge-Advocate, for time being, together with two merchants within the said town of Gibraltar, to be appointed, from time to time, by the Judge-Advocate, and any two of them (whereof the Judge-Advocate to be one,) to be a Court, to which Court full power and authority is given, to hold plea of, and to hear and determine, in a summary way, all pleas of debt, account or other contracts, trespasses, and all manner of other personal pleas whatsoever, between any person or persons whatsoever, residing or being within the said town or precincts, or territories thereof, and to give judgment and sentence according to justice and right; and the method of proceeding and manner of execution is thereby prescribed, as, by the said commission, an entry whereof is made in the Council books, to which we beg leave to refer, will appear.

This commission, passed in that manner and upon the

consideration above-mentioned, is still continued in force, and no objection has been made before us, as to the substance of it, but only as to the persons appointed to be Judges, the principal whereof being the Judge-Advocate, and he having authority, from time to time, to name the two merchants that are to act with him, it is objected that this is too great a power to be entrusted with a single person, especially with one who is an officer of the garrison and subject to the command of the military Governor, and upon that account the more improper; and, therefore, it has been proposed that persons should be expressly appointed, by His Majesty's commission, to be Judges, who understand the law and are qualified for the regular execution of justice, with competent salaries for their trouble, which may be defrayed by the revenues of the place.

And we further certify your Lordships, that the said commission was passed at the instance of the said Mr. Hayles, upon a particular occasion, which was represented, in a very pressing manner, to require great despatch, in order to the recovering of certain debts then in great danger of being lost; and for that reason, the Judge-Advocate having been proposed by the Lords Commissioners for Trade and Plantations, and being found to be the most proper person then ready upon the place, the commission passed in that manner; but we are humbly of opinion, that in case a standing Judicature be erected, to have continuance in the said town and territory, it may be proper that persons should be expressly named Judges in the very commission, who may be more particularly qualified for the administration of civil justice.

We beg leave to observe to your Lordships, that

though the petition concludes with a prayer only for the establishing a Court of Civil Judicature and appointing of Judges, yet it sets forth that the petitioners are greatly prejudiced in their trade, for want of a form of Civil Government, and, upon this head, we cannot but take notice to your Lordships, that it has been represented to us, that the place is at present wholly destitute of any Civil Government, and that the property of the lands and houses has never been settled since the conquest thereof, in the time of the late Queen, but remains precarious.

Upon this information, we have made the best inquiry we could, whether, by the articles of surrender, or any treaties, declarations, or other public acts, ratified by the Crown of Great Britain, any legal provision has been made, or rules given for that purpose, and have been able to find none; and, therefore, we are humbly of opinion, that as a fundamental, necessary to any form of civil government, without which Courts of Judicature will be in a manner useless, and for the quieting of the inhabitants in their possessions, some settlement ought to be made of the property in the houses and lands within this town and territories.

It has also been represented to us, that no laws have been given to this place for fixing the nature of crimes, and the punishments to be inflicted on offenders, but that the same are, at present, punished by martial law, or, at least, in a way of military discipline.

This we apprehend to be a defect which requires a remedy; and that laws should be given for this purpose, and powers to civil magistrates to put them in execution, in some fixed Court of Justice.

In order to enable ourselves the better to lay before

your Lordships, heads of a scheme, pursuant to your Lordships' order, we thought it not improper to inform ourselves of what had been done upon the first settlement of Tangier, in the time of King Charles the Second, and of His Majesty's colonies and plantations in the West Indies; and for that purpose, have perused a copy of letters patent passed for Tangier, and also have caused to be laid before us copies of the commissions which were granted for the islands of Jamaica and the Caribbee Islands, upon settlement thereof, which are hereunto annexed.

As to Tangier, the method then taken was thus; viz: By letters patent, dated the 20th of April, 1668, the town was declared to be a free city, all the inhabitants (being Christians,) were incorporated by the name of Mayor, Aldermen and Commonalty, with a Recorder and twelve Common Councilmen; out of the Mayor, Recorder and Aldermen was constituted a Court of Record for determining civil causes, and a Court of Oyer and Terminer for criminal matters, with a general jurisdiction, (except as to persons in actual pay in the garrison.) Besides which, a particular Court was erected for mercantile causes; and all proceedings were directed to be according to the laws of England, as near as the condition of the place and safety of the inhabitants would permit.

The first commission for the government of Jamaica, issued since the restriction, bears date the 8th February, 18th Car. II. By that the Governor is directed to take to him a Council of twelve of the inhabitants, and (amongst other things,) power given to him, by the ad-

vice of five or more of such Council, to erect such and so many Civil Judicatures, with authority to administer oaths, as should be held necessary.

The commission for the Caribbee Islands, which has been laid before us, bears date the 3d of January, 18th Car. II. By that commission, the Governor is to appoint a Council of twelve in each island, and a general power is given him, with the advice of such Councils respectively, to appoint all forms and ways of government, magistracy and execution of justice, and to erect Courts of Judicature for all causes, criminal and civil, and to institute forms of proceeding; to appoint Judges and other officers, and to ascertain their respective authorities and fees; provided, that all the constitutions and establishments so made, should be transmitted to be allowed or disallowed by His Majesty in Council. A General Assembly is appointed, to consist of members to be chosen by each township, who are to make laws with the assent of the Governor. But power is given to the Governor, with the advice of the respective Councils, to make laws on emergent occasions, without any Assembly, provided they should be as near the laws of England as the nature and constitution of the country would admit, and did not charge or take away the right of any persons in their freehold, goods and chattels. Power is also given to the Governor, to grant parcels of land, unplanted, to planters, under certain terms and reservations, and a register to be kept for all conveyances; besides which, the commission descends to other particulars, which we conceive not to be material to be stated to your Lordships.

By these instances it appears, that sometimes the

Crown has thought fit, by particular express provisions under the Great Seal, to create and form the several parts of the Constitution of a new Government, and at other times has only granted general powers to the Governor to frame such a Constitution as he should think fit, with the advice of a Council, consisting of a certain number of the inhabitants, who might be supposed to be most capable of judging what the condition of the country required, and this subject to the approbation or disallowance of the Crown; but which of these two methods is fittest to be allowed in this case, depends upon the particular circumstances of the place, of which, we apprehend, we have not obtained sufficient information to enable us to make any certain judgment; but, if there be about one thousand families in the town, as is represented in Mr. Godfrey's paper, and amongst those about two hundred of His Majesty's subjects, as in Mr. Hayles' paper (which he explains to us to mean British and Irish), we beg leave to submit it to your Lordships, whether, upon that consideration, a Constitution framed strictly according to the forms of the Common Law of England, may be convenient or practicable.

As to the settlement of property, we apprehend that may be done by virtue of powers to be given by His Majesty to the Governor, for making grants of such houses and lands, whereof the property clearly remains in the Crown (under fit regulations), and also for confirming the titles of others, by some general declaration, in such manner as shall be thought proper.

We beg leave to lay these matters before your Lordships for your consideration, because we find the recitals of the petition lead thereto, and some of them may be necessary to receive a determination before any Court

of Judicature whatsoever can have its due effect; but the prayer of the said petition, and your Lordships' commands to us, going no further than to prepare a draft or proper heads, for establishing a Court of Civil Judicature, and the objection made before us to the Court already established being only with regard to the persons thereby appointed Judges, we are humbly of opinion, that if proper persons are expressly nominated Judges by His Majesty, in the commission itself (as is above mentioned), the present form may, in the other parts thereof, not be improper.

ROBT. RAYMOND.

December, 14, 1722. PHIL. YORKE.

(2.) *The opinion of the Attorney-General Northey, that the Queen might establish a Court of Equity in Massachusetts Bay.*

[Extract from the Charter of Massachusetts Bay, and Mr. Attorney-General's report upon a clause in the Charter of the Massachusetts Bay, relating to the establishing of Courts.]

"And we do of our further grace, certain knowledge, and mere motion, grant, establish and ordain, for us, our heirs, and successors, that the great and General Court or Assembly of our said Province or territory, for the time being, convened as aforesaid, shall forever have full power and authority to erect and constitute Judicatories, and Courts of Record, or other Courts, to be held in the name of us, our heirs and successors, for the hearing, trying and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes, and things whatsoever, arising or happening within

our said Province or territory, or between persons inhabiting or residing there, whether the said crimes be criminal or civil, and whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed, and for awarding and making out of execution thereupon: To which Courts and Judicatories we do, hereby, for us, our heirs and successors, give and grant full power and authority, from time to time, to administer oaths for the better discovery of truth in any matter in controversy, or depending before them."

On consideration of this clause, if there be no other clauses that exclude the power of the Crown, I am of opinion Her Majesty may, by her prerogative, erect a Court of Equity in the said Province, as by her royal authority they are erected in other Her Majesty's Plantations; and it seems to me that the General Assembly there cannot, by virtue of this clause, erect a Court of Equity.

EDW. NORTHEY.

April 21, 1703-4.

(3.) *Mr. West's opinion on the King's right to establish a new office of law at Barbadoes.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered the following Acts of Assembly, made and passed in the Island of Barbadoes; and, as to the first Act, entitled "An Act to empower the Governor, or Commander-in-chief for the time being, and Council, to commute the value of powder, arms and ammunition,

or other stores, that are or shall be found wanting in the accounts of store-keepers of the magazines in this Island, and to reduce the same into money." I am of opinion, that it is not proper to be passed into law. Upon occasion of this Act, I have been attended by Mr. Tryon, who appeared as a Solicitor against its being confirmed, and also by the agents for the Island in defence of it. And, as to the subject matter of the Act, viz: the commuting the value of powder, arms and ammunition, for ready money, I submit that to your Lordships' judgment, upon consideration of the annexed reasons, both for and against it, that were left with me by the above named Solicitor and Agents.

As to the other part of the Act, which relates to the proceedings against Mr. Peers, late one of the store-keepers for the Island of Barbadoes; (as there is a petition now pending in the Privy Council, on the behalf of the said Mr. Peers or his representative, against the said bill, upon which their Lordships have not, as yet, come to any determination;) I believe your Lordships will not expect any opinion from me, on that part of the bill.

But then, as to another part of the bill, which confirms the process executed by the Marshal of the Committee of Accounts, I am of opinion, that it is contrary to the King's Prerogative; inasmuch as the committee do thereby pretend to establish a new officer of justice, and such an officer as no committee of our House of Commons at home, ever yet pretended to appoint.

The second Act is entitled, "An Act for the better ordering and regulating the proceedings of His Majesty's Court of Common Pleas within this Island." Upon occasion of which Act, I have, likewise, been attended by the Solicitors against its being passed, and I beg leave

to annex to my report, a copy of such reasons against, and objections to the Act, as they thought fit to leave with me, upon this occasion; and as to the subject matter of the Act, I am humbly of opinion, that it is not proper to be passed; though, at the same time, the intention of this law seems to me, not only to be very reasonable, but very fit to be passed some time or other, when drawn into proper form; for, if a special verdict be not found in any case, where either party thinks himself aggrieved by the judgment, it is exceeding difficult, if not impossible, to have a remedy by appeal, to the Council at home; since, without a special verdict, the whole of the case can never fully appear. If, therefore, they had confined the obligation they put their Judges under, of directing a special verdict, when desired, to such causes only, where the value of the thing in question was equal to what, by His Majesty's instructions, they are at liberty to appeal home for, I should have thought the Act well calculated to render the remedy the subject there has against any erroneous judgment, by appealing to the Privy Council, more easy and practicable, and also to make the dependence of those people still close to our Government at home. But the obliging all Judges to direct a special verdict, without any reason assigned, upon the bare request of the party, and that in cases of never so small a value, is certainly putting it in the power of the debtor, most unreasonably, to delay his creditor in [illegible] recovery of just debts. But the penalty inflicted upon Judges, who deny or neglect to direct a special verdict, when desired, by making them, besides an incapacity, liable to the damages sustained by the party, and those to be recovered before any Justice of Peace, as in case of servant's wages, is so absurd, that I believe

your Lordships will not think it proper to be passed into law.

As to the several Acts following, viz: "A supplemental Act to the Act to enable and empower the Treasurer, to pay unto Dr. Home, the arrears due him, on account of the French prisoners, during the late war;" "An Act for enlarging the time for sale of effects attached for parish dues in arrear;" "An Act to empower the Treasurer to defray the expenses of the late Grand Sessions, held for the body of the Island, the 9th, 10th, 11th and 12th of December, 1718;" "An Act for abrogating the oath appointed by an Act of this Island, to be taken by Attornies employed to draw up special verdicts, and appointing another oath instead thereof;" "An Act for the encouragement of William Masset in his new projection of making worms and altering stillheads, for the better improvement of distillation:" I have no objection to their being passed into law.

RICH. WEST.

June 18, 1720.

(4.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the King's right of establishing a Government in Georgia, upon the surrender of the Trustees.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us in Mr. Hill's letter of the 17th inst., setting forth that the Lords of the Committee of Council for Plantation affairs, had referred to your Lordships, a memorial of the

Trustees for establishing the Colony of Georgia, with directions to propose a draft of what your Lordships should think most advisable to be done, in order to obviate the difficulties therein suggested, a copy of which memorial your Lordships had directed to be enclosed, for our opinion, in what manner the present magistrates and other officers, appointed by the Trustees, for the administration of justice and execution of government, can, upon the surrender of the Charter, be empowered to act in their respective employments, till a new administration of government shall be settled. We have taken the said memorial into consideration, and are of opinion, that if the surrender of the Charter. by the Trustees, cannot be postponed, and the present government there kept up till a new method of admininistering the new governmet can be settled, (which seems most advisable,) the proper way for authorising the present magistrates and officers, to continue in the exercise of their respective offices in the mean time, will be, for His Majesty to issue a proclamation for that purpose, under the Great Seal of Great Britain, to be published in Georgia.

D. RYDER.

February 25, 1752. W. MURRAY.

(5.) *Mr. Fane's opinion, on the King's power of calling an Assembly, in New York.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Hill, I have considered an Act, passed in New York, entitled, "An Act for the frequent elections

of representatives, to serve in General Assembly, and for the frequent calling and meeting of the General Assembly, so elected;" which enacts, that the General Assembly of this colony shall be held once a year, at least, at New York, unless the Governor, with the advice of a majority of the Council, (which is to consist of five,) shall, under the seal of the colony, appoint another place. It further enacts, that in six months after the dissolution or determination of every Assembly, new writs are to be issued, for electing a new Assembly, which is to be held once a year; and every future Assembly is to have continuance for three years only, to be accounted from the day of their meeting; and there is a clause to determine the present Assembly on the 15th June 1739, unless the Governor, for the time being, shall dissolve it sooner. I beg leave to observe to your Lordships, that I think this Act is a very high infringement upon the prerogative of the Crown; for it takes away that undoubted right, which the Crown has always exercised, of calling and continuing the Assembly of the colony, at such times and as long as it was thought necessary for the public service, and, therefore, when such a material innovation is attempted, there ought to be some very strong and cogent reasons to induce your Lordships to consent to it. For my part, I have heard none, and therefore am humbly of opinion, that it ought to be repealed.

FRAN. FANE.

July 20th, 1738.

(6.) *The opinion of Chief-Justice Morris, in New Jersey, on the King's power of mercy.*

The Act of general pardon, now under our considera-

tion, I think, consists of two parts; the one is to pardon all those persons, who have been concerned in or are guilty of any of the late riots or insurrections in this Province; the other is, to stop and suspend all process and proceeding against those persons who are already indicted for high treason, or such as may hereafter be accused of that crime, until and to the intent His Majesty's pleasure may be known.

I look upon this to be a matter of very great importance, perhaps the greatest that ever yet was under the consideration of the Council of New Jersey, and, therefore, wish that things had been so managed as to have brought this affair before us earlier in the sessions, that we might have had the greater time to weigh and consider what was proper to be done; however, I shall deliver my opinion and advice upon the matter, in as clear a manner as the shortness of the time, and my abilities will permit.

I am clearly of opinion, that by His Majesty's commission to His Excellency, under the Great Seal of Great Britain, His Excellency has full power and authority to extend His Majesty's mercy, by a general pardon, to all those that have been concerned in the late riots and insurrections within this colony; provided, the crimes of which they stand accused, do not amount to high treason or murder; these being the only crimes excepted in that clause of the royal commission which gives power to extend His Majesty's mercy.

But I do not think it, by any means, prudent or advisable, in His Excellency, to use the powers so given, in the manner proposed by the general pardon before us, till the Legislature now sitting have made provision effectually to strengthen the hands of His Majesty's gov-

ernment, so as to enable them to protect the persons and estates of the people of the Province, and to carry into execution the laws of the land. When that is done, in a manner satisfactory to the government, then, and not before, I humbly conceive it will be prudent and advisable in His Excellency, to grant and extend His Majesty's gracious mercy to the persons concerned in the said late riots, which will then, in my opinion, tend very much to restoring the peace of the Province, as most of the persons concerned are an ignorant people, encouraged and set on by some artful and designing men.

As to the second part of the Act of general pardon, I must declare it as my judgment and opinion, that, neither by His Majesty's commission, nor by the article of the royal instructions now communicated, has His Excellency any power or authority to suspend the process, or stop the proceedings in cases of *high treason.* The powers of pardoning given by the commission, are full as to all crimes but treason and murder, which being expressly reserved and excepted, no construction, in my opinion, can possibly extend the words so as to give power to suspend or stop the proceedings in those cases, which will, in effect, be pardoning, as the parties are (and it is intended shall remain,) at full liberty, and may remove themselves, and their effects to another part of the world, long before His Majesty's pleasure can be known.

As to the construction now communicated, it is certainly a very good one, and, among many others, shews His Majesty's great care and paternal affection for these, his remote dominions; but I think there is nothing contained in it, that can be construed to give a power to do what is now proposed.

The material words are, "and if anything shall happen, that may be of advantage and security to our said Province, which is not herein, or by our commission to you, provided for, we do hereby allow you, with the advice and consent of our Council, to take order, for the present, therein," &c.

This instruction seems to me justly calculated to empower the Governor to act for the advantage and security of the Province, in extraordinary cases, wherein the commission and instruction are silent; but, in my humble opinion, was never intended, nor can it be construed, to extend to things expressly provided for by the commission, which the powers of pardoning and reprieving are, so far as His Majesty intended they should be used; and as the power of pardoning treason is there expressly reserved and excepted, I cannot think the general words in the instruction, were intended to give a power contradictory to the commission. And I conceive, that as the King's instructions receive their greatest force from the commission under the Great Seal, so the granting the suspension proposed under the powers given by that instruction, will be doing an act, by virtue of the royal commission, which that very commission prohibits and excepts in express words.

Having declared my sentiments, that His Excellency has no power, by his commission or instructions, to grant the suspension proposed, it will be needless to enter far into the consideration of the legality of tying up the hands of the Courts of Law, in such cases, which seems to me to be stopping the ordinary course of the laws, and exercising little less than a dispensing power, not warranted by the Constitution.

How far it will be prudent and advisable, in His Excellency, to grant the suspension proposed, *if he had power*, is next to be considered, and greatly depends upon the state and circumstances of the Province, which is very well known to every one here present, and therefore, need not be mentioned. But certain it is that things would never have gone the lengths they had done, if the Legislature had interposed when this rebellion was young, and before it had come to its maturity, nor need it continue longer, if they will exert themselves, in support of His Majesty's authority, and the laws of the land.

In my humble opinion, the Province is not in such circumstances as to make it prudent or advisable in the government to stretch their power in favor of a few people, who have thrown off their allegiance. There is power and strength enough in the Province, to put the laws in execution; His Excellency, with the Council and Assembly, can, if they will, presently put a stop to those disorders, and were they once inclined, these daring people would presently sneak into their hiding places, and not venture to shew themselves in opposition to the government. But while we want inclination, and while these people know what we do, all the mild measures proposed will be ineffectual, and only tend to bring the government into greater contempt.

Had these daring disturbers not been countenanced by some men of note, had they not depended upon the support and protection of men much above themselves, they never would have ventured, thus, to have flown in the face of His Majesty's Government, and to have thrown off their allegiance. Had they labored under

any injustice or oppression, they have had full liberty, and have laid their complaints before the Assembly, too many of whom want not inclinations in their favor; and as they have been fully heard, and no one instance of oppression or injustice made out, even to the satisfaction of the Assembly, it must be presumed their complaints are only clamor, designed to draw in weak and unwary people, to join them in their unlawful practices.

R. H. Morris.

How far Colonists carry English Laws.

III. How far the King's subjects, who emigrate, carry with them the Law of England: *First*, The Common Law; *Second*, The Statute Law.

First. As to the Common Law.

(1.) *Mr. West's opinion on this subject in* 1720.

The Common Law of England, is the Common Law of the Plantations, and all statutes in affirmance of the Common Law passed in England, antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements, are there in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear.

(2.) *The opinion of the Attorney and Solicitor-General, Pratt and Yorke, that the King's subjects carry with them the Common Law, wherever they may form settlements.*

In respect to such places as have been or shall be acquired by treaty or grant, from any of the Indian

Princes or governments, your Majesty's letters patent are not necessary; the property of the soil vesting in the grantees by the Indian grants, subject only to your Majesty's right of sovereignty over the settlements, as English settlements, and over the inhabitants, as English subjects, who carry with them your Majesty's laws wherever they form colonies, and receive your Majesty's protection, by virtue of your royal Charters.

C. PRATT.
C. YORKE.

(3.) *Mr. Fane's opinion how far subjects can be detained in custody, on a charge of Piracy.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter of the 3d of May last, whereby your Lordships are pleased to desire my opinion, in point of law, how far Mr. Worsley, Governor of Barbadoes, can be justified in detaining two persons in custody upon that island, upon suspicion of piracy, supposed to be committed on the Portuguese factory, at Cape Lopez. I have considered of the matters so referred, and am humbly of opinion, that Mr. Worsley cannot justify the detaining the persons any longer in custody, upon suspicion, without bringing them to a trial, and which, he says in his letter to your Lordships, he declines doing, because he is apprehensive that for want of evidence they will be acquitted; therefore, I think they ought to be released; but it may be proper for Mr. Worsley, if the suspicions are very strong against them, not to discharge them till such time as they have

given security for their appearance, to answer any matters that may hereafter, in a reasonable time, be charged upon them.

FRAN. FANE.

July 14, 1726.

Second. As to the extension of the Statute Law.

(1.) *The Attorney-General Yorke's opinion on this subject, in* 1729.

Quære.—Whether such general Statutes of England as have been made since the date of the Charter of Maryland, and wherein no mention is made of the plantations, and not restrained by words of local limitation, are, or are not, in force, without being introduced there by a particular Act of their own?

I am of opinion that such general Statutes as have been made since the settlement of Maryland, and are not, by express words, located either to the plantations in general, or to the Province in particular, are not in force there, unless they have been introduced and declared to be laws, by some Acts of Assembly of the Province, or have been received there by long uninterrupted usage or practice, which may import a tacit consent of the Lord Proprietor and the people of the colony, that they should have the force of a law there.

P. YORKE.

By Stat. 25, Geo. II. ch. 6. s. 10, it appears, that the Legislature considered *usage* as sufficient to have extended an Act of Parliament to the colonies.

(2.) *The opinion of the Attorney and Solicitor, Henley and Yorke, that the subjects emigrating, do carry with them the Statute Law, in* 1757.

My Lords;

In obedience to your Lordships' commands, signified to us by Mr. Pownal, by letter dated April 1st, 1757, accompanied with an enclosed letter and papers, which he had received from Jonathan Belcher, Esq., Chief-Justice of His Majesty's colony of Nova Scotia, relating to the case of two persons convicted in the Courts there, of counterfeiting and uttering Spanish dollars and pistareens, and requiring our opinion, in point of law, thereon; we have taken the said letters and papers into our consideration, and find that the question upon which the case of those two persons convicted of high treason depends, is this: Whether the Act of Parliament, 1st Mar. ch. 6., entitled an Act that the counterfeiting of strange coins (being current within this realm), the Queen's sign manual or privy seal, to be adjudged treason, extends to Nova Scotia, and is in force there, with respect to the counterfeiting Spanish dollars and pistareens in the said Province?

And we are of opinion, first, that it doth not; for that the Act is expressly restrained to the counterfeiting of foreign coin, current within this realm, of which Nova Scotia is no part.

Secondly, we are of opinion, that the proposition adopted by the Judges there, that the inhabitants of the colonies carry with them the Statute Laws of this realm, is not true, as a general proposition, but depends upon circumstances: the effect of their Charter; usage; and acts of their Legislature; and it would be both

inconvenient and dangerous, to take it in so large an extent.

And thirdly, we are of opinion, that the offence can only be considered as a high misdemeanor, unless there are any provisions in any Charter granted to that Province, which make it a greater offence, to which we are entirely strangers.

R. HENLEY.
May 18, 1757. C. YORKE.

(3.) *The opinion of the Advocate, the Attorney and Solicitor, Hay, Yorke and Norton on the same subject, in* 1762.

Quære.—Does the Act of the 28th Hen. VIII. ch. 15., entitled "For Pirates," (being passed before the establishment of any of the British Colonies) extend to the said colonies; and if it does, how are the regulations therein set down, to be executed?

Answer.—We are of opinion, that the stat. 28 Hen. VIII. does extend to the case of *murder*, committed any where on the high seas; and, consequently, that a commission might issue on the present case, into any county within the realm of England, to try the offenders who might be brought over for that purpose, and the witnesses examined, and jury sworn before such Commissioners, unless that mode of trial should be deemed inconvenient.

Quære.—Does the Act of the 11th and 12th Will. III., ch. 7., entitled "An Act for the effectual suppression of Piracy," or the 7th sec. of Geo. I., ch. 11., entitled "An Act further preventing burglary," contain sufficient authority for the trial and punishment of persons upon

the sea or waters, within the Admiralty jurisdiction in the plantations?

Answer.—We are of opinion, that neither of the Acts of Parliament mentioned in this quære, were intended to affect the case of murders; they relate merely to such felonies as are equal or inferior to the species particularly expressed.

March 4, 1762.

G. HAY,
C. YORKE.
F. NORTON.

(4.) *The opinion of the Attorney and Solicitor-General, De Grey and Willes, on the extension of Acts of Parliament to the Colonies, when they are mentioned generally, as dominions of the Crown, in* 1767.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Pownall's letter of the 12th of June, that we would take into our consideration an Act of Parliament, passed in the 12th of Qneen Ann., stat. 2. ch. 18., entitled "An Act for the preserving of all such ships and goods, which shall happen to be forced on shore upon the coasts of this kingdom or any other of Her Majesty's dominions;" also, one other Act of Parliament passed the 4th of Geo. I. ch. 12, entitled "an Act for enforcing and making perpetual an Act of the 12th year of Her late Majesty, entitled 'an Act for preserving all such ships and goods thereof, as shall happen to be forced on shore or stranded upon the coasts of this kingdom, or any other of His Majesty's dominions,'" and for inflicting the punishment of death on such as shall wilfully burn and de-

stroy ships; and that we would give our opinion, whether the said Acts do extend to, and are in force in His Majesty's colonies and plantations, in America; we have taken the same into our consideration, and are of opinion, that as the title of the Act of the 12th of Ann. stat 2. ch. 13, expressly imports to be "an Act for preserving ships and goods forced on shore, or stranded upon the coasts of this kingdom or any other of Her Majesty's dominions," and the enacting part has words extending to Her Majesty's dominions in general, the said Act of the 12th of Ann. extends to and is in force in His Majesty's colonies and plantations in America, notwithstanding the special promulgation of the law; and some other provisions in it are applicable only to this kingdom.

We are likewise of opinion, that so much of the Act of 4th Geo. I. ch. 12, as declares the 12th of Ann. to be perpetual, extends to America. But the third clause of that Act, which introduces a new crime, by a provision altogether independent of the former part of the Act, and made to render an Act of the first of Ann. more effectual, we are inclined to think, does not extend to His Majesty's colonies and plantations in America, that clause being expressed in general terms, without any reference to the colonies; and the 11th of Geo. I. ch. 29., s. 7., which directs the mode of prosecution of those offences, when committed within the body of any county of this realm, or upon the high seas, making no mention of the manner of trial, if such offences should be committed in any of His Majesty's plantations or colonies in America.

W. De Grey.
E. Willes.

June 25, 1767.

(5.) *The opinion of the Attorney and Solicitor-General, Raymond and Yorke, how far the Statute of Monopolies extends to the Colonies.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

In obedience to your Lordships' commands signified to us by Mr. Popple, by his letter dated the 24th of June last, whereby he acquaints us, that His Majesty, having been pleased to refer to your Lordships the petition of Mr. Shard and others, for a patent for the sole curing of sturgeon in America, and importing the same into this kingdom; and your Lordships, being desirous to have the same effectually carried on without being made a stock-jobbing business, were pleased to require our opinion, in what manner a patent may be granted them. To answer what your Lordships propose, in that point, we have considered of the matter thereby referred to us, and are of opinion, that if such a patent as is prayed by the petitioner, might be granted by law, the making it a stock-jobbing business may be prevented, by inserting a clause therein for that purpose; but, upon the case as stated to us, we apprehend that the art pretended to by the petitioner, does not appear to be a new invention, of which the sole use is grantable; besides that, we are very doubtful upon consideration of the Statute of the 21st of Jac. I., c. 3, whether the prerogative of the Crown, for making grants of this nature, exclusive of other persons, extends to the plantations.

ROBT. RAYMOND.
July 18, 1720. PHIL. YORKE.

(6.) *The opinion of the Attorney-General Yorke, in* 1727, *how far Statutes extend to the Isle of Man.*

I am of opinion, that no officer of the Customs can, by virtue of any deputation from the Commissioners of the Customs in Great Britain, make a seizure in the Isle of Man; because, as I take it, their commission doth not extend to that Island; but I conceive that the clause in the Act 7, Geo. I., upon which this question arises, gives power to any person, whatsoever, to seize goods imported into the Isle of Man, contrary to the provision of that Act; and that those general words are not restrained as they are in England, by the operation of the Act of frauds, 14 Car. II., c. 11., s. 15, which directs seizures to be made by the officers of the Customs only, for that clause extends only to England, Wales and Berwick-upon-Tweed; therefore, I think officers, so deputed, may make seizures in the Isle of Man, for importations contrary to the Act 7° Georgii, and prosecute the same to condemnation, in the proper Court there, but this must be done, not by virtue of their deputations, but as common persons, by force of the Act of Parliament.

P. YORKE.

August 23, 1727.

(7.) *The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the extension of the Laws of England to the Colonies, and on other analagous topics of Law.**

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, by his letter dated the 4th of February last, transmitting to us the annexed copy of an order of their Excellencies, the late Lords Justices, made in Council, and requiring our opinion upon the matters therein referred to your Lordships, we have considered the said order, which contains in substance, that your Lordships should consider what laws, now in force in the island of Jamaica, will expire the 1st of October, 1724, and what laws will remain in force after that time; and that your Lordships should also consider upon what foot the government of that island will stand after the said 1st of October, 1724, and under what circumstances the inhabitants thereof will remain, in relation to their dependence upon the authority of the Crown; and that your Lordships would take the opinion of His Majesty's Attorney and Solicitor General thereupon, and report a full state thereof to their Excellencies in Council.

And we humbly certify your Lordships, that the several points mentioned in the said order, depending upon

* By a clause in the Mutiny Act, 6 Geo. III. crimes committed in the upper country of Canada were made triable in the Canadian Courts of Justice; in 1772, one Due, who had murdered his master at Detroit, was thus tried, found guilty and executed.

the Constitution of the Island of Jamaica, and the several alterations it has undergone, since the conquest thereof from the Crown of Spain, in the year 1655, we have found it necessary to inquire into a great variety of facts, which could only appear by the books and memorials preserved in your Lordships' office; and in order to our information therein, your Lordships' Secretary did, at our request, lay before us several original books, and copies and extracts out of other books and papers, by the assistance whereof we have endeavored to form some judgment upon the subject matter of the said reference; but by reason of the many defects which were in the first settlement of this Colony, and the contentions which have been kept on foot ever since, between the respective Governors and Assemblies of the people, we find many things, of no little consequence, left in great uncertainty, at this day; and in several instances, it is very difficult to learn what was the real transaction, by reason of the imperfect accounts which have been sometimes transmitted hither.

The points specified in the said order of the late Lord Justices, whereupon your Lordships have been pleased to require our opinion, are three, viz:

What laws, now in force in Jamaica, will expire on the 1st day of October, 1724?

What laws will remain in force after that time?

Upon what foot the government of that Island will continue, after that time, particularly in relation to its dependence upon the authority of the Crown of Great Britain?

As to the laws of the Island, they appear to have been made in different manners, and under different

powers, at several periods of time; and because in considering them, some facts will occur, which may be found to be material, with relation to the third point referred to us, we beg leave to state the case, as to this head, more fully to your Lordships.

The first commission of a Governor of this Island, which has been laid before us, was granted to Colonel Edward D'Oiley, bearing date the 8th day of February, 1660, whereby he was empowered to do and execute all things appertaining to the office of Governor, which might tend to the defence and good government of the Island, according to such powers as were given him by his commission and instructions, and according to such good and reasonable customs and constitutions as were exercised and settled in His Majesty's other Plantations, or such as should, upon mature advice and consideration, be held necessary and proper, for the good government and security of the Island, provided they were not repugnant to the laws of England; but no reservation is made, or direction given, for the transmitting any Acts, or orders, to be made by him in the Island, to be confirmed by the King.

For the better administration of justice, and management of affairs, he was directed to take to him a Council of twelve persons, to consist of the Secretary of the Island, and eleven persons to be elected indifferently by as many of the officers of the army, planters, and inhabitants, as by his best and most equal contrivance might be admitted thereunto.

With the advice of this Council, or any five of them, the Governor was empowered to erect and constitute Civil Judicatures, with power to administer an oath, and to do and execute all and every such further Act and

Acts as might conduce to the security of the Island, and the people thereof, and the honor of the Crown.

By virtue of this commission and instructions, several Courts of Justice were erected, and many orders made by the Governor and Council, the style whereof is, be it enacted and ordained by the Governor and Council, concluding, given under my hand on such a day, signed by the Governor; and several of them are mentioned to have been proclaimed in the Island.

Amongst these is an Act, or order, for laying an impost upon strong liquors imported, viz; upon every tun of Spanish or French wine, four pounds sterling; every gallon of brandy, or spirits, sixpence; and every tun of beer, twenty shillings, and after that rate for a smaller quantity. Remedies are thereby provided for the levying and recovering this duty, and penalties inflicted on the persons committing frauds therein.

There is also another Act, or order, for laying one shilling per ton upon all ships trading to this Island.

Many other ordinances appear to have been made in the same manner, for the better government of the Island, for regulating trade, and redressing public mischiefs; and some particular Acts in the Barbadoes' book (as it is there expressed) are ordered to be in force in Jamaica.

In many of these ordinances, penalties and forfeitures to the King are inflicted; justices of the peace are spoken of as magistrates then in being, though we cannot find any general constitution of justices of the peace, only an order of the Governor and Council to be justices of the peace throughout the Island, and some others appointing particular persons justices of the peace.

On the 2d day of July, 1661, the Lord Windsor was appointed Governor, in the room of D'Oiley. By his commission and instructions, power was given him to appoint and constitute a Council, to consist of twelve persons, by the advice of whom, or any five of them, he was authorized to erect Civil Judicatures, and to proceed in all other acts of Council and Government.

And in his instructions, to this clause, you shall have power, with the advice of the Council, to call Assemblies together, according to the custom of our Plantations, to make laws, and, upon imminent necessities, to levy monies, as shall be most conducible to the honor and advantage of our Crown, and the good and welfare of our subjects: provided that they be not repugnant to any of our laws of England, and that such laws shall be in force for two years, and no longer, unless they shall be approved and confirmed by us.

This is the first mention that is made of an Assembly; but, notwithstanding that, it appears that Lord Windsor, during his stay in Jamaica, which was but short, made three ordinances, with the advice of the Council, as much in the form of laws as those made by Colonel D'Oiley.

The like was done by Sir Charles Littleton, who was appointed Deputy-Governor under His Lordship, and more particularly one ordinance, which is entitled, an additional or supplemental Act, to an Act formerly made by the Governor and Council, for the raising a public revenue out of strong liquors imported to this Island. By this ordinance, not only new methods of levying and collecting the former duties are provided, but also the

duty of four pounds sterling, per tun, is imposed upon all Madeira and Fayal wines, as was, by the former Act, upon Spanish and French wines.

But, on the 23d day of October, 1663, Sir Charles Littleton, with the advice of the Council, made an order for calling an Assembly, to consist of thirty persons, being freeholders, to be fairly and indifferently chosen in the several quarters of the Island.

In the same book, in which these Acts or orders are contained, and immediately following them, is a transcript of a body of Acts of Assembly, without any title, save the word Jamaica, and the letters S. C. L. at the top of the first page, which we apprehend to stand for Sir Charles Littleton: these, we conceive, to be the Acts of this first Assembly.

Amongst these acts there is a very remarkable one, entitled, "An Act for confirming divers Acts of the Governor and Council of this Island, and repealing all other Acts and ordinances," in which some particular Acts or orders, are expressly confirmed and ordained to be of as full force as if they had been enacted by the Governor and Council, with the consent of the Assembly; all other Acts and ordinances made by the Governors and Councils only are declared to be utterly void. But a clause is inserted for indemnifying all officers and other persons who acted under them, for Acts done before that time.

We have been the more particular in stating these facts, because from them it appears, that it was insisted upon by the people of the Island, at that time, that the Acts, or ordinances, of the nature of the laws, which had been formerly made by the Governors and Council

only, were not binding laws, but void in themselves, for want of the consent of the representatives of the people, met in an Assembly.

Agreeably to this opinion, a new Act was made for establishing Courts of Judicature, and also a new revenue Act, whereby duties were laid upon strong liquors ported, varying only in one or two particulars from the former duties.

But though these Acts passed in the Island, they do not appear to have been approved by King Charles the Second, and, consequently, could continue in force only for two years.

The 15th day of February, 1663, Sir Thomas Modyford was appointed Governor; by his commission express power was given to him to choose a Council of twelve persons, and with the advice of them, or any five, or more of them, to make reasonable laws, constitutions, and forms of government, magistracy and execution of Justice, and to erect Courts of Judicature: provided the laws to be made were as near as might be to the laws of England, and did not extend to take away any right of any person in their freehold goods, or chattels, or to the loss of member, and so as they were transmitted to His Majesty to be approved.

Power was also given to the Governor, with the advice of the Council, to establish and frame in such a way and manner, as should be thought fit for the calling of General Assemblies of freeholders and planters, according to the usage and custom of His Majesty's other Plantations, and the said Assemblies so established, from time to time, to call and summon together, and by, and with their consent, to make, ordain, and constitute, all, and all manner of laws, statutes, ordina[illegible]s, and consti-

tutions, for the good of the said Island, the inhabitants, and government thereof; in the making whereof, the Governor was to have a negative voice, and also by their consent, upon eminent occasions, to levy money for the safety or good of the public. These laws to be, as near as might be, suitable to the laws of England, and not to extend to the taking away rights of freehold, or loss of member, and to be in force for the space of two years, and no longer, unless confirmed by the King.

There is a clause in these instructions, that what shall be requisite for defraying of the public charge and expense of the government, shall, with the advice of the Council, be laid upon hot waters, strong drink, imported, or made and spent there.

It does not appear, that any Acts or orders, in the nature of laws, were made by Sir Thomas Modyford, and his Council; but, in 1644, he held an Assembly, which consisted of two representatives, chosen by each Parish, by virtue of the King's writ issued by the Governor, by the advice of the Council, at which several bills passed, but, whether all of them received the assent of the Governor is uncertain, because, to some of them, his consent is particularly subscribed, and to others not, and amongst those which are not so subscribed, is an Act, entitled, "An Act, declaring the proceedings of the Assembly, convened by the Deputy-Governor, Sir Charles Littleton, null and void in law." The reasons given in the preamble of that Act are, that disputes had arisen, touching the writ, whereby that Assembly was chosen, and the manner of choosing them, and touching the validity of their Acts, by reason they were not signed by the then Deputy-Governor, nor by the speaker of the Assembly, and that the substance of as

many of them as had been thought needful, were made laws by the then present Assembly.

Amongst those signed by the Governor, is one entitled "An Act, declaring the laws of England in force in this Island," which is in these words: be it declared by the Governor, Council, and Assembly, and by the authority of the same that all the laws and statutes heretofore made in our native country, the kingdom of England, for the public weal of the same, and all the liberties, privileges, immunities, and freedoms, contained therein, have always been of force, and are belonging to His Majesty's liege people within this Island, as their birthright, and that the same ever were, now are, and ever shall be, deemed good and effectual in the law, and that the same shall be accepted, used, and executed, within this His Majesty's Island of Jamaica, in all points, and at all times, requisite, according to the tenor, and true meaning of them, (except only such statutes, or so much of them, whereby any subsidies, loans, aids, or other impositions, were granted or made): provided, nevertheless, and it is hereby further declared and enacted, by the authority aforesaid, that the said laws and statutes may, at any time hereafter, by the Governor, Council and Assembly, be mitigated, altered, lessened, or enlarged, according as the constitution of this place shall require, and as it shall seem requisite and necessary, to the General Assembly then in being.

This Assembly also passed a revenue Act, imposing duties upon strong liquors imported, varying in some few particulars, from the former duties, and likewise laying a duty of one shilling per ton on ships and vessels belonging to His Majesty's subjects arriving at the Is-

land, and two shillings per ton on the ships and vessels of foreigners.

But this Act does not appear to have been subscribed by the Governor.

The 5th day of January, 1670, Sir Thomas Lynch was appointed Lieutenant-Governor of Jamaica, with the like powers and authorities, in case of the absence, or disability of Sir Thomas Modyford, the Governor, as the Governor himself had; but the clause in his instructions, concerning Assemblies, and the making of laws, is this: you shall have power, with the advice of the Council, to call Assemblies, (according to the custom of our other Plantations,) to make laws, levy monies for our service, which said laws are to be as agreeable to the laws of England as may be, and shall be in force for two years, and no longer, unless they shall be confirmed by us.

In 1674, the Lord Vaughan was appointed Governor, with power to hold Assemblies, and pass laws, to continue for two years, and no longer, unless confirmed by the King; and under him, three Assemblies were holden, but the particular Acts passed in these Assemblies do not appear.

But the four Governors last mentioned, being restrained from passing laws to continue for any longer time than for two years, without the approbation of the King, and none of their laws having received such approbation, they are all long since expired.

After this, the Earl of Carlisle was appointed Governor, and by his commission and instructions, he, and in his absence his Lieutenant-Governor, for the time being were empowered to make laws, with the consent of the

Council and Assembly, to continue in force until His Majesty's pleasure should be signified to the contrary: accordingly, Sir Henry Morgan, Lieutenant-Governor, with the consent of the Council and Assembly, in the year 1681, passed twenty-eight Acts, one whereof was a revenue Act, which were transmitted into England and by order of His Majesty, King Charles the Second, in Council, dated the 23d day of February 1682, were confirmed, to continue in force for seven years from the 1st of October, 1682. A copy of which order, specifying the titles of the said Acts is hereunto annexed, marked (A.)

Sir Thomas Lynch succeeded the Earl of Carlisle as Governor, and had the like power to make laws, with the consent of the Council and Assembly, to continue in force till His Majesty's pleasure should be signified to the contrary, several Acts of Assembly having been transmitted by him to England for the royal approbation, thirteen whereof (amongst which was a revenue Act) were approved by King Charles the Second, in Council, the 17th day of April, 1684, and, together with so much of the Acts of 1682 as were [illegible] by repealed, were ordered to continue in force [illegible] and twenty years, from the 1st day of November, 1683. A copy of this order, in which also the titles of these last mentioned Acts are specified, is annexed, marked (B.)

Before the said term of one and twenty years expired, viz: in 1703, an Act passed in the Assembly of the island, entitled, "An Act for raising a revenue to Her Majesty, her heirs, and successors, for the support of the government of this island, and for maintaining and repairing Her Majesty's forts and fortifications," which was confirmed by Her late Majesty, in Council the 17th

day of August, 1704. This is the revenue Act now subsisting, and therein is an express clause, that all the laws of Jamaica confirmed in Council, the 17th day of April, 1684, for one and twenty years, and not before that time, or thereby repealed, and also that Act should continue in force for the space of one and twenty years, from the 1st day of October, 1703.

It has been represented to us, by Mr. Popple, that between the respective periods of the continuance of the two last mentioned bodies of acts, and also since the last confirmation, several particular Acts of Assembly have passed, which are perpetual in their nature, and have been generally confirmed by the Crown, without relation to the other laws.

All these Acts (except the four last) are contained in the printed collections of the laws of Jamaica, and a schedule of the titles of them is hereunto annexed, marked (C.)

It has been represented to us, by Mr. Popple, that there are nine acts of Assembly, perpetual in the frame of them, which have been transmitted hither at several times, between the year 1712, and the year 1723, which have not hitherto been either approved or disallowed by the Crown, so that these have, at present, the force of laws in the island. A schedule of the titles thereof is hereunto annexed, marked (D.)

From this account of the laws of Jamaica, which is the best we have been able to collect, we are of opinion, that all the acts of Assembly specified, and confirmed, in the two orders of Council, of the 1st of October, 1682, and the 17th April, 1684, will determine with the revenue act, on the 1st day of October next: amongst these is the only law now in being, for appointing and establish-

ing their Assembly; an act for settling the militia; an act for establishing Courts, and directing the marshal's proceedings, which regulates the course of legal proceedings; an act for ascertaining the quit rents, and the manner of receipt thereof; and several other acts of great consequence to the government, and welfare of the colony.

It has not appeared to us, that any acts made antecedent to those of 1682, do now continue in force, or can revive upon their determination.

The printed collection of the laws of this island, begins with those of 1682, and takes no notice of anything more ancient; and it appears by what has been already stated, that all the Governors before that time, (except Colonel D'Oiley, who was appointed in 1660,) were restrained to make laws to continue any longer than two years. Therefore, if any precedent laws can be pretended to be in force, or capable of being revived, they must have been made by him. But it seems to us very doubtful upon his commission and instructions, whether it was the intention of the Crown to give him a general power of making perpetual laws, or only ordinances and regulations for the present administration of the government; and we the rather incline to think the latter, because the word law is no where mentioned in the authorities given to him, and there is no reservation of power to the Crown to approve or disallow the constitutions he should make, which could hardly have been omitted, if it had been intended that he should make perpetual laws. Besides this, it is to be observed, that his acts were made by the Governor and Council, without any Assembly of the people, and though that Council was directed to be indifferently elected by as many of

the officers of the army, planters, and inhabitants, as by the Governor's best and most equal contrivance might be admitted thereunto, and in that respect might be a kind of representation of the people, yet how that power was executed, does not appear; and in fact the very first Assembly, which was held in the year 1663, made an act declaring all the acts made by the Governor and Council (except such as were particularly confirmed by them) null and void, and added a clause to indemnify persons for having acted under them, and though, by the very next Assembly, the acts of the first Assembly were declared void, yet one of the reasons given is, that as many of them as were needful, had been re-enacted by that second Assembly, some of which acts so re-enacted, are to the same effect with several of D'Oiley's ordinances.

As there are those doubts concerning those acts or ordinances in their original, and no complete submission ever yielded to them by the people, so it doth not appear to us that any of them have been acted under, or put in practice since the year 1663, but the entries in the books in your Lordships' office, do in our apprehension, import the contrary. And for these reasons, we are of opinion that they cannot now be considered as subsisting laws, or put in execution.

As to such acts of Assembly as have been made since the year 1682, perpetual in their nature, and confirmed generally by the Crown, which are specified in the schedule marked (C.), we apprehend they will continue in full force after the expiration of the revenue act: and so will also those other acts, not yet approved or disallowed, mentioned in schedule (D.) until His Majesty shall be pleased to declare his disallowance of them, and

then they will cease. These are the only acts of Assembly of the island which, so far as we have been able to be informed, will remain in force after the 1st day of October, 1724.

Such acts of Parliament as have been made in England, to bind the Plantations in general, Jamaica in particular, and also such parts of the common, or statute law of England as have, by long usage, and general acquiescence, been received and acted under there, though without any particular law of the country for that purpose, will (as we humbly conceive) continue of the same force after the first day of October next as they were before.

But we must observe to your Lordships, that we apprehend there may be great difficulties in putting such laws as will continue in force, in execution after that time; because, though the Courts of Judicature which have been erected by the Governor and Council, from time to time, by authority from the Crown, will remain in the state they now are, yet particular regulations and kinds of process and forms of proceedings, having been instituted by Acts of Assembly which will expire, it will be difficult for the Judges to know by what rules to proceed.

The next general question upon which your Lordships are pleased to require our opinion, is: Upon what foot the government of Jamaica will continue, after the first of October next, particularly in relation to its dependence upon the authority of the Crown of Great Britain.

As to this point, we apprehend that the expiration of the Laws before mentioned, will not, in general, weaken or take from the dependence of this Island upon the Crown of Great Britain.

The powers given by His Majesty's commission and instructions to this government, or the Governor and Council, will remain as they are now, unless any particular parts of them relate to the putting in execution Acts of Assembly which will then expire.

His Majesty may also, under His Great Seal, give such further powers to his Governor, to be exercised by him alone, or with the advice of a Council, (the power of appointing which will still remain in His Majesty,) as shall be found necessary for putting in execution the laws which remain in force; and also for appointing judges and officers, and administering justice in his courts; for ordering the militia; and doing all other acts which belong to His Majesty to do, by his prerogative. And in legal proceedings, an appeal will lie to His Majesty in Council, in the same manner as it does now.

The chief difficulties with regard to government, will arise under the head of the revenue to the Crown, and the power of making new laws.

As to the revenue, it does not appear to us that any will subsist, after the determination of the present revenue act, besides the rents reserved upon the grants of lands, licences for selling strong liquors, and the casual revenue of fines, forfeitures and escheats; in the recovery whereof there may be also some difficulties, by reason of the expiration of the laws directing the methods of proceedings now in use. As to the power of raising any new revenue for the support of government, by laying new taxes or impositions upon the people, that will depend upon the question, whether Jamaica is now to be considered merely as a colony of English subjects, or as a conquered country; if, we apprehend, as a colony of English subjects, they cannot be taxed, but by the

Parliament of Great Britain, or by and with the consent of some representative body of the people of the island, properly assembled by the authority of the Crown; but, if it can now be considered as a conquered country, in that case, we conceive, they may be taxed by the authority of the Crown.

As to the fact upon which this question (which is of great weight and importance,) doth arise, we apprehend sufficient materials have not been laid before us to enable us to judge thereof, for which reason we have offered our opinion to your Lordships, upon a supposition that it may come out either way; but, if it should appear that this island can now only be considered as a colony of English subjects, yet we are clearly of opinion, that since the present Act of Assembly of 1682, appointing the number of members of the Assembly and the places from whence they are to come, will expire with the revenue act, on the first day of October next, it will after that time, be in the power of His Majesty, by his commission and instructions to his Governor, to appoint Assemblies, to be summoned in such manner as His Majesty shall think fit, both as to the number of the whole, the number of representatives to be elected for particular places and parts of the island, and the qualifications, both of the electors and the elected; provided such order and method be observed therein as that they be reasonably understood to be a representation of the people.

This power was exercised by His Majesty's predecessors, before that act of 1682 passed, and consequently will remain entire to the Crown, after it shall expire; and such assemblies, so summoned, will have the same

authorities to make laws and raise money, as the present or any other Assembly have been possessed of.

P. YORKE.

May 18, 1724. C. WEARG.

(8.) *The opinions of Northey, Ryder and Strange, on the discontinuance of the American Act of Queen Anne.*

[Copy of the opinion of the late Sir Edward Northey, His Majesty's Attorney-General, in relation to the American Act, dated the 10th of February, 1715-16.]

I am of opinion, that the whole American Act was intended, and appears to have been intended, only for the war.

EDW. NORTHEY.

[Copy of the joint opinion of Sir Dudley Ryder, Attorney, and Sir John Strange, Solicitor-General, in relation to the American Act, dated the 17th July, 1740.]

We have perused the several clauses in the American Act, and by comparing the several clauses together, it seems to us, that the Act is not now in force, but expired at the end of the then war.

DUDLEY RYDER.

July 17, 1740. JOHN STRANGE.

Of the Colonial Constitutions.

IV. Of the colonial constitutions, which were variously modified: *First*, Of the Governor, who derives his *power* from the King's commission, under the great seal, and his rules of conduct from the King's instructions, under the sign manual; *Second*, Of the King's Colonial Councils, who derive their authority, both executive and legislative, from the King's instructions to the Governor; *Third*, Of the *Representative* Assemblies, who were chosen by certain classes of the colonial people. There is on this topic much complication: the right of granting a representative assembly, at what time, and under what circumstances, belonged to the King, subject to after regulation by the local legislature: the colonists carried with them the fundamental right of neither being taxed, nor ruled, but with their own assent, given either directly, or virtually.

First, Of the Governor.

(1.) *See the opinion of the Attorney-General Blenman, of Barbadoes, in* 1729.

His Majesty's Attorney-General for this island is de-

sired to give a full and explicit answer to the following *quære*, viz.

Quære.—Whether, notwithstanding the King's second proclamation for continuing all officers in their respective posts after six months from the demise of the late King, the act for supporting the honor and dignity of the government did not determine, and the salary of £6000 *per annum*, thereby provided for the Governor, ceased to be due, by reason that his new commission was not obtained before the six months elapsed? And, whether the gentlemen of the vestry for St. Michael's parish are obliged, or may refuse, to lay the tax this year, as they have usually done, in pursuance of the said law; or what will be proper for them to do in this case: divers of them being apprehensive that if they lay the tax they do thereby allow the act to be in force, and they will be afterwards bound by it, although they are of opinion the said law is in fact determined?

It has been generally held, that at common law, all patents determined by the death of the King by whom they were granted; and it is observable, that, on the death of King James the First, the judges thought it safest not to act till their patents were renewed, although there had been a proclamation for continuing them in their several offices as before; the reason of which opinion so far prevailed, that even on the abdication of King James the Second, many lawyers held that the judges' commissions determined, from the time of the King's withdrawing. However, by the stat. 7 and 8 W. 3, which was explained by a subsequent stat. of 1 Queen Anne, ch. 8, all commissions of patents are made to continue for six months after the demise of the King, unless superseded, in the mean time, by the successor. Now

the Governor, holding his place by virtue of a commission from the late King, and that not having been renewed by his present Majesty till after the six months were elapsed, it would seem just enough (taking it in this light) to infer, that his excellency ceased to be Governor, at the expiration of the six months; and consequently that the act was no longer in force, the same being limited to continue only so long as Mr. Worsley should continue to be His Majesty's Captain-General, and Governor-in-chief, and in that quality personally reside in the island. But, I apprehend, that this case will turn upon its own particular circumstances, and the reasonable construction which is to be made of the act for settling the £6000 per annum, abstracted from any regard to the commission, which is not mentioned in it.

I take it then to be clear, that the intention of the law was to make a suitable provision for His Excellency, as long as he should continue in the government; for to continue His Majesty's Captain-General, is undoubtedly the same as if the words had been, to continue the King's Captain-General; and since the King, in a legal understanding, never dies, it seems to me, that those words do not confine such provision for the Governor to the then reign only, but that they take in the whole time of his residence here as chief magistrate, which construction, I think, is plainly indicated by the preamble to the act. Now it is certain that Mr. Worsley has continued personally to reside in this island ever since his first arrival in the quality of Captain-General, &c., and that he hath during that time exercised all acts of government, in every respect, without interruption; whereas, if the royal proclamation was not sufficient

(here, in one of the King's colonies) to continue his Excellency in his government from the end of the six months to the date of the new commission, I conceive all such acts of his, during that interval, as well as those of subordinate magistrates and judges, were absolutely void, and there would have been a total discontinuance of all process and causes, both civil and criminal, throughout the island, which would introduce the utmost confusion, in point of property, and occasion other inconveniences of the most dangerous tendency. If, then, the second proclamation did effectually prevent these fatal consequences, which thenature and necessity of the thing, as well as the general practice of all in authority at that time (and perhaps of many who now start the objection,) doth evince, it must be allowed that Mr. Worsley continued His Majesty's Captain-General, and Governor-in-chief of this island, without intermission; and from thence it will as strongly follow, that the act for supporting the honor and dignity of the government is not determined. But admitting there were any doubt of this matter, I should think it the safest way, for such as are concerned in a public capacity, to do what is required of them by the act, since it hath not yet been declared void by a competent authority; but, on the contrary, it is manifest from the Governor's new instructions on this head, that it is taken to be still in force, by the same sovereign power which confirms or repeals all laws made in this place. And as the performing the duties required by the act will avoid the penalties otherwise to be incurred, so it will at the same time leave every one at liberty to try, if he pleases, the validity of it, in the courts of law. Upon the whole, I am of opinion that it will be most advisable for

the gentlemen of the vestry to proceed and apportion the tax in like manner as they have hitherto done; but they may, however, for the satisfaction of such as are dubious, make a minute in their parish books, reserving to themselves all benefit and advantage of exception, in case the law should be deemed not in force, which, I conceive, will be sufficient to put the gentlemen of the vestry upon equal foot with other persons in this respect, whilst it prudently leaves, at the same time, the point in dispute to be determined by the proper judicature.

J. BLENMAN.

April 10, 1729.

(2.) *The opinion of Mr. Thomas Reeve, on the same subject*, 1727-8.

I am of opinion, that this act is not determined by the demise of His Majesty, King George, but will remain in force, as long as Mr. Worsley continues Governor of Barbadoes, and shall personally reside in the Island. It is observable, that the tax, &c., is granted to His Majesty, his heirs, and successors, during the continuance of the act: it is limited to continue, for so long time as Mr. Worsley shall continue to be His Majesty's Captain-General, &c. Yet, I conceive, these words will have the same construction, as if it had been limited to continue so long as Mr. Worsley should be the King's Captain-General; and as the King, in law, never dies, I conceive the demise of King George the First will not be a determination of this act.

THOS. REEVE.

Jan. 15, 1727.

This act is to continue no longer than Mr. Worsley shall continue Governor, and be personally resident on the island; if he once ceases to be Governor, though he hath afterwards a new commission granted him, I conceive the act is determined. By the statute of 6th Anne, the commissions of the Governors of the plantations are continued, for six months after the demise of the Queen, or her successors, and if a new commission was granted to Mr. Worsley within the six months after his late Majesty's demise, it may be a continuance of him as Governor within the intention of the act, though I think this point is something doubtful; but if the six months expired, and then a new commission was granted, it seems to me that the act is determined.

THOS. REEVE.

Feb. 1, 1728.

(3.) *Mr. West's opinion, in* 1725, *whether a Governor can vote as a Councillor.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by letter from Mr. Popple dated the 24th day of November last, I have considered the following *quære*, Whether a Governor can vote, as a Councillor, in the passing of bills, when the council sits in their legislative capacity?

Upon consideration of which, and of the Governor's commission, and instructions, I am of opinion that a Governor cannot, by law, vote as a Councillor in the passing

of bills, when the council sits in their legislative capacity.

Jan. 8, 1724-5. RICH. WEST.

(4.) *Mr. West's opinion in 1719, concerning a Governor's power to prorogue the Assembly, under an adjournment.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered the following questions, viz: Whether an Assembly under adjournment or prorogation, may be prorogued without a meeting, according to such previous adjournment, or prorogation? And I am clearly of opinion, that it may.

But, as I believe so general an answer to the question, will not be esteemed by your Lordship to be satisfactory, I shall beg leave to be a little more particular, in giving some reasons for such my opinion.

It may be made a question, whether the general assemblies of the several provinces in the West Indies may be entitled to those privileges which are claimed by, and have, by the Crown, been allowed, to the parliaments of England; but it is most certain that the prerogative, in relation to their general assemblies, is at least as extensive as it ever was in England. In respect to our parliaments, and this prerogative of the Crown, whatever the extent of it may be, every Governor, by his commission, is empowered to exercise in his particular province.

The prerogative in the West Indies, unless where it

is abridged by grants, &c. made to the inhabitants of the respective provinces is that power over the subjects, considered either separately or collectively, by their representatives, which, by the common law of the land, abstracted from all acts of parliament and grants of liberties &c. from the Crown to the subjects, the King could rightfully exercise in England.

The only point of prerogative which this question relates to, is that power which the Crown has of summoning, proroguing, &c. of parliaments; and here your Lordships will be pleased to observe that this branch of the prerogative does at this time subsist entirely upon the foot of the common law and custom of parliaments, which, in this respect, must be considered as part of the common law, which has never been, in this particular, anywise abridged or circumscribed by any act of parliament; and, therefore, if the affirmative part of the question is impracticable in England, it is impossible a governor should be empowered to practise it, in America.

The determination therefore, of this question depends entirely upon the custom of our English parliaments: in relation to which I shall observe to your lordships these two particulars, i. e. the present practice in our parliament as it appears to the public, and the words of the writ of prorogation.

Every parliament, whether it be upon original summons, or prorogation, &c. is always appointed to meet at a day certain, on which day the members are obliged to meet together unless the King does think fit to discharge them from their attendance; and as their obligation to attend does arise from writs under the great seal, their discharge must likewise flow from the same seal.

Now, if a parliament is summoned to meet on a certain day, and the Crown thinks it inconvenient the parliament should assemble on that day on which the writs of summons were returnable, a proclamation is issued (as it is generally supposed) to prorogue the meeting of the parliament to some further day, without there being any necessity of their meeting upon that day upon which their attendance was required by the original writ of summons. In this present parliament, we see it prorogued from time to time, and proclamations are constantly issued to notify it to the kingdom; and, although it is usual upon those days to which parliament stands prorogued, and when a further prorogation is to be made, for several lords and members of the house to attend in the parliament chamber on that day, yet such their attendance is noways necessary, but the prorogation would be just as good if they were all in the country and the clerk of the parliament read the writ to his fellow officers; for the writ of prorogation being always *tested* some day before the day to which parliament stood prorogued, all the members are thereby actually discharged from their attendance.

I would beg leave further to observe to your lordships, that it is not by these proclamations, that parliaments are prorogued, but that they do always suppose a writ patent for the prorogation, which writ was anciently, when a prorogation was intended, sent to the sheriffs of the several counties, by whom it was proclaimed, in order to save the members the trouble of coming from town, and the counties and towns they represented, the expense of their journies; but the latter practice has been to supply this by printed proclamations, though, to this day, according to the ancient custom, the writ is

constantly read in the parliament chamber: and, that your lordships may judge whether the members were discharged from attending on the day to which the parliament stood prorogued, and that consequently no meeting could be necessary, I must beg leave to mention to your lordships some clauses of the writ.

But first I must observe, that the writ is not directed to any particular person, but is general, like a proclamation, the style of it is thus: "*Prædilectis et fidelibus nostris prælatis. magnatibus et proceribus regni nostri Angliæ ac dilectis et fidelibus nostris militibus, civibus, et burgensibus dicti regni nostri, &c.*" and then, after specifying the day to which the King thinks fit further to prorogue his parliament, there is a clause inserted, for no other purpose but to discharg the members from meeting. on the day to which they were antecedently summoned, viz: "*Ita quod nec vos, nec aliquis vestrum ad dictum diem apud civitatem prædictam comperere teneamini, seu arctemini; volumus enim vos et quemlibet vestrum inde erga nos penitus exonerari, &c.*" Now every session being in law a distinct parliament, and every prorogation putting an end to a session, the obligation upon the members to meet on the day mentioned in the writ of prorogation, is obviously the same as it was upon the original writ of summons; and consequently if the Crown can, by writ of prorogation, discharge the members from attending on the day fixed in the first writ of summons, the Crown can, in like manner, by another writ, discharge them as to the day to which the parliament stands prorogued.

As to adjournment, whether it be a royal adjournment, or an adjournment flowing from the votes of the houses, as the Crown could undoubtedly dissolve them

without suffering them to meet, which puts an end to their very being, so likewise (which is an act of less power) can it prorogue them, which is only determining that session which was continued by their adjournment, though, doubtless, if the Crown intends to continue the session, they must be suffered to meet, and it must always be in the power of the Crown, *ad libitum*, to put an end to one session, and to commence another.

May 27, 1719. RICH. WEST.

(5.) *The opinion of the Attorney and Solicitor-General, Trevor, and Hawles, in 1700, on the determination of a Governor's commission.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

Upon perusal of their Excellencies, the Lords Justices' letter to the President and Council of Nevis, dated the 29th September, 1698, and of a copy of a commission, granted by His Majesty to Colonel Fox, dated the 15th November, 1699, we are humbly of opinion, that the powers and authorities, given by the Lords Justices to the President and Council of Nevis, were determined by the commission to Colonel Fox, upon the arrival of Colonel Fox there, and publication of his commission, and we conceive he might upon his coming there before Colonel Codrington, by virtue of his commission, dispossess the President and Council, and assume to himself that government, until the arrival of Colonel Codrington there.

THO. TREVOR.
J. HAWLES.

August 9, 1700.

(6.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the effect of notice on the validity of a Governor's commission.*

The Lords Proprietors of Carolina, having always appointed governors of that province, before they made a sale thereof to the Crown, those governors, with the consent of the Council and assembly there, passed laws, and have continued so to do, even since the purchase made by the Crown, not having notice of the said purchase.

Quære.—Whether any laws passed after the said purchase by the proprietor governors, in their name, *before notice* of the sale, are valid? Whether laws passed in the proprietors' names, *after notice* of such purchase, and before the King appointed a governor of his own, be valid?

We are of opinion, that laws passed by the Governor, appointed by the Lords Proprietors, and in their names after the sale, and before notice thereof arrived in the province, are of the same validity as such laws would have been if they had been passed in like manner before such sale; but that any laws passed in the proprietors' names after notice of their having conveyed their interest to the Crown, are absolutely null and void.

P. YORKE.
August 11, 1732. C. TALBOT.

(7.) *The opinion of Mr. Thomas Reeve, and Mr. Lutwyche, on the continuance of the Governor's commission.*

This act is to continue no longer than Mr. Worsley shall continue Governor, and be personally resident on the island. If he once ceases to be Governor, though he

hath afterwards a new commission granted him, I conceive the act is determined. By the stat. of 6 Ann, the commissions of the Governors of the plantations, are continued for six months after the demise of the Queen, or her successors; and if a new commission was granted to Mr. Worsley, within the six months after his late Majesty's demise, it may be a continuance of him as Governor within the intention of the act, though I think this point is something doubtful; but if the six months expired, and then a new commission was granted, it seems to me that the act is determined.

February 1, 1728. T. REEVE.

I am of opinion, that upon the demise of his late Majesty, the act for granting the £6000 *per annum*, did not determine; for I think it is clear, that the Governor's commission continued, for the space of six months after the death of the King, by virtue of an act of parliament, in Queen Anne's reign, unless the commission was superseded in the mean time; and if the commission was determined by ending at the six months, I am of opinion, that the act had determined also, though the Governor had been appointed afterwards, because he once ceased to be Governor under any commission. But if the fact was, that within the six months he had a new commission, it is doubtful whether his continuing Governor without intermission, will not be sufficient to entitle him to the £6000 *per annum* by the act; and upon consideration of these three clauses, I am inclinable to think, that it will entitle him so long as he remains Governor, and continues without intermission; but perhaps it might be made plainer by seeing the whole act.

February 1, 1728. T. LUTWYCHE.

N. B. The first commission, dated 11th January, the 8th year of our reign. The second commission, dated 8th May, 1728, being the first year of our reign, which was eleven months after the late King's reign.

(8.) *The opinion of the Attorney and Solicitor-General, Ryder, and Murray, on the question, whether the great seal of the province should not be affixed to every act of government, that requires a seal, in the Colony.*

We have perused the case you inclosed to us, by the order of the Lords Commissioners for Trade and Plantations, and find it necessary to trouble you, to transmit to us, a copy of my Lord Howe's commission, which is but shortly stated therein, that we may the better judge, when we peruse the whole, whether the office of Surveyor-General was in his power to dispose of by that commission, and whether his private seal at arms, be a proper way of putting that power in execution; we therefore desire to see the same, and to know whether the Governor's private seal is commonly made use of, in the grants of any, and what offices in the plantations.

It will likewise be necessary to be informed, whether the instance, in 7690, of a grant of the same nature, be the only instance of the grant of that office, or whether it has been usually granted in the same, or any, and what, different manner, and under what seal, and whether generally, or for life, or at pleasure.

D. Ryder.

February 26, 1736. J. Strange.

Quære.—Whether the great seal of the province, or island, should not be affixed to every act of government, that requires a seal, notwithstanding it may have been

the custom to appoint certain officers, and to issue proclamations, under the governor's private seal at arms?

We have perused the copy of my Lord Howe's commission, and Mr. Popple's answer of the 17th inst. to our letter, desiring some further information, and which we have returned, annexed to the case.

And as to the first *quære*, we observe, that there is no part of the commission that gives my Lord Howe a power to grant the office in question, the only clause which we can find relating to granting offices extending only to judicial offices, and the ministerial ones attending upon them. But supposing a power in the Governor to grant the office in question, we think the seal to be used upon that occasion ought regularly to be the great seal: but if there never was any grant otherwise than under the seal at arms of the Governor, and that has been used in the grant of other such like offices, such usage may dispense with the general rule requiring the great seal, and the grant may be good notwithstanding; and then, we are of opinion, the death of my Lord Howe will not put an end to the grant.

As to the second *quære*, we are of opinion, that if such proclamation as is mentioned had issued, it would have made no alteration as to the continuance of those civil and military officers in their employments, who hold the same under the hand and private seal of the Governor.

In answer to the third *quære*, we are of opinion, it is safest, and therefore most advisable, that all acts of government should be under the great seal of the island; though if there has been such an usage, as is mentioned in the *quære*, we think that it may be sufficient to jus-

tify the use of the private seal at arms in those cases to which the custom extends, which however, are liable to disputes that can never arise if the great seal is used.

D. RYDER.
February 26, 1736. J. STRANGE.

(9.) *The opinion of the Attorney and Solicitor-General, Ryder, and Murray, of the Governor's right to prorogue the Assembly to any place within his government.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance to your Lordships' desire, signified to us by Mr. Hill, in his letters of the 30th of April, and 11th of May last, referring two acts passed in His Majesty's province of North Carolina, in 1746, viz: "an act for the better ascertaining the number of members to be chosen for the several counties within this province, to sit in general assembly, and for establishing a more equal representation of all His Majesty's subjects, in the house of burgesses;" "an act to fix a place for the seat of government, and for keeping public offices, for appointing circuit courts, and defraying the expense thereof, and also for establishing the courts of justice, and regulating the proceedings therein;" for our opinion, whether the said acts are proper to be confirmed by His Majesty, and transmitting several papers relative thereto (all which are herewith returned): we have taken the same into consideration, and have heard counsel for, and against, the said "act for the better ascertaining the number of members to be chosen for the several

counties within this province, to sit in general assembly, and for establishing a more equal representation of all His Majesty's subjects, in the house of burgesses." Although the Governor of North Carolina may certainly prorogue the Assembly, to meet at such place, and time, as he shall see proper, and although it has not been made out sufficiently to our satisfaction, that the presence of a majority of the whole Assembly is absolutely necessary to the doing business, as alleged by the petitioners against the said last mentioned act; yet, these two acts appear to have passed, by management, precipitation, and surprise, when very few members were present, and are of such nature, and tendency, and have such effects and operation, that the Governor, by his instructions, ought not to have assented to them, though they had passed deliberately in a full Assembly; and we are of opinion, that they are not proper to be confirmed.

December 1, 1750.

D. RYDER.
W. MURRAY.

(10.) *The opinion of the Chief-Justice Morris, of New York, on the question, whether the change of the Governor would dissolve the Assembly.*

Quære.—Whether a Governor publishing a commission under the great seal, which determines that of a former Governor, can legally meet, and act with the same assembly, that was chosen by virtue of the King's writs, tested by the former Governor, they standing continued by adjournment; or whether the publication of such new commission, does *ipso facto* dissolve an assembly, so chosen, notwithstanding such continuance?

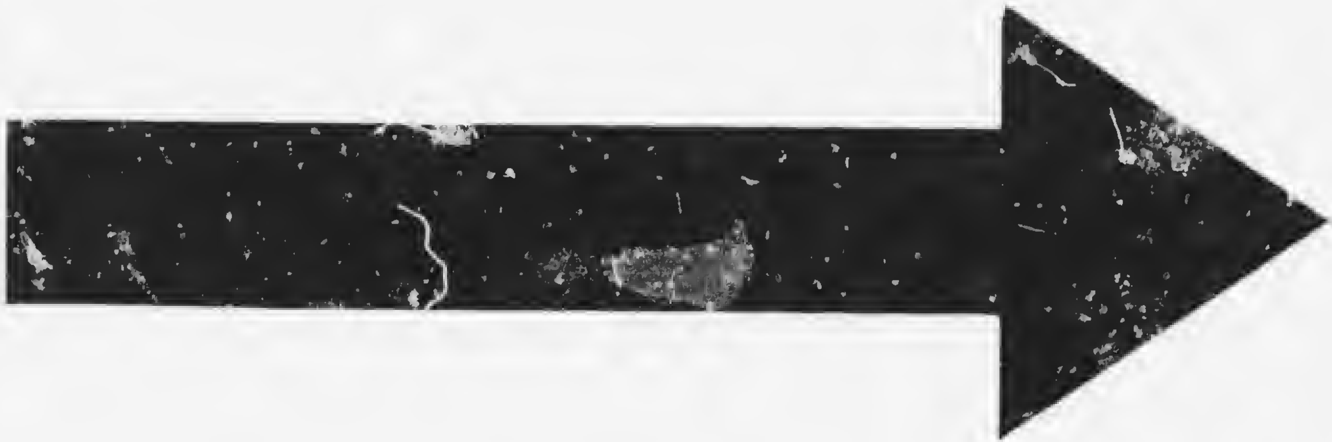
In obedience to your Excellency's commands, I have considered the above questions, and am humbly of opinion, that the publication of your Excellency's commission, determining that of Brigadier Hunter's, doth not dissolve the general Assembly, chosen by virtue of the King's writs, tested by Brigadier Hunter, but that you may either meet them at the time they stand adjourned to, or adjourn them to a further time, if you think convenient, and legally act with them; and the laws made by you and them in the usual manner, will be as legally made, and as much binding, as any other acts of the general assembly of this province, or as if they had been made by you, with an assembly chosen by virtue of His Majesty's writs, tested by yourself.

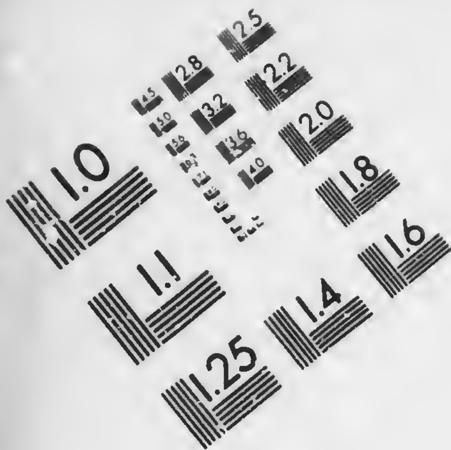
I would not have troubled your Excellency, at this time, with any thing but this direct answer to your question, had not a groundless notion, contrary to law, and the received practice both of this, and all, or the greatest part, of His Majesty's dependent dominions, lately obtained among some persons, viz: that the determining the commission of a Governor has the same effects upon this province, as the demise of the King would have both upon England and this province.

That opinion, if propagated with the zeal some weak men seem to entertain it with, will at this time be of dangerous consequence to the public peace, and may for the future be of no small prejudice to the service of the Crown: I shall therefore give my reasons for the answer I have given, and endeavor to show the absurdity of that notion.

Our law books have but very little to be met with on this head, the powers of Kings and parliaments, and their acts, being rather to be obeyed than disputed: how-

ever, they are not altogether silent on the subject, and afford us one rule in law, that I take to be sufficient to govern and determine this matter. It is in Paston's case, 4th Edw. IV. fo. 43, 44. Paston was outlawed, and the certificate of outlawry returned in the time of Ed. IV. by two coroners of the county of Suffolk, chose in the time of Hen. VI., and Paston's counsel prayed the outlawry might be reversed, because the power of the coroners, as well as other officers, determined by the demise of Hen. VI., to which he was answered, that coroners were chosen by virtue of the King's writ, which election, certified into the chancery, is a judicial act of record, and judicial acts done in the time of the King that was, remained, notwithstanding the demise of the King, and therefore the coroners remained; to this was replied, that the election of knights of the shire was equally a judicial act of record, but did not operate so as to continue the knights after the demise of the King, because by such demise the parliament was discontinued, &c. The case is a long case, too long to transcribe; I shall therefore take it as it is abridged, by Sir Robert Brooke, in the time of Queen Mary, the law, in that point, of coroners and knights of the shire being as above, viz: that the choice of both was a judicial act of record, but that it did not operate, so as to continue the knight of the shire after the demise of the King, though it did to continue the coroners: he says not, that a coroner is not made by commission, but by writ, and when he is elected by writ, this is returned into the chancery, and is a judicial act of record; and therefore, when the King dies, he shall remain, whereas all manner of commissions cease by the demise of the King, as commissions of justices *et hujus modi*, but judicial acts remain,





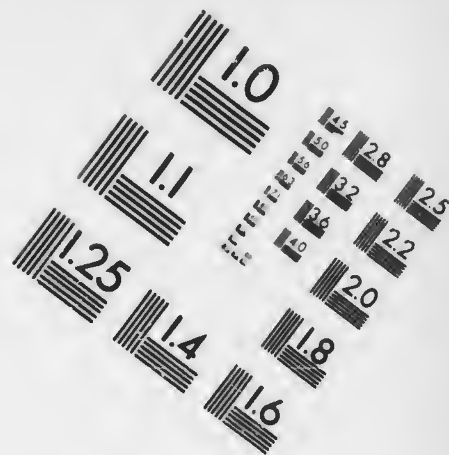
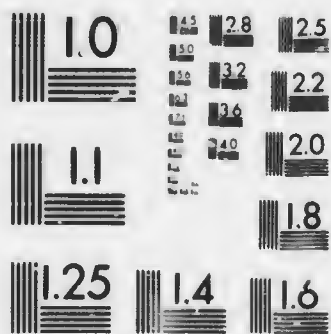
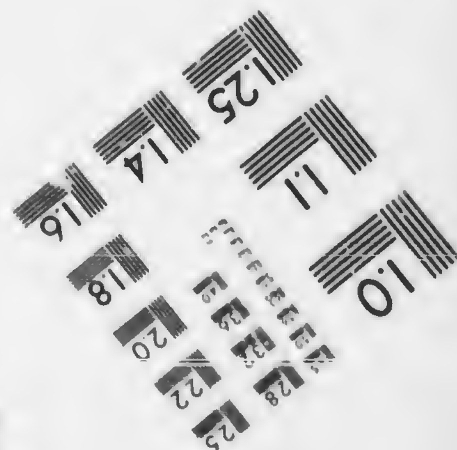


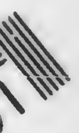
IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503



and so a coroner shall remain, till removed by the King's writ (*Catesby*). But knight of the shire shall cease, when the parliament ceases, by demise of the King, or otherwise, *ratio videtur*, because the parliament ceases by it, contrary of coroners—that is, where the whole ceases, the constituent parts must also cease.

It was an agreed point, that on the demise of the King the parliament was determined, though they do not tell us the reason why; but that we have, in the opinion of the judges in Sir Henry Vane's case, viz:—every parliament is called to consult with the person of the King who calls it, and therefore, upon his death, it is determined; for they can no longer consult with him, for which end they were called. Kelgyn's Rep. f. 19.

This shows why the demise of the King dissolves the parliament; but the reason is not the same on the determining the commission of a Governor; for as every parliament, called to consult with the person of the King who calls it, must determine upon the demise of such King, and every assembly here being called to assist our Captain-General, and Governor-in-Chief of our province, &c., in general assembly, &c., though it dissolve on the demise of the King, in whose name the writ issued, the Governor being not longer our Governor, that is, the Governor appointed by the King, in whose name the writ issued; yet should there be ten succeeding Governors, during the reign of one King, the tenth would be as much our Governor, that is, the Governor of that King, in whose name the writ issued, as the first was; and the assembly being continued by prorogation, or adjournment, might, by virtue of that writ, as legally assist the tenth, as the first.

Some persons may perhaps be of opinion that, by our Governor is meant the person of the Governor testing the writs, and that the assembly is to meet him, as the parliament is to meet the person of the King who calls them together. If this opinion be true, then the death or removal of the Governor will be equal (in that case at least) with the demise of the King, and no Lieutenant-Governor, or President of council could meet with such an assembly; and it was to no purpose to direct the President here to continue the present Assembly: but every day's practice in this and all the other plantations shows the weakness of such a notion, and that they may meet and act with other persons than the person of the Governor testing the writ. Since, then, the person of the Governor is no otherwise to be considered, in this case, than as the servant of the King that sent him, and the assistance intended by the writ is not for his own, but the benefit of his master, whom he here represents, it is plain, both from the words and intent of the writ, that the assembly may as legally act with the tenth Governor, and he with them, (the same King continuing,) as with the first; so that the determination of a Governor's commission cannot operate to dissolve an assembly, as the demise of a King does to dissolve a parliament, there being nothing like the same reason, or one of equal force; the nature and intent of the writs being entirely different.

As by the case of Paston, it was a point agreed that upon the demise of a King the parliament discontinued, the reasons of which I have shown, and, that they do not at all concern the determination of a Governor's commission: so another point by that case agreed, is, that the choice of them is a judicial act of record, and

that judicial acts of record remain. If, then, the death, removal, or determination, of a Governor's commission does not affect this province and the assembly in the same manner that the demise of the King doth, then it will follow, that an assembly regularly chosen, and returned into the chancery here, is such a judicial act of record as will remain, notwithstanding the determination of the Governor's commission, or such death, or removal, of a Governor.

That the death or removal of a Governor has not that effect, is agreed on all hands, for that does not determine his own commission, a Lieutenant-Governor, or President of the Council, being directed and enabled to execute the powers of it; so that the matter must rest solely on the determination of the patent, and if that has not such an effect, the case will be pretty clear that the determination of such commission does not dissolve the general assembly. First, the determination of the Governor's patent does not determine the office of any person holding by patent under the great seal of England, because such officer holds his office by the same authority that the Governor holds his; and if it can be supposed that the determining of one patent can determine another independent on it, the determining any other patent in the government, may equally conclude the rest, and the determining the Secretary's patent, as effectually determine the Governor's, and dissolve the assembly, as the Governor's can. Secondly, neither does it determine any office held by the seal of this province: for patents under the seal here are often given by the King's especial directions and commands, in which the Governor is always ministerial; and patents under the great seal here are as effectual for all

the purposes intended by them, as if they had been under the great seal of England, being derived from the same authority, viz: the King; for what he does by another is of equal validity as if done by himself, and only to be set aside the same way; therefore, offices held under the seal of this province are no more voided by the determination of the Governor's patent than if the same offices had been held under the great seal of England. Thirdly, if the determination of a Governor's patent has the same effects with respect to offices, &c., here, as the demise of a King, such effect must be occasioned either, 1st, by the nature of the thing, or 2dly, by the express words of the patent to the new Governor, or some other patent, signifying such to be His Majesty's pleasure.

First, if, from the nature of the thing, (viz: that, upon the determining of a derivative power, all offices become void, that are held by patents or commissions tested by the person or persons exercising such derivative power,) then the present Governor's patent will become void upon the King's return into England, and, for any thing we know may be void at present, which it is ridiculous to suppose, and of dangerous consequence to the public administration and peace to maintain: it is therefore very clear no such effect can arise from the nature of the thing; and it will be as evident to any body that reads the Governor's patent, that no such direction is contained in the words of that patent, nor are there any other letters patent, signifying such to be His Majesty's pleasure.

If, then, the determination of a Governor's patent does not affect this province in such manner as the demise of a King would do, in the determining of offices

and commissions, which is the less thing,—*a fortiori*, it cannot affect it so as to make a judicial act not to operate, i. e. to dissolve an Assembly, which is the greater. I shall, therefore, lay it down as a true position in law: that every judicial act of record remains, notwithstanding the death or removal of a Governor, or determination of the powers by which he acts; an Assembly, chose by virtue of the King's writs, and the returns made into the chancery or office here, is a judicial act of record; therefore, an Assembly so chose, &c., remains, notwithstanding the determination of the Governor's patent. 4 *E. P.*

When any question arises here, concerning a Governor, or assembly, many are ready to ask what the King or parliament of England does on a like occasion: vainly thinking, that whatever is done by a King or parliament, is fit to be drawn into example for this place. However extensive that notion may be in America, it is rather to be laughed at than argued with; not but that the wisdom and regularity of a British parliament are very fit patterns, so far as they are imitable by us. But, as my Lord Vaughan observes, under title process into Wales, when the question is of the jurisdiction in a dominion or territory belonging to England, the way to determine it, is to examine the law in dominions, the same, in specie, with that concerning which the question is. So the question being here concerning an assembly, and whether it is dissolved by the determining the powers of a Governor's commission, the way to determine it is, not to examine how far a King and Governor, or a parliament of England, and an assembly of this province, are alike, but to inquire into the practice of dependent dominions, like ourselves, such as Ireland,

and the plantations; and if we find the determination of the commissions in those places never was thought to dissolve a parliament or assembly, we have no reason to conclude it will do so here: in Ireland there was but one parliament chosen, which continued all or the greatest part of the Queen's reign, under a succession of several deputies.

In Barbadoes, where by a law of that island their Assemblies are annual, I am informed it has been very common to act with an assembly chosen in the time of a former Governor: it has been done in Virginia, in Maryland while under the King, in Pennsylvania, nay, it has been done in this province, for Colonel Fletcher, (justly styled the great patron of the Church here,) met and acted with an assembly summoned by Colonel Honghter. And upon debate of this very question, which was started by some of the members of the then assembly, it was the opinion of himself and council, *nemine contradicente*, and of the Assembly, that it was a legal assembly, as you will see by the journals, if you please to inspect them. These journals were sent home, and I am apt to believe the opinion and practice were approved of, otherwise the Governor would have been reprimanded, and the succeeding Governors forbid the doing so, nothing like which has been done; and the Earl of Ballamont, who succeeded him, was so far from thinking that the assembly was dissolved by his publishing the King's patent, that (if I am rightly informed) he published a proclamation to dissolve the Assembly chosen in the time of Colonel Fletcher. So that the opinion of an Assembly's dissolution, by the publishing a new patent, is but of late date, and I am humbly of opinion, without any foundation in law.

LEWIS MORRIS.

(11.) *The opinion of Mr. Hamilton, an eminent lawyer of Pennsylvania, on the same subject.*

[Copy of a letter to Dr. Johnston, one of the council for the province of New York, from Mr. Hamilton, an eminent lawyer, at Philadelphia.]

Sir;

At your request (though in much haste, this being the time of our Supreme Court), I have considered how far it is agreeable to law, for a succeeding Governor to meet and act with an assembly called by his predecessor; and, upon the whole, it appears to be thus: First, I find it to be the practice of several of the governments under the Crown, to meet the same assemblies called by their predecessor. I also find the justices and judges, appointed by the former Governor, continue to act by the same commission under a succeeding Governor, and that their commissions are never renewed, but when the Governor thinks fit to make some change in the magistracy. Thirdly, that no military officer receives any new commission from a succeeding Governor. These things I know to be facts; and the reason then must be because the writs and commissions by which the persons are called or commissionated, are the King's writs and commissions, and not the Governor's that grants them. These considerations, with the practice of Ireland, who had but one new parliament in the Queen's time, and had six several Lords-Lieutenants, besides ten several Lords-Justices, is full proof to me that the test of a writ of summons for holding an assembly, being changed, does not by any means dissolve the assembly. As to the objection of the parliament of Ireland being summoned by writ under the great seal of England, it is a mistake: for both history and law do

agree, that the parliament is summoned or called by the Lord-Lieutenant, under the great seal of Ireland, who indeed cannot call a parliament until he has obtained licence from the King for so doing under the great seal of England.

Now, a Governor in the plantations is not restrained or tied up, for his commission gives him a power generally to do those things, which, in their nature, are to be done by a Lord-Lieutenant, by special licence. See the manner of calling a parliament in Ireland, (upon a question which arose about the exposition of Poyning act, as it is called,) resolved by the two chief justices, the chief Baron and the King's learned counsel, in 4th Coke's Institutes, fol. 353.

Heylin, in his Cosmography, says the Lord-Lieutenant summons a parliament by the King's appointment.

Collier's Historical Dictionary says the Lord-Lieutenant calls and holds the parliament of Ireland by the King's licence.

The present state of Great Britain, published in the year 1718, the fourth edition, title Ireland, page 58, says the parliament is at the King of England's pleasure called by the Lord-Lieutenant, or deputy, and by him dissolved. That the test of the writ is in the Lord-Lieutenant's name, appears from the history of that country, and the book called the History of the Reduction of Ireland.

That it must be so, appears from the form of the summons made by a guardian of England in the King's absence, for calling a parliament, 4th Coke's Institutes, fol. 6, at the foot of the page.

Then, if it be so, that the test must be in the name of the officer who calls the parliament, as undoubtedly it

is, see how absurd it is to say that the determining that officer's commission, can dissolve the parliament, when the contrary has always been practised.

In the first year of Queen Anne, the Duke of Ormond was made Lord-Lieutenant in the room of the Earl of Rochester.

In February, 1702-3, he meets the same Parliament that was in being, and acts with them. Ormond continued Lord-Lieutenant till the 7th of April, 1707, and then Pembrooke was appointed in his room: he arrives at Dublin the 24th, and on the 7th of the next month, meets the parliament then in being.

On the 29th of November, he prorogued the parliament to the 6th of May next, and returns to Britain. In October, 1708, the Lord Wharton is made Lord-Lieutenant, in the room of Pembrooke; and April the 21st, arrives at Dublin, and then prorogues the parliament, then in being, to the 5th of May following, at which day it meets; and it appears in the speech of the commons, that that parliament had held many sessions before, so it was not one of his calling. On the 30th of August, 1709, the patliament is prorogued to the 13th of March. On the 19th of May, the Lord-Lieutenant, who had been over in Britain, returns, meets the same parliament and orders the choosing of a new speaker, in room of Allen Broderick, who was called up to the house of Lords as chief justice of the King's Bench in Ireland, to give his assistance there.

August the 28th, the parliament was prorogued to the 8th of March next, and the Lord-Lieutenant goes for Britain. July, 1711, the Duke of Ormond appointed Lord-Lieutenant and arrives at Dublin, and meets the same parliament the 8th of July. November, 1711,

parliament prorogued to the 2d of September, 1712, and goes for England.

This is a history of matters of fact, by which it appears that the removal of a Lord-Lieutenant or Governor who tests a writ of summons for a parliament or an assembly in his own name, neither does nor ought to dissolve that parliament, or assembly.

These are the grounds of my judgment for the legality of the present assembly meeting the Governor. I have spent as much time as my private affairs would permit, in taking the opinion of the men of the best judgment here, (Philadelphia,) and I have met with none that differ from me in judgment.

But how far it may be convenient for the Governor to take these measures, though lawful, I cannot say; nor can I see what can be objected against his so doing, unless the people say that it is striking at their privilege, in denying them the opportunity of a new choice, and this is fully answered by the arguments in favor of the septennial bill.

W. HAMILTON.

September 27, 1720.

(12.) *Mr. Fane's opinion on the nature of the bond to be given by the Governors of Proprietary Governments, for observing the Acts of Trade.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter of the 14th of this instant, wherein your Lordships are pleased to desire my opinion

in point of law whether in obligations which are made to the King's Majesty, the word *executoribus*, or *successoribus*, ought to be made use of. The act of the 33d of Henry VIII. chap., 39, expressly directs the word *executoribus* to be used in all obligations to the King, considering him in his natural capacity; and a punishment of imprisonment is by the same act inflicted upon such persons as shall make, or take, such obligations, unless it is in the terms prescribed by that act. Therefore, I am humbly of opinion, since this law has so particularly directed the manner of taking it, the King' remembrancer, who is the proper person for seeing it done in the most regular and legal method, cannot safely act in this matter, but agreeably with this law. But supposing this act was not in force, I apprehend a bond, the conditions of which are of the same nature with Major Gordon's, should more properly be taken to the King, his heirs, or successors.

FRAN. FANE.

Feb 18, 1726-7.

(13.) *The opinion of the Attorney and Solicitor-General, Trevor and Hawles, on the trial of a Lieutenant-Governor, and other legal topics.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

In answer to your Lordships' quæries, signified to us by Mr. Popple, the 30th of April last, relating to offences committed by Captain Norton, and against the act for regulating abuses in the plantation trade: we are of opinion that for such offence or wilful neglect, the

Lieutenant-Governor, Captain Norton, may be indicted and tried in the court of the King's Bench, by virtue of the act for punishing governors of plantations for offences committed by them in the plantations; but we doubt whether he will incur the penalty of one thousand pounds by the act, made the 7th and 8th of the King, for regulating abuses in the plantation trade; for the words of the act extend to Governors and Commanders-in-chief, and is given only for the offence of not taking the oaths, or putting the acts in execution; but he will be finable at the discretion of the court.

June 4, 1701.

THOS. TREVOR.
JO. HAWLES.

Second. Of the Council.

(1.) *The opinion of the Attorney and Solicitor-General, Murray and Lloyd, in 1755, on the question whether the Governor and Council have the power of making laws.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

Pursuant to your Lordships' desire, signified to us by Mr. Hill. in his letter of the 31st of March last, setting forth that a doubt having arisen whether the Governor and Council of His Majesty's province of Nova Scotia have a power of enacting laws within the said province, and Jonathan Belchier, Esq. having transmitted to your Lordships his observations thereupon, enclosing to us a copy of the said observations, together with copies of several clauses in the commission and instructions of the said Governor of that province referred to, (all which are herewith returned), and desiring our opinion

whether the said Governor and council have, or have not, a power to enact laws for the public peace, welfare and good government of the said province and the people and inhabitants thereof: we have taken the said observations and clauses into our consideration, and are humbly of opinion that the Governor and council alone are not authorized by His Majesty to make laws. Till there can be an assembly, His Majesty has ordered the government of the infant colony to be pursuant to his commission and instructions, and such further directions as he should give under his sign manual or by order in council.

W. MURRAY.
April 29, 1755. RICH. LLOYD.

(2.) *The opinion of the Attorney-General Pratt, on the several powers of the Council and Assembly of Maryland.*

As to the nomination of officers by the lower house.

In my opinion the sole nomination of those commissioners who are new officers, appointed by this bill, belongs neither to the proprietary, nor the lower house; but, like all other regulations, must be assented to by both, but can be claimed by neither. The proprietary's charter entitles him to nominate all constitutional officers and all others which by the laws are not otherwise provided for; but I do not conceive my Lord Baltimore has any original right to nominate new officers, appointed for the execution of a new law, without the consent of the two houses, nor, on the other hand, have the lower house any such independent authority; and, therefore, I think the upper house are right, notwithstanding

this claim in which they might be supported by the proprietary, because it is unreasonable for one branch of the legislature to assume a power of taxing the other by officers of their single appointment.

As to the insufficiency of the allowance of the commissioners of the loan office.

My Lord should not meddle with this question, which is proper to be discussed and settled by the two houses, as it concerns only the quantum of allowance for the officers, and does not encroach upon any of the proprietary's rights.

As to the duties required from Lord Baltimore's private officers, his agent and receiver.

Here my Lord ought to interpose, for it is a great indignity to compel his Lordship's agents into a public service without making them a liberal allowance and compensation for their trouble.

As to that required from sheriffs.

This my Lord will leave to be debated by the two houses.

As to the power of the upper house to examine claims and accounts.

The upper house are right in making a stand to this clause in the bill, and should take care how they admit encroachments of this kind, when they are supported by arguments drawn from the exercise of the like rights in the House of Commons here. The Constitutions of the two assemblies differ, fundamentally, in many respects; our House of Commons stands upon its own laws, the *lex parliam.*, whereas assemblies in the colonies are regulated by their respective charters, usages and the common law of England, and will never be allowed to assume those privileges which the House of Commons

are entitled to justly here, upon principles that neither can, nor must be applied to the assemblies of the colonies.

As to the narrowness of the exemption of persons to be assessors.

My Lord has nothing to do with this.

As to the double tax on nonjurors.

My Lord would do right to join with the upper house in opposing this double tax, because it is a breach of public faith and tends to subvert the very foundation of the Maryland Constitution, and can be excused by nothing but a well-grounded jealousy of dangerous practices and disaffection in the papists.

As to the clauses enabling debtors and tenants to retain.

This is very absurd, but my Lord need not meddle with it.

As to the tax on non-residents and imports.

The upper house are clearly right in that part of the objection which relates to British merchandise imported; for I am satisfied the mother country will never endure such an impost upon their trade. The province may by the same rule prohibit the importation, as well as they may tax the merchandise imported; and it seems to be a very unwarrantable attempt, to make the English importer of goods carried to Maryland in the way of trade, pay a tax for the defence of that province, for no other consideration but the liberty of trading there, to which they have an original right, which cannot be invaded, diminished, or even regulated, by any thing this province can ever do.

As to the tax on tenants for life.

My Lord will leave this to be settled by the two houses.

As to the tax on uncultivated lands.

This seems to me a very unreasonable tax, and ought to be resisted by the proprietory, because it seems principally to be levelled at his estate.

As to the tax on plate and ready money.

My Lord has nothing to do with this.

As to the tax on the Governor.

This is rather an uncivil, than unjust tax; and, therefore, the upper house would do well to oppose it as far as they may in reason.

Having given my sense on each of the objections, so far as they have been taken up and maintained by the upper house, in the margin of that part of the case, I shall only add here a general piece of advice to Lord Baltimore, that in this disposition of the lower house to assume to themselves any privilege which the English House of Commons enjoy here, his Lordship should resist all such attempts where they are unreasonable, with firmness, and should never allow any encroachments to be established on the weight of that argument singly; for I am satisfied neither the Crown, nor the parliament, will ever suffer those Assemblies to erect themselves into the power, and authority, of the British House of Commons.

C. PRATT.

(3.) *The opinion of the Attorney and Solicitor-General, Henley and Yorke, how far the proclamation of martial law suspends the functions of the Council.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' commands, signified to us by Mr. Pownall, in his letter of the 22d instant, acquainting us that your lordships had received two letters from Henry Moore Esq., Lieutenant Governor of Jamaica, informing your Lordships that he had, in consequence of advices which he had received of an intended invasion of that island, caused martial law to be proclaimed; and that His Majesty's council, upon being summoned to meet in their legislative capacity, had refused to do any business, alleging that neither they nor the assembly had any right to sit or transact business after the publication of martial law; and also transmitting to us copies of the Lieutenant-Governor's letters and two other papers, containing the reasons assigned by the council for their opinion, and their answers to several questions propounded to them by the Lieutenant-Governor, and desiring us to take the same into our consideration and report to your Lordships our opinion thereon: we have taken the same into our consideration, and are of opinion that there is no foundation for the notion of the council that the proclaiming of martial law suspends the execution of the legislative authority which may, and ought to continue to act as long as the public exigencies require.

Nor do we apprehend that by such proclamation of

martial law the ordinary course of law and justice is suspended or stopped any further than is absolutely necessary to answer the then military service of the public and the exigencies of the province.

Jan. 28, 1757.

ROBT. HENLEY.
C. YORKE.

Third. Of the *Representative Assembly.*

(1.) *The opinion of the Attorney-General Raymond, on the King's power to grant the privilege of having an Assembly, and on the right given by the King to particular districts, to choose delegates.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In humble obedience to your Lordships' commands, signified to me by Mr. Popple, by his letter dated the 14th day of June, 1722, that I should send your Lordships my opinion whether His Majesty may legally alter the present constitution of the assembly in New Jersey, in such manner as Mr. Burnett, His Majesty's Governor, there says in his letter would be for His Majesty's service, and in what manner it might be most properly done, (for which purpose, the extract of Mr. Burnett's letter and his printed speech to the assembly, in which is set out a true copy of his instruction and the printed acts of that colony, were sent to me, and are herewith sent back to your lordships), I have read over the said extract of Mr. Burnett's letter, his speech, and the act of assembly supposed to have been passed in Lord Lovelace's time, in New Jersey, page 5, entitled, "an act for regulating the qualification of representa-

tives, to serve in the general assembly, in the province of New Jersey;" and considered thereof.

And I certify your lordships, that as the right of sending representatives to the assembly and the qualification of the elector and elected, for any thing appearing to me, were founded originally on the instructions given by the Crown to the Governor of New Jersey, and, as is observed by Mr. Burnett, have already received alterations by different instructions given in Lord Cornbury's time, and the election, which before was left in all the freeholders of East Jersey and West Jersey, respectively, and fixed in the method now established, as those new instructions given in lord Cornbury's time made the alteration which at present is in force, I am of opinion, by the same reason, by new instructions to be given by His Majesty, His Majesty may lawfully make such establishments, as to the electing and sending representatives to the assembly, as Mr. Burnett in his letter desires; and indeed the reason used by Mr. Burnett in favor of such an alteration, seems to me to have a great weight. But if there had been any act of assembly passed and approved by His Majesty, whereby the manner of choosing representatives and the qualifications had been fixed, that would have had a different effect; but nothing of that nature appears to me, for, as to the act said to be passed by Lord Lovelace, it being an act contrary to the instructions, and never approved by the Crown, seems to me void, which Mr. Burnett has observed in his letter. Therefore, upon the whole matter, I apprehend His Majesty may in point of law comply with Mr. Burnett's request, in empowering the new county of Hunterton to send two representatives, and restrain the town of Salem from sending any represen-

tatives for the future, if it shall be his royal pleasure so to do; and the manner whereby it may be done, I conceive, may be by His Majesty sending his Governor there new instructions for that purpose.

ROB. RAYMOND.

Sept. 16, 1723.

(2.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, upon the issuing of writs for choosing new representatives.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us by Mr. Hill, in his letter of the 10th of June instant, representing that your Lordships having lately received a letter from William Popple Esq. His Majesty's Governor of the Bermuda Islands, dated the 16th of February last, relating, among other things, to having, upon the assembly's neglecting to meet at a certain time, to which they were adjourned, issued writs for the electing new representatives, without the dissolution of the assembly; and transmitting an extract of so much of the said letter, and copies of such papers therewith transmitted, as relate to this proceeding; and desiring our opinion, whether the said governor, when the speaker and all the members of the assembly neglected to meet at the time to which they were adjourned, on the 5th day of February, in the morning, could legally issue writs for choosing new representatives, without dissolving that assembly; and, whether the representatives, chose by

virtue of such writs, issued as aforesaid by the Governor without a dissolution of the assembly, will constitute a legal assembly, so as to make the proceedings of such assembly valid: we have taken the said papers into consideration, and are of opinion, that neither the assembly was dissolved, nor did the members lose their seats by their not meeting at twelve o'clock on the 5th of February, 1747-8, and that there was no ground for the hasty step taken in issuing new writs for supplying their places: and, as the writs were issued, not upon the foot of any supposed dissolution, but to supply vacancies that had not happened, we are of opinion, the members so returned on those writs were unduly chosen, and cannot constitute or sit as a legal assembly.

D. RYDER.
June 18, 1748. W. MURRAY.

(3.) *The opinion of the same lawyers, on the right of the Crown to enable particular towns to send delegates to the Assembly.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance to your Lordships' desire, signified to us by Mr. Hill, in his letter of the 22d of January, 1746-7, representing that your Lordships having received a letter from Benning Wentworth, Esq., His Majesty's Governor of New Hampshire, in which he acquaints your Lordships that the assembly of that province have refused to admit the representatives of five towns and districts, (to which he had issued writs in His Majesty's name, to elect and send members to the assembly,) to sit and vote in the choice of a speaker, and that Mr. Hill

is directed by your Lordships to enclose to us an extract of so much of the said letter as relates thereto, as also papers therewith transmitted, containing an account of the assembly's proceedings in this affair, and a copy of the twenty-eighth article of His Majesty's instructions to Mr. Wentworth, which relates to the settling of townships, (all which are herewith returned,) and to desire our opinion concerning this matter, and what may be proper for His Majesty to do therein. We have taken the same into consideration, and are of opinion that as the right of sending representatives to the assembly was founded originally on the commissions and instructions given by the Crown to the Governors of New Hampshire, His Majesty lawfully may extend the privilege of sending representatives, to such new towns as His Majesty shall judge to be in all respects worthy thereof.

We therefore humbly submit, that it may be advisable for His Majesty to send positive instructions to the Governor to dissolve the assembly as soon as conveniently may be, and, when another is called, to send writs to the said towns to elect representatives and support the rights of such representatives when chosen.

March 18, 1747.

D. RYDER.
W. MURRAY.

(4.) *Mr. Fane's opinion on the same point.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships commands, signified to me by Mr. Gellibrand, desiring my opinion on the matters contained in the extract of a letter from Mr.

Wentworth, His Majesty's Governor of New Hampshire, and in several other papers relating to the proceedings of the assembly of that province, I have carefully read over the said extract of Mr. Wentworth's letter; the clause in the commission of John Cutts, Esq., dated the 8th day of September, in the 31st year of King Charles the Second, relating to the calling the assembly of the said province; the clause in the commission of Samuel Allen, Esq., Governor of the said province, in the reign of King William and Queen Mary, relating to the said assembly; the 38th clause of the instructions given to the said Governor Wentworth in the year 1741; the copy of His Majesty's writ by which the assembly of the said province was convened, and the sheriff's return thereon; and the copy of the proceedings of the said assembly from the 24th day of January, 1744, to the 29th of the same month inclusive, which were sent to me, and are herewith returned to your Lordships.

And I beg leave to observe to your Lordships, that, as the right of sending members to the general assembly of the said province appears to me to be originally founded on the said commission to the said John Cutts to be President of the Council of said province, by which commission, as well the persons who are to choose such deputies, as the time and place of their meeting, are left to the discretion of the said President and Council: and as by the commission granted by King William and Queen Mary to Samuel Allen, Esq. to be Governor and Commander-in-Chief of the said province, the assembly of the freeholders thereof is directed to be called in such manner and form as the said Governor, by the advice of the Council, shall find most convenient for His Majesty's service, which powers of the said Governor and

Council do not appear to me to have been taken away or abridged, I am of opinion that the Governor and Council of the said province, for the time being, may by His Majesty's writ command the sheriff of the said province to make out precepts, to be directed to such towns, parishes and districts, within the same, as they, the said Governor and Council, shall think fit, requiring them to elect and send fit persons, duly qualified to represent such towns, parishes and districts in the general assembly of the said province.

And it likewise appears to me, that the several precedents offered by the assembly of the said province, in support of the rights being in the said house, or general court, to grant the privilege to towns or parishes, to send representatives to sit in the general assembly, do not sufficiently prove or make out such a right, most of them being cases, where such right was granted by His Majesty's charter, and confirmed by act of the assembly, assented to by the Governor and council; and any modern instance of the assembly alone taking on themselves to grant such a privilege, appearing to me a high encroachment on His Majesty's prerogative, and tending manifestly to vest the whole government of the province in the general court, or house of representatives.

And, as it is represented in Governor Wentworth's letter that the five towns, or districts, therein mentioned, pay near one-fifth part of the provincial tax, it seems to me that the said Governor acted properly, in directing the said towns to elect and send representatives to the general assembly; and that the assembly have acted arbitrarily and illegally in excluding such members, before they proceeded to the choice of a speaker.

But, in order that no doubt may remain concerning the right of the said towns to send such representatives,

and as it may hereafter be necessary to empower other towns to do the like, pursuant to the 38th article of the said Mr. Wentworth's instructions for the settling new townships, who are to have and enjoy all the immunities and privileges as do of right belong to any other parish, or township, within the said province, I apprehend it may be expedient for His Majesty, in case it shall be his royal pleasure so to do, to make some new establishment concerning such elections, which, I conceive, may be done by sending instructions to the Governor of the said province, thereby empowering the said towns, and districts, and also any other new townships to be settled within the said province, pursuant to the aforesaid article, under such restrictions as His Majesty in his royal wisdom shall think fit, to choose and send representatives to sit in the said assembly, or general court, and directing the said Governor to issue proper writs and precepts for that purpose. which instructions, I am of opinion, His Majesty, in case he shall so think fit, may accordingly send to the said Governor lawfully and consistently with the constitution of the said province.

FRAN. FANE.

July 1, 1746.

(5.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, on the same point.*

CASE.—On the 28th of November, 1746, an act was passed in His Majesty's province of North Carolina, entitled "an act for the better ascertaining the number of members to be chosen for the several counties within this province, to sit and vote in general assembly, and for establishing a more equal representation of all His Majesty's subjects, in the house of burgesses."

The preamble of this law sets forth, that the inhabit-

ants of the several northern counties had assumed to themselves the privilege of choosing five persons to represent them in general assembly, without any pretence for such claim, while those of the southern and western counties, who are more numerous, and contribute much more to the general tax, were represented only by two members, which irregularity had been attended with great inconvenience; and therefore directs, that every county already erected or to be erected, shall, for the future, choose two representatives to sit in general assembly, and that fourteen members shall constitute a quorum of the assembly.

This act having been transmitted to the Lords Commissioners for Trade and Plantations by Mr. Johnston, late Governor of this province, a petition was soon after presented to the King, on behalf of the northern precincts or counties of Chowan, Perquimans, Pasquotank, Currituck, Berty and Tyrrell, complaining of the said Governor, of having passed the said act in an illegal, improper way, and praying to be reinstated in their just rights and privileges.

This petition having been referred by His Majesty to the Lords of the committee of Council, was, by their Lordships, referred to the Board of Trade to consider thereof and report their opinion upon it.

Upon a hearing before the Lords Commissioners for Trade and Plantations, of the petitioners, in consequence of the said reference, and it appearing that they were not able to prove the allegations of their petition for want of evidence, their Lordships made a report to the Lords of the committee of Council, and submitted, whether it would not be proper that orders should be given to admit the petitioners to examine witnesses in

the province in support of the petition, as also to allow the like liberty to the Governor, to examine witnesses on his part, and to direct him to return his answer to the complaints contained in the said petition, and to transmit copies of the minutes of the general assembly, and of such other papers as might be necessary for His Majesty's full information in this affair.

In consequence of this report, the Lords of the committee of Council were pleased to direct, "that a copy of the said petition of complaint should be transmitted to Gabriel Johnston, Esq., Governor of the said province, requiring him to return his answer thereunto in writing with all convenient speed; and that the complainants, or their agents, should be at liberty to take copies of all records, in any of the public offices in the said province, touching the matters complained of, as the said complainants, or their agents, should think necessary to support the said petition of complaint; and that the same should be delivered to the complainants, or their agents, signed and authenticated in the usual manner under the seal of the province, upon paying the usual fees for the same; and that free liberty should be also given to all such persons as the said complainants, or their agents, should name, as also to all such persons as the said Governor should name, to make affidavits before the Chief Justice and Judge of the Court of Admiralty of said province, or either of them, of what they knew touching the premises, particularly as to the practice of the said province with regard to a majority of the assembly being present before any business could be proceeded upon; and likewise with regard to the number of representatives sent by each of the northern counties to the general assembly from the year 1696 to

the year 1746; and that such Chief Justice, or Judge of the Admiralty Court, or either of them, should summon before him or them, such persons as the complainants, or their agents, should name, as likewise such as the said Governor should name, and take their affidavits, and examine them upon such interrogatories as should be exhibited for that purpose, which the said Governor was to signify to the said Chief Justice and Judge of the Admiralty Court, as soon as might be; and that the complainants, or their agents, should deliver unto the said Governor, copies of such affidavits or dispositions as should be made or taken in this matter on their part; as also, that the said Governor should deliver unto the said complainants, or their agents, copies of his answer and of such affidavits or depositions as should have been likewise made on his part, within the space of three months after the receipt of the said order; as also, that within thirty days after receiving each other's proofs, the said Governer should in like manner exchange with the said complainants, or their agents, the replies that should be made by affidavits or depositions, before they were transmitted, and that the whole matter should be returned under the seal of the said province, within the space of six months from the time that the said order should be served upon the said Governor of the province of North Carolina; and that the said Governor should transmit the minutes of the general assembly of the said province, in November, 1746, with the names of such members as were present at their first meeting, the names of such as were sworn in afterwards, and the whole number present during the continuance of that session, and also attested copies of some of the writs issued for calling assemblies antecedent to the year 1736,

if the same form had been constantly observed, and if there had been any variation in the form of those writs, then to send copies of such as had so varied, and also copies of the returns of such writs, together with a copy of the order of the palatine's court, in the year 1696, directing five members to be chosen for the northern counties, and that the same should be properly authenticated, under the seal of the said province, and transmitted at the same time with the aforementioned proofs and depositions; whereof the said Governor of North Carolina, the Chief Justice and Judge of the Admiralty Court, and all others whom it might concern, were to take notice, and govern themselves accordingly."

In consequence of this order, the papers and other evidence, thereby required to be transmitted, were laid before the Lords of the committee of Council, who referred them to the Lords Commissioners for Trade and Plantations, with directions to proceed in the examination of this affair, and make a further report thereupon.

On the 30th of April, 1750, their Lordships referred the said act to His Majesty's Attorney and Solicitor-General, together with a copy of an order of the Lords of the committee of Council, referring to their Lordships the petition and representation of the inhabitants of the northern counties against the same, and all the papers and evidence transmitted, as well in support of the said petition, as of the proceedings of the Governor and Council and Assembly in passing the said law, and desired their opinion, whether it might be proper, consistently with the just rights of the inhabitants, and the constitution of the said province, to be confirmed by His Majesty.

On the 1st of December, 1750, His Majesty's Attor-

ney and Solicitor-General reported, "that they had considered the said act, and had heard counsel for and against the same: that, although the Governor of North Carolina might certainly prorogue the assembly to meet at such place and time as he should see proper; and, although it had not been made out sufficiently to their satisfaction, that the presence of a majority of the whole assembly was absolutely necessary to the doing any business, as alleged by the petitioners against said act: yet the act appeared to have been passed by management, precipitation, and surprise, when very few members were present; and that it is of such a nature and tendency, and has such effect and operation, that the Governor, by his instructions, ought not to have assented to it though it had passed deliberately in a full assembly; and that they were of opinion that the said act is not proper to be confirmed."

The points upon which the legality or illegality, the propriety or impropriety, of this act depend, are: 1.—The right which the inhabitants of the six northern counties claim of sending five representatives, each, to the general assembly; 2. The necessity of a majority to constitute a quorum of the assembly; and 3. The manner in which the act in question was passed.

In order to judge of the two first of these points, it will be necessary to revert to that period when first an assembly was constituted in this colony, and to state such regulations as have from time to time been made with respect thereto, and by what authority the several places, which have sent members to the assembly, have been empowered so to do.

In 1663, soon after the grant made by King Charles the Second, of Carolina to the Lords Proprietors, they,

by a commission under their hands and seals, erected all that part of the grant which lay to the north-east of Chowan River, into a separate and distinct county, by the name of Albemarle County.

In 1667, the proprietors appointed Samuel Stephens Esq. to be their Governor of Albemarle County, with a power of nominating twelve persons to be his council, and to call an assembly of twelve persons, to be chosen from among the freeholders, until the county should be divided into parishes, districts, or divisions, and then each division, district, or parish, was to send two representatives who, with the governor and council, were to form a general assembly.

In 1669 the proprietors of Carolina formed a model of government for the better ordering and ruling the province, commonly known by the name of the fundamental constitutions of Carolina.

By these constitutions it was directed that a parliament should be held once in every two years, to consist of the proprietors, or their deputies, the landgraves and cassiques, and one freeholder out of every precinct.

These constitutions however were never received or acknowleged by the people; and, in 1693, were laid aside by the proprietors themselves

The proprietors again, in 1679, framed a new set of fundamental constitutions, with some little variation as to the succession of officers, and these were sent to the Governors of the several districts in Carolina, which were then three, viz: Albemarle, Craven and Clarendon.

With these fundamental constitutions, the Governor of Albemarle County had instructions to issue writs to the four precincts of that county, requiring them to elect

each five freeholders, to be their representatives in assembly, who were to govern themselves according to the rules laid down in the fundamental constitutions.

In 1691, Colonel Ludwell was appointed Governor of all Carolina, with instructions from the proprietors to call a general assemby to consist of twenty members, viz:

For Albemarle County . . .	5
For Berkeley County . . .	5
For Colleton County . . .	5
For Craven County . . .	5
	20

And when any new county was erected, and should make it appear that there were forty freeholders, inhabitants of it, to have a privilege of sending four members to the assembly, and then the whole to be reduced to four for each county.

The said Governor was further directed by an additional instruction, to appoint a deputy-governor of North Carolina, if he thought proper; and, if he should find it impracticable for Albemarle County to send delegates to the general assembly, to direct Berkeley, and Colleton, to send seven each, and Craven six.

The same powers and directions given to Colonel Ludwell, were given by the proprietors to Mr. Smith and Mr. Archdale, his successors in the government of Carolina, in 1693 and 1694, the latter of whom, at a palatine's court, holden in 1696, ordered writs to be issued out to the several precincts of the county of Albemarle, for electing five burgesses for each precinct; and the

precinct of Pamptico, without the limits of Albemarle to the southward, in the county of Archdale, was erected into a county by the name of Bath, and empowered to send two members to the assembly.

In 1705 Bath County was, by an order of a council of the proprietors' deputies, divided into three precincts, by the names of Pamptico, Wickham and Archdale, each of which were, by the said order, empowered to send two members to the assembly.

Some time after this, the particular time not appearing, the three aforementioned counties were by the succeeding Governors appointed by the proprietors into four counties, by the names of Beaufort, Hyde, Craven, and Carteret, each of which sent two members to the assembly; and in 1715 two towns were erected in the southern district, by the name of Bath Town, and Edenton, the first of which was empowered, by an act of the legislature, to send one member to the assembly.

In the same year an act was passed in North Carolina, entitled "an act relating to the biennial and other assemblies," which directed that each precinct in Albemarle county, viz: Chowan, Perquimans, Pasquotank, and Currituck, should send five members to the assembly, and every precinct in every other county or counties then erected or thereafter to be erected, to send two; but this act was repealed by His Majesty's order in council, dated the 21st day of July, 1737.

In 1722 a new precinct was, by an act of assembly, erected out of the county of Albemarle, called Berty precinct, and empowered to send five members to the assembly, as was Tyrell precinct, in the year 1729.

In 1729 the Crown purchased the sovereignty of both Carolinas from the proprietors, and also seven-eighths

of the property of the lands, which purchase was confirmed by act of parliament, and, in consequence thereof His Majesty appointed a Governor of North Carolina, with a power of calling assemblies according to the laws and usage of the said province.

It appears from the journal of the first assembly called after the Crown's purchase, that the assembly consisted of forty-one members, viz;

For Chowan precinct	5
Perquimans	5
Pasquotank	5
Currituck	5
Berty	5
Tyrrell	5
Beaufort	2
Hyde	2
Craven	2
Carteret	2
Edenton	1
Bath Town	1
Newbern	1
	41

During the administration of Governor Burrington, the first Governor, the following precincts were erected in the county of Bath by the Governor's order, viz; New Hanover, Edgecumbe, Bladen, and Onslow, the two last of which were confirmed by act of assembly 1734.

In 1733 Gabriel Johnston Esq. was appointed Governor of this province; and the first assembly which met

after his arrival was composed of forty-nine members, viz:

For Chowan	5
Perquimmas	5
Currituck	5
Pasquotank	5
Berty	5
Tyrrell	5
Beaufort	2
Hyde	2
Craven	2
Carteret	2
Edgecumbe	2
New Hanover	2
Bladen	2
Onslow	2
Edenton	1
Bath Town	1
Newbern	1
	49

In 1736 the writs issued by the Governor for calling assemblies, which before that time directed the northern counties to send each five members, were altered, and they were directed to send not any particular number, but representatives only, in general words.

During the administration of Governor Johnston, part of Berty County was, by an act of assembly, erected into a separate county, by the name of Northampton, and empowered to send two representatives to the assembly; and the same act directed that Berty county, for the future, shall send but three; and at the same

time Edgecumbe county, which had been erected by Governor Burrington and had sent two members to the assembly, was confirmed in that privilege by act of assembly.

In 1739 the town of Wilmington was erected by act, and empowered to send one representative to the assembly; and, 1746, a little before the passing of the act in question, two other counties were erected by act of assembly, in the southern district, called Granville and Johnson, and empowered to send each two representatives.

From the foregoing state therefore it appears that at the time of passing this act, the province was divided into seventeen counties and four towns; that four of these counties in the county of Albemarle, viz: Chowan, Perquimans, Pasquotank, and Currituck, had, from the first establishment of an assembly, chosen each five representatives, and the other two in the same county, viz: Berty and Tyrrell, had been empowered by the acts by which they were erected, to send the like number, until Berty county was limited to three by the act which separated Northampton from it, and that the other eleven counties, in the southern district, commonly called Bath county, had never sent more than two each.

Since the passing this act, two other counties have been erected by act of assembly, in the southern district, by the names of Dupplin and Anson.

As to the second point, viz: the necessity of a majority to constitute a quorum of the assembly, it appears by the charter granted to the first proprietors of Carolina, in 1663, that they had a power of making laws, with the advice, assent, and approbation of the freemen of the said province, or of the greater part of them, or

of their delegates or deputies; and in a declaration soon after published by the proprietors, setting forth the encouragements to be allowed to persons who should settle in that province, they declare that they will empower the major part of the freeholders, or their deputies or assemblymen, to be by them chosen out of themselves, to make their own laws.

By the instruction given to Governor Stephens, in 1667, to call an assembly, it was declared that they should have a power of ascertaining their own quorum, provided it was not less than one-third of the whole number.

By the fundamental constitution, it is declared that the quorum of the parliament shall be one-half of the number.

By the instruction given to Colonel Ludwell, and to his successors in the government of Messrs. Smith and Archdale, concerning assemblies, they are empowered, with the advice and consent of the deputies of the proprietors, the landgraves and cassiques, and the delegates of the freemen, or the major part of them, to make and ordain laws, statutes, and ordinances.

It does not appear, from any books or papers in the Plantation Office, what was the regulation or usage with respect to the quorum of the assembly from the year 1694 to the year 1715, when the biennial law was passed, by which it was enacted that a quorum of the house of burgesses should not be less than one-half.

It is to be presumed that this rule was observed while the act remained in force, and it does appear that at the first assembly called by Mr. Burrington, a majority of the members were present the first day of the session; and that on the 1st day of January, 1734, the

first day of the meeting of the first assembly called by Mr. Johnston, the succeeding Governor, he adjourned them, on account of there not being a majority present.

As to the third point, viz: the manner of passing the law, it appears by the journals of the assembly, that the assembly by which this law was passed met first at Newburn, on the 12th day of June, 1746, and were prorogued to the 21st day of November, to be then held at Wilmington; that they met at Wilmington on the said day, fourteen members being present, when the bill now in question was moved for, and brought in and read, and ordered to be sent to the council the next day; that on the 24th it was received back, and read a second time, and that it was read a third time, and passed the next day.

This method of proceeding in passing this act, is represented by the northern counties as a design of the government to ensnare and entrap them: the town of Wilmington, to which the assembly was prorogued, being two hundred miles from their habitations, and where it was not possible for them to attend, and that the fourteen members present were all of the southern district, as well as the council which advised the Governor to take this step.

The Governor of the said province, in order to show the propriety and necessity of this law, and to justify his passing it, acquaints the Lords Commissioners for Trade and Plantations, in a letter dated the 9th of March, 1746, that the northern counties having thirty-one votes out of fifty-four, and being generally united under the conduct of a few designing men, who found their account in keeping public affairs in confusion, they had made the Governor and council and the remaining

members, of no weight in that legislature; for they could not so much as meet unless they thought fit to be present, and after they were met, if they did not like any bill they withdrew privately, and then the majority of burgesses being absent, no more business could be done, so that the very being of assemblies depended on their whim and humor and not on the King's writ and Governor's proclamation and prorogation: that this was no imaginary consequence, but a real effect, which had happened more than once within four years, when he had waited with the council for three or four weeks and been obliged to separate without doing any one thing; that when he prorogued the assembly in June, 1746, to the middle of November following, then to meet at Wilmington, they entered into a formal agreement not to attend, and to engage as many of the other members as they could influence to stay at home.

Quære.—Have all the six counties, viz: Chowan, Perquimans, Pasquotank, Currituck, Berty, and Tyrrell, or any of them, or which of them, a right to elect five representatives, to serve in the general assembly?

Though the case seems very carefully and accurately stated, we are afraid of giving an official opinion upon so important rights, where a question has arisen upon which the parties can have an opportunity to be heard. In general, as the four counties first named from the first establishment of an assembly are said to have chosen each five representatives, and the two counties last named were empowered by the acts of assembly by which they were created to send each the like number, and Berty county, by a subsequent act, was limited to three, we are at a loss to find out upon what foundation an objection is made to Berty county sending three, and

the rest five representatives each.

Quære.—Is a majority of the representatives necessary to constitute a quorum of the assembly?

It does not sufficiently appear to us, that a majority of the representatives is necessary to constitute a quorum of the assembly; such a constitution is very extraordinary, and liable to great inconvenience.

Quære.—Was the law in question legally and properly passed?

Upon this question we see no reason to vary the opinion we gave by our report of the 1st of December, 1750, above referred to.

Quære.—If it should be thought proper to repeal the law, can the Crown, by virtue of its own prerogative, make any alteration, with respect to the places which send representatives to the assembly, or direct what number of representatives each place should send?

Though it may not be advisable for the Crown to impeach rights heretofore granted and enjoyed, we think, as the province grows more peopled and cultivated, the King may erect towns and counties, and give them the privilege of choosing representatives; and to preserve the King's prerogative, we think it ought rather to be done in this way, than by act of assembly.

Since this law was passed, assemblies have met and passed many laws for erecting courts of judicature and justice, and many proceedings have been had, and judgments given, in such courts.

Quære.—If the said law should be repealed, will the acts of assemblies of the said province, held in consequence of the said act, (which acts were subsequent to the passing of the said act of 1746, but previous to the repeal of it,) become void and illegal by such repeal?

We apprehend the acts of the assembly are good till repealed, and, consequently, void only from notification of the repeal; but the particular constitution of this province is not stated as to the force of their laws, till approved or disapproved by the King.

Quære.—If the said acts should, by the repeal of the act in 1746, be illegal and void *ab initio*, what method will it be proper for the Crown to take to indemnify such persons, who have acted under the powers and authorities of such acts?

This falls within the answer to the former question.

July 20. 1753. D. RYDER.

W. MURRAY.

(6.) *The opinion of the Attorney and Solicitor-General, Murray and Lloyd, on the privileges of the Jamaica Assembly.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

Pursuant to your Lordship's desire, signified to us by Mr. Pownall, in his letter of the 15th instant, setting forth, that your Lordships having lately received a letter from Mr. Knowles, Governor of the Island of Jamaica, in which he acquaints your Lordships with his having dissolved the assembly there, for calling in question His Majesty's right of issuing writs for electing members to sit in the assembly, without waiting for a message first from them; and inclosing to us an extract of the said letter, together with a copy of the resolution of the assembly, upon which that dissolution was founded, (which extract and copy are herewith returned); and desiring our opinion whether the assembly were warranted in coming to that resolution, and whether it be

consistent with His Majesty's rights and prerogative: we have considered thereof and do not think ourselves sufficiently informed to give an opinion upon the question so generally stated, because it depends upon the constitution of the assembly of Jamaica, and the usage, whether, whilst the assembly is sitting, all vacancies should first be signified by themselves to the Governor; and yet the case must frequently have happened. Nothing is transmitted to us relative to the particular constitution or usage in Jamaica upon this point, and there are no parties to whom we could send for information.

What the assembly claims seems analogous to the law and practice here; but it does not from thence necessarily follow that it is, or ought to be, the law there; that must depend upon their own constitution and usage, which, without further light, we cannot venture to give an opinion upon.

April 29, 1755. W. MURRAY.
RICH. LLOYD.

(7.) *The opinion of the same lawyers, whether a person chosen into the Assembly, had a right to sit, he having been convicted of a crime in England.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

Pursuant to your Lordships' desire, signified to us by Mr. Pownall, in his letter of the 25th instant, setting forth that your Lordships had received a letter from Mr. Knowles, Governor of Jamaica, dated the 25th of January last, acquainting your Lordships with his having dissolved the assembly of that Island a second time, and containing his reasons for such dissolution (a copy of which letter, and the other papers inclosed to us, are

herewith returned,) desiring our opinion whether Mr. Dawes, the gentleman mentioned therein, by having been convicted in England of uttering treasonable expressions against His Majesty, and sentenced to enter into recognizance for his good behaviour for seven years, is disqualified during that term from being elected into, or sitting in, the assembly of Jamaica, he having taken the oaths to His Majesty and made and subscribed the declaration and taken and subscribed the oath of abjuration; we have taken the same into our consideration and are humbly of opinion, that though the said assembly might in their discretion have expelled the said James Dawes, in consequence of the said judgment, yet that the same was no legal objection to his right or capacity of sitting.

April 29. 1755.

W. MURRAY.
RICH. LLOYD.

(8.) *The opinion of the Attorney and Solicitor-General Northey, and Harcourt, how far a representative, absenting himself, may be punished.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

My Lords;

In humble obedience to Her Majesty's commands in council, signified to us by your Lordships' secretary, we have considered what method may be proposed for punishing such members of the assembly of Barbadoes, as wilfully absent themselves from the said assembly, which consisting of two and twenty, and fifteen being reputed there to be necessary to be present, eight of them absented themselves voluntarily, and thereby the proceedings

of the assembly have been for a long time obstructed; and we do humbly report to your Lordships, that the assembly in Barbadoes begun and hath been continued, by virtue of the commissions granted from time to time to the Governors of that island by Her Majesty's predecessors, and by Her Majesty, whereby the Governor is enabled, by the advice of Her Majesty's council there, to summon and call general assemblies of the freeholders and planters there, and, with the advice and consent of the said council and assembly, or the major part of them, to make laws for the public peace, welfare, and good government of that island; and the number of persons of the assembly being two and twenty, twelve, being the majority of them, is sufficient to be present, and the appointing fifteen to be necessary, which was done by an order of the assembly as we are informed, and not by order of Her Majesty or her predecessors, or by any act of the assembly confirmed by Her Majesty or her royal predecessors, is irregular, and could not alter the quorum appointed by Her Majesty's commission.

As to the case of the absentees, we are humbly of opinion that they being chosen and having accepted of the places and acting in the assembly and wilfully absenting themselves without any just occasion, to the total obstruction of all business, they are guilty of an high misdemeanor, in the execution of of the trust in them reposed, and contempt of Her Majesty's royal authority; and there being no power expressly lodged by Her Majesty in the assembly to punish such offences, they may be proceeded against in Her Majesty's ordinary courts of justice there, and punished by fine and imprisonment.

But whether a prosecution of an assemblyman in the courts of justice of that Island, without any application from the assembly to Her Majesty or her Governor there for that purpose, may not tend to Her Majesty's disservice, by creating an uneasiness in the present and all future assemblies, and occasion an unwillingness to serve therein, is most humbly submitted to Her Majesty.

EDW. NORTHEY.
SAM. HARCOURT.

February 1, 1704-5.

Sir:

Some members of the late assembly of Barbadoes having applied to me on behalf of themselves and the rest of the absenting members, and represented that a matter of fact, stated in the report lately made by Mr. Solicitor and myself, hath been misrepresented, for that the said assembly hath power to punish their own members, and therefore, they desire an opportunity to make out the same; I am content that the said report may be reviewed and altered as justice shall require, which I desire you to communicate to the Lords.

EDW. NORTHEY.

February 9, 1704.

(9.) *The opinion of the Attorney-General De Grey, whether the Assembly of South Carolina could grant money to the Bill of Rights Society.*

Questions arising out of the foregoing state of facts, and upon which questions the opinion of Attorney-General is desired are:

Whether, under the circumstances above mentioned, the commons house of the assembly of South Carolina

can, or ever could, legally, by an order of that house alone, not concurred in by the other two branches of the legislature, appropriate to specific public purposes, any sums of money for such public purposes of the colony as the said commons house of general assembly might think fit? If this question is answered in the affirmative, then question whether, under the above mentioned circumstances, the foregoing order of the said commons house of assembly, on the 8th of December last, for the purpose therein mentioned and thereby intended, is warranted by law and the constitution? If not, what remedy, in either of the cases stated, can be legally and constitutionally applied in a matter of so great importance to His Majesty's government and the future well-being and security of the colony of South Carolina?

1st. I am of opinion, that the house of assembly of South Carolina cannot, by the constitution of that colony, without the concurrence of the governor and council, legally direct the treasurer of the colony to issue out of the balance or surplus of funds arising from taxes granted to the King, and appropriated by the legislature of the colony to certain public services, any sums of money for such other public purposes of the colony as the house of assembly shall alone think fit. Such a power would, as I conceive, be contradictory to the first and fourth articles of the commissions and instructions, repugnant to the nature of the grant by which the surplus must remain disposable by the same authority which raised it, and cannot, I think, be warranted by the modern practice of a few years, irregularly introduced and improvidently acquiesced in.

2d. I think the order of the assembly, of the 8th of December last, is not to be supported in point of law;

not only as they cannot, in my opinion, legally issue the public treasure by their sole authority, but as the sum is directed to be paid out of any money in the treasury, without regarding the payment of the appropriations mentioned in the act of assembly; and as it is to be applied not to the particular service of the colony and the support of the government thereof, but to be remitted to Great Britain, for the vague and indefinite purpose of supporting the rights and liberties of Great Britain and America, to be ascertained by the arbitrary pleasure of seven particular persons, and without any immediate reference to the service of that colony.

3d. If the order of payment of the money is not warranted by law, the payment cannot be legal, and the treasurer has issued the money without authority; but it would be hard, after the late acquiescence in the orders of the assembly, to make the treasurer liable to the consequences of a wrong payment.

What preventive measures for the future may be most conducive to the service of the colony and of His Majesty's government and to protect the subject from the repetition of such exactions whether by the parliament here, or by instructions to the Governor, must be submitted to the wisdom of His Majesty's servants.

WM. DE GREY.

February 13, 1770.

(10.) *Several opinions on the act of the Maryland Assembly, "for the establishment of religious worship, according to the Church of England." The following facts may be premised, as the case: King William deceased on the 8th of March, 1701-2; the Assembly, which was thereafter called in the usual manner, met on the 17th of the same month, and during its sitting passed the act in question, without the possibility of knowing that such an event had taken place. Governor Seymour, the successor of Governor Blackstone who summoned the assembly, upon his arrival, on the 11th of April, 1704, found the same Assembly existing that had been called by his predecessor in the name of King William: so that there were three several sessions of Assembly held after the demise of King William, to wit, in June 1802, in October, 1703, and in April 1704.*

First.—*The opinion of Mr. Hollyday, an eminent lawyer of Maryland, on this subject:*

King William died the 8th day of March, in the year of our Lord 1701. On the 16th day of the same month, an assembly met, under Governor Blackstone, and continued until the 25th of the said month; in which was made the act for the establishment of religious worship in this province according to the Church of England and for the maintenance of ministers. Two questions concerning this act have lately been stirred; whether the act be in force; if it be, whether the Sheriffs can execute for the forty pounds of tobacco *per* poll, established by the act for the maintenance of ministers.

The objection to the validity of the act I take to be founded on the fact of the King's demise, whereby it is supposed that the assembly was dissolved, and therefore the act made by persons having no legislative powers.

I am of opinion, that the aforesaid act is in force. If the objection drawn from the demise of the King can be obviated, and it can be shown that the act had the validity of the law when it was made, I conceive it will follow, that it is still in force; there is no limitation of its continuance in point of time, it is therefore a perpetual law, and I do not know that it has been repealed by any subsequent act.

At the time of the King's death his Governor here was acting under his commission, in consequence of which, he was invested with the royal authority, had power to call, prorogue and dissolve assemblies, assent to laws, and to exercise the other functions of the royal capacity within this province; and I apprehend, that so long as that commission remaineth in force, all acts done by virtue of the powers derived from its words, are good and valid. I have no doubt but that by the demise of the King, all commissions granted by him during pleasure would have determined, unless provided for. But by an act of parliament made in the seventh year of his reign, cap. 27, it was, amongst other things, enacted, that no commission, either civil or military, should cease, determine, or be void, by the death or demise of his said Majesty, or of any of his heirs or successors, Kings or Queens of England; but that every such commission should be continued and remain in full force for the space of six months next after such death or demise, unless in the mean time superseded by the next immediate successor. And, by an act made in the first year of Queen Anne by the parliament that was sitting when the King died, and in that same session, it was enacted that all and singular the provisions, clauses, matters, to things whatever, contained in the above re-

cited part of the act, of 7 W. III. should extend, and be construed to extend, to the kingdom of Ireland, to the Islands of Jersey and Guernsey, and to all His Majesty's dominions in America, and elsewhere. By these provisions, the Governor's commission was in full force at the time of making the act in question; it did not cease, or determine, by the demise of the King; for, if the general words of the act of 7 W. III. did not extend to commissions in the plantations, they were undoubtedly extended to them by act of Queen Anne, which, by express provision, was to have its operation and commencement on the 8th day of March, on which day the King died, so that there was no interval of time between the death of the King and the making of the act here, in which the Governor's commission was not in full force. And I am of the opinion, it will follow from hence as a necessary consequence, that, by the demise of the King, the assembly of this province was not dissolved; for the reason why, by the death of a King, the parliament was dissolved (until the case was provided for by the statute,) was, that he being considered in law as the head of the parliament, that failing, the whole body was extinct. But the reason does not subsist in this case, for the politic capacity of the King, in which only he can be said to be the head of the parliament, was still residing in his Governor here, as fully as it had been at any time during his life; the Governor's commission was from the King, that commission was in full force, he was invested with all the powers derived from it originally, amongst which, that of legislation, calling assemblies, and assenting to laws, was one. The Crown, whilst the government was in its hands, and the Proprietaries, in the time of their administration, have exer-

cised a power of dissenting to laws passed here by their Governors: but I have never understood, that the assent of the Crown, or Proprietary, was thought necessary to the validity of an act of assembly to which the Governor had given his assent, such act having, to every purpose the force, and obligation of a law, unless dissented to by the Crown, or Proprietary; and I think, that this being the case, it may fairly be inferred that the Governor here, acting under a commission from the Crown, stood in the same relation to the other branches of our legislature, as the King does to the other branches of the parliament; that he must be considered as the head of the assembly, in the same light as the King is of the parliament; and that, therefore, the legislature of this province remained complete and perfect notwithstanding the demise of the King: nor will it follow from this reasoning, that, by the death of the Governor, the assembly would be dissolved, because the powers of a Governor, though perfect and complete whilst they continue, are but delegated and derived from a superi , to whom they result immediately on the death of the Governor.

I have heard of an objection drawn from the style of this act, "it is enacted by the King's most excellent Majesty, &c." but I think this objection is of little weight: the King is here named in his royal and politic capacity, which, at the time of making the act, it was to this purpose residing in his Governor, who then enjoyed and exercised the functions of it in this province; and the personal assent of the King was not necessary to the act. Further, this act has always been allowed and received for a law: the 40lbs. of tobacco per poll has always been collected by virtue of it; and parish assess-

ments for a long time made under it; the being and authority of the vestries for seventy years past have been derived from it; many duties are required of these by subsequent acts; and some share of our civil polity depends upon the existence of it; it was expressly excepted out of the general repeal in 1704 and has been referred to and made the ground-work of many later acts of assembly. This long uninterrupted allowance, and frequent recognition of the validity of it, leave no room to doubt of the uniform sense of the people and opinion of the legislature with respect to its existence, and furnishes a strong argument against questioning the force of it at this time of day.

As to the second question: By the act of 1702, sect. 3, for the encouragement of faithful and able ministers, laboring in the work of the gospel, to come and reside in this province; it is enacted, that a tax or assessment of 40lbs. of tobacco per poll, be yearly, and every year successively, levied upon every person, &c. and paid to the minister, &c. And the act directs, sect. 6, that, for the better and more effectual collecting of the duty of 40lbs. of tobacco per poll and paying the same to the uses intended and appointed by the law, the sheriff of the county shall, and is obliged, to collect and gather the said assessment of the several persons within each respective parish, in the same manner, and by the same authority, as the public and county levies are collected, and shall pay, &c. It could scarce be imagined, that a minister, who had a comfortable establishment in England, would be induced to come over to this province for the sake of the provision made by this act. Those who should come, it might be expected, would be such as from their circumstances must depend on their sala-

ry for the support of themselves and their families. Hence a necessity that this should be annually collected and paid, and that some power should be placed in the hands of the sheriff who was to collect and gather the 40lbs. of tobacco per poll, by which he might in a speedy and summary way enforce the payment of it; and I have no doubt but that this was done and that the sheriffs had power to execute for it The act does not, indeed, in express words give a power; but the sheriff is obliged to collect and gather in the same manner and by the same authority, as public and county levies were already collected. The words are in the same manner; and by the authority, have a plain reference to the mode of collecting, i. e. compelling the payment then in use and practice, which was clearly by way of execution, or to some law then [illegible] being which pointed out a mode of compelling payment, or to both. I have met with no law which does originally and expressly give a power of executing for public and county levies, or point out any mode of compelling payment. If such an one can be found to have been existing when the act of [illegible] was made, it might perhaps put an end to this question. If there was no such law in being, the mode referred to must be the usage and practice of the time.

The act of 1699, of directions for the sheriff's office, which was a perpetual law, and, I apprehend, continued in force until it was re-enacted in 1704, does plainly prove the mode then in use and practice, to have been by execution It restrains the sheriffs from seizing tobacco unstripped, or marked for merchants, or others, for any cause except levies, and gives him a power to break locks in order to seize tobacco for public levies. This law was again re-enacted, so far as concerns the

present question, with some addition in 1715, cap. 46, a perpetual law now in force, by which the sheriffs are restrained from seizing tobacco unstripped, &c. for any cause except levies due to the public, county or parish, or for the 40lbs. of tobacco per poll to the minister; and he is empowered to break locks in order to seize tobacco for levies and dues as aforesaid.

In 1699, the law of 1702 not being made, the exception was confined to levies. In 1715, it includes the 40lbs. of tobacco per poll to the minister, because that was to be collected and gathered in the same manner. And by sect. 5 of this act the sheriff shall not levy by way of execution any public dues, or officers' fees, upon the body, goods, or chattels, of any inhabitant, except he has made a demand thereof, at or before the 20th day of February. The 40lbs. of tobacco per poll is here omitted, and I conceive with design, because every man might know without demand what he was to pay the minister. By the act of 1723, cap. 16, fines for breaches of this law are to be levied by the sheriff, by way of execution, as other public dues are to be levied. By the act of 1724, cap. 21, no sheriff shall be allowed any fee or reward for executing for any public or county levies or any public dues or officers' fees. This act recites, that several sheriffs, to increase fees to themselves, had executed several persons for public and county levies and officers' fees, and had charged execution fees thereon; and that the power of execution ought not to be used in oppression of the people, but only to enable the sheriff to collect the public dues and officers' fees with greater facility. Usage is said to be one of the best expounders of a law: the usage, in this case, is not only proved by the acts of assembly above referred to, which

at the same time that they evince the fact, shew the sense of the legislature with respect to the legality of it, but might be appealed for to the experience of every man in the county who lived and was conversant in business. Before the inspection law of 1747 took place, the sheriffs used to execute body or goods, as he thought most effectual for obtaining payment.

To draw this matter into a narrow compass, the terms tax, assessment, levy, as used in the act, convey an idea of something compulsory. The sheriffs, by the act, are obliged to collect this tax and to pay it annually. The purposes to which it is applied, required that it should be annually collected and paid. A compulsory power, therefore, in the hands of the sheriff was necessary to enable him to discharge this obligation: the law plainly intended to give him a compulsory power. Of what nature was it? I conceive, for the reasons assigned, a power to execute body or goods, as should be most conducive to the end and purposes of the power.

JAMES HOLLYDAY.

August 1, 1772.

Second.

Sketches of an argument on this subject, by Mr. Daniel Dulany, one of the ablest lawyers which America ever produced, after he had retired from the bar.

Quære.—Whether the validity of the act of 1701 may not be asserted on the principles of the common law, though the Governor's commission determined on the royal demise, inasmuch as the meeting of the assembly and passing the act were agreeable to the commission

while in force, and happened before notice of the royal demise?

Defendant in assize pleaded a recovery before commissioners of oyer and terminer of damages, wherein one moiety of the land demanded was on eligit taken into execution &c. The plaintiff replied, that after the said commission, and before judgment, another commission issued. &c. Fish prayed judgment, because the plaintiff did not allege that the first commissioners had notice before judgment of the second commission; because, though the second commission, when executed, has, to some purposes, relation to the date, yet the acts done under the first, before notice, were good.—So adjudged, 34th As. Pl. 8.

Under a commission to examine witnesses, the commissioners began the examination the 28th of March, 1625, the day after King James's demise, but before notice of it. Agreed, the commission was determined by the royal demise, without any notice; but held that the proceedings before notice were good, and that the witnesses, if perjured, might be punished, because examination before notice of the royal demise was legal. Crow v. Vernon. Cro. Car. 97. in which Lib. Ass. is referred to.

An attachment sued out in the time of Car. II. and executed at Exeter three days after his demise, but before notice of it, held to be good.—Burch v. Maypowder, 1 Vern. 400, in which the case in Cro. is cited.

A commission to Algiers to examine witnesses. The plaintiff died before the examination, but the witnesses were examined before notice of his death. Though the

suit was abated, yet the examination before notice held to be good. Thompson's case, 3 P. Will. 195, in which the case in Cro. is referred to.

Whatever effectually determined a commission on the principles of common law, whether a royal demise, a new commission, or death of the party, should, on the principle of the objection to the act of 1701, invalidate all acts done under it; but the cases cited prove that all acts done before notice are valid. When a new Governor is appointed in England, it takes some time to convey hither notice of the appointment; and the acts of the old Governor, before notice, have always been deemed to be valid. Very inconvenient if not so.

Should it be asked, why, then, the statutes of King William and Queen Anne? Answer, it takes time, after a royal demise, to settle the proper arrangements of government. The common law only supported all official acts performed before notice, and, therefore, the statutes have preserved and continued all commissions for six months, and thus comprehend as well acts done after as before notice during that period. Such was the defect of the common law and such the remedy provided by the statutes.

There can be no doubt but the act of 1701 passed with the fullest concurrence and assent of the Crown and the two houses. Former bills on the same subject had passed in Maryland; but they were defeated by the royal dissent. The assembly addressed the King and expected that he would order a bill to be framed for the purpose of a religious establishment and to be remitted hither for the assent of the two houses. The bill was accordingly framed, remitted, and assented to in 1701; moreover, after the demise of King William, the act of

1701 was transmitted to England, as was the practice when acts passed here. An application was made against it by some dissenters, which not only failed of effect, but was the occasion of the particular confirmation of the pious Queen Anne, which was ordered to be published in all the churches. The 12th of Car. II. passed in the convention parliament, which was not dissolved till the 29th of December, 1660. Vid. Parl. Hist. vol. xxiii. and what is said in Vent. 15. applies much stronger to this case.

There was a precedent royal assent to the act of 1701; parliament and assembly not to be confounded; local circumstances, as well as other reasons, distinguish them. It is true, there cannot be a royal assent before the meeting of parliament; but it is true, there cannot be a royal dissent after a session of parliament. To acts of assembly there may be dissent after the session, and why not an assent before? It is not, except in the case of an act of grace, usual for statutes to originate with the king; but without do'bt, if a bill with the royal assent sho'd be sent to the Lords and Commons and receive their assent also, it would be a perfect law, if even in the form of a charter, as was the case with Magna Charta. That which constitutes law is the concurring assent of all the branches of the legislature, wheresoever it may happen to originate, whatever may happen to be the form of it. Vid. Hale, Orig. and Antiq. Parl. and 8th Co. Rep. Prince's case. The King cannot be personally present in assembly; the manner must be governed by the nature of the business: he can, therefore, dissent out of assembly; and why not assent? In most of the acts which have lately passed in Virginia, the acts do not operate till the royal assent is given: Why, then, if assent

or dissent, subsequent to a session, shall be so effectual, may not any assent, before a session, be as effectual? If there be a restriction in a governor's commission with respect to particular acts, and the restriction be not observed, his assent is a nullity: this is in the nature of a precedent royal dissent. Why, then, should not a precedent royal assent be effectual? Sir Philip Yorke and Mr. Lutwyche were clearly of the above opinion on the point of restriction.

The discretion in passing acts of parliament, or not, is a royal incommunicable prerogative; but not so as to acts of assembly. Such discretion may be communicated to a Governor. The statute of Henry VIII. relates only to the mere execution of the royal will. The idea of a provincial legislature to be kept up.

It is a very slight objection that the King's name was used after his demise; his name was unnecessary, and *utile per inutile non vitiatur*. The royal name is not used in the acts of New York or Virginia. What is said of the abatement of the writ of summons, I do not understand. *Fungitur officio*, when returned, and the qualification performed. What is said of prorogation and dissolution is a mere mistake; they may be, and usually are, in the Governor's name.

Next consider the statutes.

All commissions continued in full force and virtue for six months: continuance and suspension are as opposite as motion and rest. If there was a continuance for six months, there could be no suspension within that time.

Full force and virtue. *Plenum est, cui nihil addi potest, cui nihil deest secundum modum suæ capacitatis*; but if the Governor could not meet the assembly and

pass acts under his commission, there was something wanting, and the commission was not continued in full force; a conclusion directly against the statutes. If the Governor had authority to meet the assembly, it was exercisable, *vana enim est potentia, quæ non in actum venit*, 2 Co. 51. The assertion of a power unexercisable, is a contradiction; but it is said the power was exercisable only in the name of the Queen. The absurdity is the same, because the capacity to exercise the power is made to depend upon an impossibility, the knowledge of an event unattainable by any human means. The law expects no miracles; it is satisfied with human prudence. *Casus fortuitus non est sperandus (expectandus), et nemo tenetur divinare*, 4th Co. 27. c. 66. Litt. Rep. 98.

The governor, it is said, has no exclusive authority, &c. Exclusive of whom, or what? I do not understand what is meant by the term.

Blackstone quotes from Hale and Bracton. *Principium, caput, et finis*, not applicable to an American assembly, nor even to parliament at this time.

Julius Crispinus observes, *distinguenda sunt tempora, mutata enim hominum conditione, mutatæ sunt et sanctiones, nam plurimæ regulæ priscis temporibus accommodæ, nostris sunt alienæ.*

Queen Anne, on the 11th of March, 1701, met the parliament that was sitting at King William's demise, under the statute. The Lords-Justices met the parliament after the death of Queen Anne, under the statute. George II. met the parliament that had been summoned by his father. Should there be a dissolution of parliament by effluxion of time, it would be renewed and meet under the statute.

Statutes, accommodated to the times, have controled the rule in England: in America, it is not with any degree of propriety applicable, where the King is necessarily absent from the assemblies; what is done in the royal name is, for the most part, done by a deputy; where in the great point of passing laws, discretionary powers are frequently entrusted; where, as has been shewn, there can be no defect, on the principles of the common law, in acts of government performed before notice of a royal demise; where the powers of government, for six months after a royal demise, are by statutes continued in full force, terms which exclude all idea of suspension, cessation, and defect; where those powers are therefore always, during that period, exercisable; where consequently, the validity of the exercise cannot depend upon an impossible observance. *Quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa valere non potest.* Co. Litt. 56.

An aiding act, it is said, passed in Virginia; therefore a similar provision was necessary in Maryland. A serious answer to this remark would be ridiculous; but I cannot help observing how little care is taken to avoid inconsistency. It is admitted that process stood in need of an aid, but the Virginia law includes process as well as acts of assembly. That the act of 1751 is relied upon is astonishing. The statutes extend to a royal demise, but a proprietor's death was no more thought of by parliament than the death of any other person who might happen to appoint an attorney. The act of 1751 very properly aided process as well as acts; but though the act of 1751 is nothing to the purpose for which it has

been cited, yet, in another view, it is not immaterial. Consider the preamble of this act and the rule of construction: the intention or will of the legislature deducible from the whole act, of which the preamble is part, constitute the law. There can be no doubt but it was the will or intention of the assembly in 1751, that laws which should pass after a proprietor's death should be aided, as well as process. In order that this purpose might be attained, the act of 1751 enacted only that the Governor's commission should remain in force, so that as far as the sense of the assembly in 1751 is of weight, it follows, that preserving the Governor's commission is sufficient to preserve the power to make laws; wherefore it may be inferred from the manner of the provisions made by the act of 1751, to have been the opinion of the assembly that the act of 1701 was in force.

With what license are principles rejected and adopted, *uno flato?*

Above one hundred acts have recognized the force of the act of 1701; but these clear indications of the sense of different legislations are slighted, the sense of the legislature is supposed in one instance only, and this one instance is represented as a conclusive proof.

The argument, from the number of supplementary dependent acts, and therefore of recitals, need not be insisted upon here. These acts are so many legislative declarations, to which all ought to give credit. Pop. Rep. 79. The acts that passed in June 1702, Oct. 1703, in April 1704, show the sense of these assemblies; for

no new writ of election issued till after the April session, 1704.

If the act of 1701 be void, we have no religious establishment, no rectors or vestries. What is to become of the churches, glebes, donations to, purchases by, or from them, leases, &c. judgment, convictions, determinations before the governor and council, assessments, parish registers, &c.?

What will become of all those most useful acts that passed the 3d of June, 1715, and the acts dependent upon them; for the assembly then met on writs of election that had issued in the King's name? The Governor derived his authority from the King's commission; Lord Benedict died on Good Friday before; his son, Lord Charles, was a protestant; the disability which was the cause of the royal assumption was removed; the charter of the province had a full operation; Lord Charles was restored; he became supreme magistrate in *loco regis*; laws and process were to be in his name; Governor Hart's commission from the Crown was determined; a new commission from Lord Charles passed the 30th of May, 1715. On the principle of the objection, all the acts that passed the 3d of June, 1715, and the dependent acts, are void. How are wills to be proved over again; administrations to be granted; proceedings of delegates *enure*; titles affected by the enrolment act revived; when are the courts to meet, &c. &c.? What is to be done to prevent playing the very devil? *Quam periculosum est, res novas & inusitatas inducere!*

Some gentlemen will have a great deal to do as legislators and lawyers. Unhappily, as legislators they cannot remedy the inconvenience; for a re-enaction of the laws will not be sufficient, and a confirmation would

have a retrospective operation, which they are principled against. A word or two on the matter of relation or retrospect.

If an act pass the last day of a long session, and nothing expressed in it to control the relation, it is, in notion of law, an act of the first day of the session; but yet, I think, the rule *lex normam imponit futuris*, is a very just one, when the application corresponds with the reason of it. It would be cruel and unjust to punish an action, indifferent when done, as a crime, by a retrospective law. *Moneat lex oportet prinsquam feriat;* but the confirmation of the act of 1701 is clear of this imputation, for no person who did not commit a breach of it would be liable to the little penalties, and none who did commit a breach could properly allege that he thought the action lawful, because no one doubted the existence and validity of the law. *Reus est, cujus mens est rea.* Besides, all this tenderness is affected, since there cannot be a case of punishment to be inflicted.

All aiding acts are retrospective.

Suppose a law had passed in 1701, inflicting the pains of death on the crime of burglary, and a trial, conviction, and execution, before notice of the King's demise. On the principle of the objection (vide what is said by Persey in the year-book at large, above cited), the executioner would have been guilty of murder, the Judges, Governor, and Council, accessories, and yet each would have performed his duty. This would be more cruel and unjust than even a clear retrospective act inflicting a little penalty on an action supposed by the agent, at the very time of doing it, to be unlawful.

Military as well as civil commissions were continued by the statute in full force and virtue. Suppose a court

martial, trial, condemnation, and death, inflicted before notice of the royal demise. This may have probably happened; what a deal of employment for Jack Ketch!

To conclude. Suppose, according to the rule in Plowden, the case stated, and the question put to the parliament that passed the above statutes--You have enacted that all commissions should continue in full force, &c. and therein included the commissions of American Governors: it was the duty of these Governors to act in His Majesty's name during his lifetime. Did you mean that what they should do in his name at a time when they could not know by any human means that he was dead, should be void, because they were not, by some miraculous interposition, informed of the King's demise?

No. It was at first said that all the supplementary and dependent acts were void, as well as the act of 1701; but it seems that the contrary is to be contended for, in order to lessen the weight of the argument, *ab inconvenientia.*

The former position was more consistent. If the act of 1701 was originally void, and none of the supplementary or dependent acts have confirmed it, these acts are void; for, as said above, it is the will or intention of the legislature, which constitutes law. Without execution, the law is a dead letter; the execution must be agreeable to the legislative will. Technical words are not, as in the limitation of estates, necessary to express their will. When one act is supplementary to, or dependent upon, a prior act, the construction is on both, the will being deducible from both: if the former law be rejected, the execution of the latter law will not be, as it ought to be,

agreeable to the legislative will. Wherefore either the supplementary and dependent acts had confirmed the original act of 1701, or they are void. What is implied in a law, is as effectual as what is expressed. The rule, *expressio eorum, quæ tacite insunt, nil operantur*, is as applicable to this as to any subject. It is agreed that the act of 1701 might have been expressly confirmed: a confirmation necessarily implied, is as strong as an express one ; and what can be more necessarily implied in a law, than that which, if not supplied in construction, must entirely destroy it ? I refer, in general, to cases of construction, which are too numerous to be applied here. The principle, and not the letter of a determination, is the authority of it ; and on this ground I apprehend there may be, whether any case in point can be found or not, an implied confirmation.

I have avoided taking notice farther than I was led to do by 1st Vent. 15. of what has been done in times of great danger or turbulence, because I think such instances rather show the distemper than the constitution of the state; but as something of this kind has been indistinctly spoken of, I will add in what manner parliaments have been convened upon accessions to the throne.

The first writ of summons of the commons, now extant, was in the 49th year of Henry the Third.

Edward the First was in the Holy Land, at the time of the demise of his father, Henry the Third. On returning to England, he was crowned the 14th of August, 1274, near a year and a half after his father's death — Soon after his coronation, he called a parliament.

Edward the Second issued new writs. He being deposed by parliament and compelled to resign, was succeeded by his son, Edward the Third, who met the parlia-

ment that had been called in his father's name and had deposed him. This parliament continued for about one month after Edward the Third's coronation.

Richard the Second—new writ of summons. Henry the Fourth met the parliament that had been called by Richard the Second. Henry the Fourth had summoned a parliament to meet the 24th of March, 1413. Whether Henry the Fifth met this parliament or not, is doubtful.

Henry the Sixth issued new writs.

Edward the Fourth issued new writs.

Edward the Fifth: nothing done in his time. He was born in a sanctuary and died in a prison.

Richard the Third issued new writs.

Henry the Seventh, the same.

Henry the Eighth, the same.

Edward the Sixth, the same.

Mary, the same. On her marriage, a new writ issued in the name of Philip and Mary.

When Mary died, the parliament was sitting, 17th Nov. 1558, and proclaimed Elizabeth.

Elizabeth issued new writs, 1st Dec. 1558.

James the First issued new writs.

Charles the First, the same.

The convention parliament began 25th of April 1660. Agreed in a [illegible]ttee of [illegible]oth houses to proclaim Charles the Second [illegible]h of M[illegible]y, 1660. He was accordingly proclaimed, 30th of May.

Charles the Second met the convention parliament.

James the Second issued new writs.

What happened at the Revolution need net be mentioned.

Queen Anne met the parliament that was sitting at King William's demise, under the statute.

George the First. The Lords-Justices met the parliament that had been summoned by Queen Anne, under the statute.

George the First died at Osnaburg, 11th of June, 1727. An account of his demise was received the 14th of June. On the fifteenth, the parliament met, was prorogued by commission to the 27th June, 1727, when the session was opened by George the Second. 17th July, prorogued to the 29th of August. On the 7th of August 1727, dissolved and new writs issued.

I have not, above, insisted upon the act of 1704, though that alone may be sufficient to establish the act of 1701, because hardly any thing can be suggested which will not occur to every one whose business it is to consider subjects of this nature, and shall therefore only observe, that the practice of assemblies enforces the act of 1704; for at different periods before 1704, the assemblies renewed the acts that had passed, and having determined which of them were convenient and inconvenient, by an act similar to that of 1704 declared the former should remain in force and that the latter should be repealed. From this circumstance, the intention or will of the legislature may be strongly inferred. I have also avoided a particular application of the supplementary and dependent acts. The detail would be very prolix, and throw no new light on the question; but there being one dependent act of a peculiar nature, I shall make a short remark upon it: I mean the act of 1713, cap. 10, which does not expressly mention or refer to the act of 1701, but enacts in general terms that a minister, lawfully inducted, or admitted, shall have a proportionable part of the 40 lbs. of tobacco per poll, computing the time from the day of his induction to the laying the levy, &c. Vid. the act. The will of the legislature constitutes

the law. By this act, if a minister should serve the whole year except one day, he would be entitled to the 40 lbs. of tobacco per poll, after deducting for that day. According to the objection, if the minister should completely serve for the whole year, he would be entitled to nothing. That there should be parts without a whole, aliquot parts of nothing is a new discovery. If objected, that the act of 1701 being void, there can be no incumbent, then there must always be a vacancy, and the 40 lbs. of tobacco per poll be eternally applied, under the act of 1705, cap. 24, but to what end? If objected, this act is void, then the argument *ab inconvenientia* will have its full force.

D. D.

Third.

The Opinion on the same subject by Mr. William Paca, an eminent lawyer of Maryland *.

Case.—The province of Maryland was in the hands of the Crown in the reign of King William, and

---

* Yet see the opinion of those immortal lawyers, the Attorney and Solicitor, Yorke and Talbot, under the head of the Governor 1. No. 6; wherein they avow their judgment to be, that "laws passed by the Governor appointed by the Lords Proprietors, in their names, after the sale [of Carolina] and before notice thereof arrived in the province, are of the same validity as such laws would have been, if they had been passed in like manner before such sale:" now, as every demise imports transfer, the demise of a province by sale is the same in contemplation of law as the demise of a kingdom by the decease of the King; and notice of the demise by decease is as necessary to effect the legal object, as notice of the transfer by sale. The sophistry of Mr. Paca's opinion consists in this, that he reasons the question as if it were concerning the supreme legislature, and not a local legislature, having local usages; and the local usages of the assembly of Maryland appear above to have been different from the law of parliament; depending perhaps, much more upon the continuance of the Governor, than upon the life of the King; and we may see how strongly this notion had taken hold on the minds of lawyers in the question at New York upon the dissolution of the assembly by the discontinuance of the Gov-

Queen Anne. A general assembly, in the time of William had been legally chosen by the King 's writ of election and summons: King William died on the 8th March 1701-2: without any fresh writ of election and summons the assembly afterwards met, and on the 16th March 1701-2, made and enacted the contested law, commonly called the forty per poll law.

Quære,—Is this forty per poll act a law or not?

The King being the fountain of all judicature, the writ of summons of the parliament issues in his name and by his authority; and the parliament commences and is held by such writ of summons: all commissions, civil and military, flow from him: and all process in the several courts of justice proceeds from him and in his name. At common law, therefore, upon the demise or death of the King, the writ of summons abated and the parliament was dissolved; all commissions, civil and military, were determined; and all process in the courts of justice abated or discontinued. To prevent the inconveniency, delay and expense of a general abatement, or discontinuance of process in the courts of justice, an act was passed in the time of Edward the Sixth; but not being large and comprehensive enough, the act of 1 Anne, cap. 8. was afterwards enacted. The continuance of all process in the courts of justice by the act of Edward the Sixth, after the demise of the King, did not

---

ernor. The Attorney and Solicitor General, Yorke and Talbot, we have seen, argued their question upon common law principles: so did Mr. Dulany of Maryland, and he, like them, in[illegible] to keep the attention fixed, throughout the argument, to the nature of the question, as it related to a local legislature. It is easy for judges, sitting in Westminster hall, to say—we will take notice of the King, who reigns over us: but what notice can judges take at the distance of three thousand miles! They must argue every question upon common law principles which never require impossibilities of any one.

invigorate or impliedly revive the patents of the justices, or commissions of the judges. This was a mischief which called for redress; and hence the statute of the 7th and 8th of William III. cap. 27, which being local and not reaching the plantations, was afterwards extended by the above act of 1 Anne, cap. 8. Another mischief demanded redress;—the dissolution of the parliament by the abatement of the writ of summons upon the demise of the King: wherefore the act of 7 and 8 William III. cap 15. was enacted. This act is expressly confined to Great Britain, and not extended to the plantations.

By virtue of the provisions in the several statutes, I admit, upon the demise of King William the proceedings in our courts of justice were not abated or discontinued: and I also admit, the commissions in this province, civil and military, were not determined: but I hold the assembly was dissolved.

I lay out of the case the act of 7 and 8 William III. cap. 15, which provides against the dissolution of the parliament at home. I presume no gentleman of legal knowledge will oppose it against me: the act being local and not extending to the plantations.

The common law operates till suspended or abrogated by statute: upon the demise of the King, the writ of summons of the parliament, at common law, abated, and the parliament was dissolved. I ask, upon the demise of King William what statute prevented the abatement or discontinuance of the writ of summons by which the assembly of this province was then held? if no statute existed, the common law attached, and the assembly was dissolved.

I have been told a gentleman of very respectable

character has given a different opinion, and relies upon the act of 7 and 8 of William, cap. 27, (extended to the plantations by the act of 1 Anne, cap. 8.) which enacts that all commissions, civil and military, shall remain in full force for six months after the demise of the King.

I grant the commissions of the Governor upon the death of King William did not cease or determine: I also grant that the Governor is invested with the powers of summoning, proroguing, and dissolving the assembly: but these concessions cannot influence the case.

When we speak of the powers of the Governor to summon, prorogue and dissolve, we ought to be explicit in our ideas. The Governor has no exclusive authority in this department of his office: the writ of summons for an assembly issues in the King's name, tested only by the Governor: the prorogation is made in the King's name and so is the dissolution.

The assembly, then, being held by the King's writ of summons, what avails the subsisting commission of the Governor upon the point of abatement or discontinuance? The writ may abate without affecting the commission: there is no clashing or repugnancy: a summons might have issued for a new assembly in the name of Queen Anne, and every power might have been exerted consequential upon such commission.

The argument cannot be rested upon the general operation of the Governor's commission to summon, prorogue, and dissolve; for these powers, with respect to the parliament at home, upon the demise of the King devolve upon his successor: yet, at common law, the successor could not proceed upon a writ of summons awarded in the time of the predecessor: the parliament

dissolved, and a new writ issued. I observed the continuance of all process in the several courts of justice did not prevent a determination of the commissions of the judges upon the death of the King: and yet no process could be executed without judges and officers. Upon what principle then shall the mere continuance of a commission invigorate a process, which, at common law, upon the event of the King's death ceased and determined? But to mention a case more analogous to the present. The statute of Edward the Sixth extended only to civil suits: criminal proceedings were left as they stood at common law, and upon the demise of the King abated or discontinued. The act of 7 and 8 William III. cap. 27. continued all commissions for six months, &c. Did the subsisting commissions of the judges, after the demise of the King, prevent an abatement or discontinuance of criminal process? Could the courts of judicature proceed upon a criminal process awarded in the time of the deceased King? No. The parliament was aware of this in the time of Anne, and provided against the mischief by an express statute. The court of King's Bench is authorized by commission to issue criminal process: the Governor was authorised by commission to issue a writ of summons: the criminal process issues in the King's name, tested by the court of B. R. The writ of summons for an assembly issued in the King's name, tested by the governor: the commissions of the judges of B. R. subsist after the demise of the King: the commission of the Governor also subsisted: but upon the event of the King's death, before the statute of Anne, the criminal process ceased and determined, and the court of King's Bench could not proceed upon it. What shall prevent a determination of the writ of summons or

warrant, after proceedings upon it? The King, in judgment of law, is a body politic, to prevent an interregnum. The powers of government lodged in the crown do not drop upon a demise, but are instantaneously handed to the successor, without any cessation or intermission: the power, therefore, to summon, prorogue, and dissolve the parliament, devolves as a subsisting power undetermined.

Before the act of William, cap. 27. the powers of government delegated to the Governor, upon the death of the King determined with the commission: and of consequence the power to summon, prorogue, and dissolve assembly, ceased. After the above act of William, the commission of the Governor did not fall upon the demise of the King, but remained in force for six months. Upon the event, then, of King William's death, the power to summon, prorogue, and dissolve the assembly did not fail, but survived and existed in the Governor as a subsisting power undetermined.

The power to summon, prorogue, and dissolve the parliament is handed, by the common law, as a subsisting power to the succeeding monarch: the power to summon, prorogue, and dissolve the assembly of this province, was handed by statute law, upon the demise of the King, as a subsisting power to the Governor.

But the succeeding monarch, notwithstanding the subsistence of the power to summon, prorogue, and dissolve, cannot, by common law, proceed upon the writ of summons issued by his predecessor: a fresh writ of summons must issue, and a new parliament must be called. Did the statute of William give a greater latitude to the subsisting power of the Governor?

The statute of William, cap. 27. is enacted in general

expressions: all commissions, civil and military, shall remain in full force for six months after the death of the King. My lord Coke observes, in the construction of a statute we should always advert to what the mischief was at common law.

Before the above statute of William, by the common law, all patents of justices, commissions, civil and military, were determined by the King's death; and the defect or mischief was the anarchy resulting from the want of officers to put the laws in execution. This, then, was the mischief the statute meant to provide against: and as the same anarchy, upon the same event, prevailed in the plantations, the act of William was extended by the 1st Anne, cap. 8. Not a syllable is dropt with respect to the parliament: nor is there any ground whatsoever to infer that the preventing of a dissolution of the parliament upon the demise of the King was an object in contemplation when the above statutes were framed. The dissolution did not spring from the determination of commissions: the continuance, therefore, of commissions was never meant as a prop to parliament.

The celebrated Blackstone lays down the law, that a parliament may be dissolved by the demise of the Crown: for the King being considered in law the head of the parliament—*caput, principium et finis*—that failing, the whole body is extinct. While the province was in the hands of the Crown, I ask who was *caput, principium et finis* of the general assembly? the King, or his deputy, the Governor? I affirm not the Governor; upon no principle can he be considered *ut caput, vel principium*; for the assembly commenced and was held by the King's writ of summons, tested only by the Governor: nor upon any principle can he be consid-

ered *ut finis* of the general assembly; for upon the death, or removal of a Governor, the assembly did not, in law, cease and determine, but was kept alive by the King's writ and subsisted. Only the King, then, could have been *caput, principium, et finis;* upon his demise a dissolution followed.

The colony of Virginia was in the hands of the Crown, as well as this province, in the reign of William and Anne. Upon the death of King William the assembly of Virginia was dissolved: a fresh writ of summons issued, and a new assembly was called: the subsisting commission of the Governor, by virtue of the statute of William which continues all commissions, civil and military, did not prevent a dissolution; and, so far from entertaining any such idea of the statute, the general assembly afterwards, in the *fourth year* of Queen Anne, passed "an act for the continuing of general assemblies, in case of the death or demise of Her Majesty, her heirs, or successors," &c. Had the statute of William a more extensive influence in Maryland than in Virginia? or doesit operate differently in different colonies?

Having then observed, that the assembly of this province was dissolved upon the death of King William, and that the writ of summons by which it was held was discontinued or abated; I now lay down the positon, as a fundamental principle, that a parliament cannot be legally convened without the King's writ of summons. And I further assert, that, by the undobted constitution of this prvince, when in the hands of the Crown, no laws could be enacted without the consent of the freemen legally called together and assembled by the King's writ of summons: I do not expect to be contradicted in this assertion of the law; but the fact is stated as a *postulatum* in the case, that, after the demise of King

William; no fresh writ of summons was issued. By what authority, then and upon what constitutional ground, was the assembly convened, which enacted the contested law of 1701-2?

After the death of the late Charles, Lord Baltimore, and before the general assembly was apprized of the event, a session was held and laws enacted: by the death of his Lordship, the assembly was held to be dissolved, and a fresh writ of summons issued. When the general assembly was afterward convened, a law was immediately passed, to confirm and make valid the several acts which had been made in the preceding session, the death or demise of the said Charles, Lord Baltimore, notwithstanding. What can be a clearer proof that an asembly dissolved upon a demise, and afterwards called without a fresh writ of summons, is illegally convened, and cannot enact, or establish laws?

When I assert for law, that the parliament cannot be legally convened without the King's writ of summons, I do not forget the two capital cases of the restoration, and revolution parliaments: the former summoned in the names of the keepers of the liberties of England; the latter in the name of the Prince of Orange, before the crown was placed upon his head. Charles the Second met the lords and commons thus assembled, and laws were enacted: King William, too, when crowned, met the lords and commons thus summoned, and laws were also enacted: both parliaments passed a statute to establish the several conventions as legal parliaments, and to cure the defect or want in the King's writ of summons. If these cases, however, are urged against me, I shall only reply in the language of an eminent sage of the law upon this subject: they are cases founded upon the necessity of the thing, which supersedes all law.

It has been alleged, that the act of 1701-2, though void *ab initio*, has been lifted up and animated by succeeding acts of assembly. I should be glad to know, what succeeding acts of assembly have worked this miracle? When did the act of 1701-2 first obtain the binding force of a law? From what period shall we calculate the commencement of its validity? from the act of 1704? or from the act of 1713? or from the act of 1715? or from the act of 1730? or from the act of 1763? or from the act of 1771? which of these acts communicated the obligatory virtue? That successive assemblies have presumed an existence of the act of 1701-2, I freely admit; that the above several laws recognize it as an act in force, by reference, recital, and supplementary provisions, I also admit; but, that such recognition can, upon any legal principle of construction, amount to a confirmation, I must take the liberty to deny.

I presume I may safely assert that the act of 1701-2 has never been re-enacted; but the advocates for this act insist that it has been confirmed: the position, then, is this, that the act of 1701-2, though void *ab initio*, has been confirmed by succeeding laws. Every confirmation must be express or implied: I can find no succeeding law, which expressly confirms the act; and an act void ad initio, confirmed, impliedly, by an after act, is, in my judgment, a perfect novelty in the law: I candidly own I never met with such an assertion, and confess my ignorance of any statute existing upon such implication. I have met, indeed, with a maxim, *posteriores leges priores abrogant*: subsequent laws cancel and repeal preceding laws: but this maxim, far from supporting, defeats the assertion.

It is an established rule of law that statutes have no

retrospect; they look forward only and prescribe for the time to come; for, upon no principle of natural justice, can a man's actions fall within the conusance of a law made and enacted *ex post facto*. But, when an act, originally void, is confirmed by an after act, the act, thus confirmed operates *ab initio* and attaches upon the time mesne, the commenc't, and confirmation of it; and, therefore, the act confirming has a clear retrospective effect. By the act of 1701-2 many pains and penalties are imposed: the first act, relied upon as a confirmation, is the act of 1704; three years and upwards then, had the act of 1701-2 slept without the sanction of a law: in that interval of time, upon a supposition of the nullity of the act originally, every precept might have been lawfully broke without apprehension of pains and penalties; but if the act of 1704 operates as a confirmation, every such breach in the interval, though clearly a legal act at the time, becomes criminal and subject to the punishment imposed: this is contrary to natural justice. Hence the maxim, *Nova constitutio futuris formam debet imponere non praeteritis*, which, in substance is, statutes have no retrospect: when an act, therefore, is originally void, the law will never work a confirmation, by construction or implication.

An act of parliment, indeed, when express upon the point, I admit will bear down the law and principles of justice; but, when an act is not plain and express, no exposition can prevail which is repugnant to natural right and established maxims.

Among the old statutes we meet with acts recognized that are not to be found on record; the recognition of them by succeeding law is good evidence that such statute once existed; they are received and prevail as statutes,

not as lifted up or animated by the statutes which recognize them, but as original statutes, made and enacted upon a constitutional foundation; the recognition operates only as presumptive evidence of the fact. But when we can go back and lay our hands upon the very statute itself; when we can trace the foundation of it and show it originally void from the clearest grounds, what avails a naked recognition? Every presumption ceases when the contrary is proved.

It has been objected, that, upon a supposition of the nullity of the act of 1701-2 the act of 1700 must be existing: I have no such conception. If the act of 1701-2 was void *ab initio*, the act of 1700 was in force when the act of 1704 was made, and therefore expressly repealed. But then it is objected, that the saving clause of the act of 1704 prevents the repeal. This objection scarce demands the ceremony of a refutation. The saving clause expressly extends to such rights and benefits only had accrued, and were then actually vested. Was the present claim of the forty per poll by the present clergy a right and benefit which had then accrued and actually vested? Surely the clergy of this province are not a body politic with a capacity to take by succession; nor is the forty per poll a transmissible right. The saving clause, with respect to the rights of the clergy, was spent upon the dropping of the appointments or inductions which were then in being.

My opinion then is, that, upon the demise of King William, the assembly of this province was dissolved; that the assembly which afterwards met and enacted

the contested forty per poll law, being called without a fresh writ of summons, was illegally and unconstitutionally convened; that, therefore, no obligation can result from the said forty per poll act, as a law.

WILL. PACA.

August 15, 1772.

Fifth.

Of the want of sovereignty, in the Governor and Council, and Representative body, when met in Assembly.

(1.) *The opinion of the Attorney-General Harcourt, on the impropriety of an act of recognition of Queen Anne, by the Assembly of Maryland.*

As to the act entitled "an act of recognition," altho' the said act be an instance of the fidelity of the inhabitants of this province; yet, in regard the said province is entirely dependent on the Crown of England, and no such law has been thought proper to pass in England, since Her Majesty's accession to the Crown; I humbly conceive such a law was improper to be passed by the assembly of this province.

SIM. HARCOURT.

Sept. 17, 1707.

(2.) *The opinion of the Solicitor-General Thomson, on the limited effect of an act of naturalization by an Assembly.**

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by William Popple Esq., the 10th of December last, I have considered the bill to naturalize Jacob Arents and his three children in New Jersey; and as such naturalization can have the effect to give them a right to enjoy the privileges of natural born subjects in that province only, I do not see any objection to the passing this act, since the assembly there think them proper objects of that favor.

WILL. THOMSON.

March 5, 1718-19.

(3.) *The opinion of the Attorney-General Murray, on the question, whether an assembly can impose a duty on the importation of convicts into a colony.*

This statute, 4th Geo. I. c. 11, for the more effectual transportation of felons, after reciting, that it had been

* In 1698, Governor Nicolson, of Maryland, wrote the board of trade, "that he always caused a proviso to be inserted in the acts of naturalization, that they should not operate against the statute of 7 and 8 Will. III." Governor Seymour, of the same province, observed to the board of trade, upon an act of naturalization, of the Maryland assembly, 1704, 'this is only intended to enable the parties to purchase lands, but not to qualify them to trade, or to be owners, or masters of ships, it being always acknowledged, that any act of naturalization, made in this province, extends not beyond it, being circumscribed by the 7 and 8 Will. 3. for preventing frauds in the plantation trade."

found by experience that the punishments inflicted by the laws against the offences therein enumerated had not proved effectual to deter persons from these crimes; and that many offenders to whom royal mercy had been extended upon condition of transporting themselves to the West Indies, had often neglected to perform that condition; and, that in many of His Majesty's colonies and plantations in America, there was great want of servants who by their labor and industry might be the means of improving and making the said colonies and plantations more useful to this nation; enacts, that where any persons shall be convicted of the felonies therein specified, it should be lawful for the court before whom they were convicted to order such offenders to be sent to some of His Majesty's colonies and plantations in America, for the several terms of seven years, fourteen years, or for life, (according to their respective crimes,) and to convey, transfer, and make over such offenders, to the use of any person who shall contract for the performance of such transportation, and to his assigns, for such terms.

It also enacts, that such contractor shall, previous to the delivery of such offenders to him, to be transported, give sufficient security, to the satisfaction of such court, effectually to transport such offenders to some of His Majesty's colonies and plantations in America as shall be ordered by the said court, and procure an authentic certificate from the Governor or chief Custom-House officer of the place, (which certificate they are thereby required to give forthwith, without fee or reward, as soon as conveniently may be,) of the landing of such offenders so transferred, as aforesaid, in that place whereto they shall be ordered, (death and casualties of the sea

excepted,) and that none of the said offenders shall be suffered to return from the said place to any part of Great Britain or Ireland, by the wilful default of such contractor or his assigns.

This statute likewise, 6th Geo. I. c. 23, for the more effectual transportation of felons, enacts, that all charges in and about making the contracts, taking securities, and conveying of felons, in order to be transported, shall be borne by each county, riding, division, liberty, or place, for which the court was held for ordering such felons to be transported, and directs the manner of the payment of it by their treasurer to the contractor.

Agreeable to these statutes, such contracts for the transportation of felons have hitherto been made, the expenses thereof borne, such bonds executed, and such certificates of their landing abroad procured; but the merchant, who usually contracts upon this occasion, has now received advice from his correspondent at Maryland, that the assembly of that colony have imposed a tax of forty shillings upon every convict to be landed there.

Such vote of that assembly must necessarily produce one of these two consequences, either that the courts here must not order the felons to be transported to Maryland, or any additional expense of forty shillings per head, to be paid by the treasurer of the county, &c. from whence such felons shall be transported, and which expense, so far as relates to London, Middlesex, and the home circuit, (from which places the transports are very numerous) His Majesty has been graciously pleased to take upon himself, and to pay out of his own purse.

Quære. Have the assembly of that, or any other

colony, authority to pass such law; and if they have not, cannot the contractor's agent demand the certificate prescribed by the statute of the convicts being landed there, without payment of such tax?

I am of opinion that no colony can make such a law, because it seems to me in direct opposition to the authority of the parliament of Great Britain; but the charter of Maryland, and power thereby given to make laws, is not stated. There always is a restriction that they shall not be contrary to the laws of England; but this matter should be set right by a proper complaint of the law itself, and Mr. Sharpe seould be acquainted with it, in order to his taking the proper steps to have the law repealed or declared null; for it is a matter of public concern and derogatory to the Crown and legislature of Great Britain. By the same reason they might lay a duty upon or even prohibit British goods.

WILL. MURRAY.

May 6, 1775.

(4.) *Mr. West's opinion on the question, when the six months commenced wherein the Crown might repeal the act of the Pennsylvania Assembly.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Secretary Popple, I have perused the charter of Pennsylvania transmitted to me, and particularly considered those clauses therein which relate to the powers of enacting laws in that province; and in answer to the first question which your Lordships have

been pleased to propose to me, I am of opinion that there is nothing in the said charter by which the inhabitants of the said province are prohibited the re-enacting, in their general assembly, the substance of any laws which may at any time have been disallowed by the Crown.

As to the second question, likewise proposed by your Lordships, I am of opinion that the six months during which any laws passed in the said province are repealable, are to be counted from the time of their being delivered to the privy council; and therefore unless the agents of that province do deliver duplicates of their laws unto the privy council at the same time as they are delivered unto your Lordships, the time during which they remain with your Lordships can make no part of the six months; but the said six months must in such case be reckoned from the time they are delivered to the privy council, subsequent to your Lordship's report.

RICH. WEST.

March 24, 1718–19.

(5.) *The opinion of the Attorney and Solicitor-General, Raymond and Yorke, relating to the time when the three years for the King's approval or repeal of the Massachusetts acts commenced.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by letter from Mr. Popple of the 31st of May last, transmitting to us the enclosed extract of the charter of the Massachusetts-Bay, and also of the Governor's in-

structions, and thereupon desiring our opinion whether the three years in which His Majesty is either to repeal or confirm the acts passed there are to be deemed to commence from the time that they are revived either by the board of trade, or by one of His Majesty's principal secretaries of state, or from the time they are presented to His Majesty in council for his pleasure thereupon: we have considered the sad papers and the questions referred to us thereupon, and are of opinion that the three years allowed by this charter. either for the repeal or confirmation of such laws, are to be taken to commence from the time they are respectively presented to His Majesty in his privy council, the words of the clause being plain and express for that purpose.

ROB. RAYMOND.
June 2, 1722. P. YORKE

(6.) *The opinion of the Attorney-General, Northey, of the bad effects of temporary acts of Assembly, which in his judgment could only be remedied by an act of parliament.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the several papers transmitted to me, and herewith returned, and your Lordships having demanded my opinion to your returning an answer to the order of the Lords of the committee of the council, dated the 5th day of June last, whereby your Lordships were desired to examine and

inform yourselves, how and by what grants or authorities the plantations in America do claim the liberty and power of making temporary laws to continue in force for so short a time, whereby Her Majesty's prerogative of approving or disapproving such laws is evaded, and to propose to that committee what methods you shall judge most proper to be taken, in order to the setting aside those practices so prejudicial to Her Majesty's interest and the trade of her subjects; and I do most humbly certify your Lordships, that as to such laws, which are made in Her Majesty's plantations not granted in property to any subject, the mischief complained of may be prevented by Her Majesty's instructions to her Governors thereof, and there is already among the instructions, a copy whereof was sent me, a full instruction for that purpose; and therefore all that I conceive necessary to be further done as to them, is to require a due observance of that instruction, by Her Majesty's Governors.

As to law to be made in the proprietary plantations, I am of opinion, that mischief cannot be remedied there but by act of parliament of Great Britain; for that the proprietors thereof have a right vested in them of the power of making laws granted by their charters, and are not, nor can now, be put under any other restraint or regulation, than such as are contained in their respective charters, but by act of parliament.

As to Pennsylvania, directions were given for perfecting the agreement with Mr. Penn, and for preparing an act of parliament to supply his incapacity, and to alter the method complained of as to temporary laws, and the time limited for transmitting and approving laws made there; but during the last session of parliament, a bill for that purpose could not be settled, in regard of some

differences between the mortgagees and family of Mr. Penn.

I observe that there is not any obligation by charter to return the laws made in the proprietary plantations of Connecticut and Rhode Island for Her Majesty's approbation; and, therefore, there will also want an act of parliament to oblige them to transmit their laws, and to have them submitted to Her Majesty's approbation.

EDW. NORTHEY.

July 22, 1714.

(7.) *The opinion of the same lawyer, concerning the illegality of the legislative proceedings at New York, against Bayard and Hutchins.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

May it please your Lordships ;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple junr., I have considered of an act, passed at New York, entitled an act for declaring the illegality of the proceedings against Col. Nicholas Bayard and Alderman John Hutchins, for pretended high treason, and for reversing and making null and void the said judgment and all proceedings thereon; and do humbly certify your Lorships, that Her Majesty having, by order in council, of the 18th of Dec. 1704, directed that it should be signified to the Governor, or Commander-in-chief of New York, for the time being, that Colonel Nicolas Bayard and Alderman John Hutchins do enter into recognizance on record, with condition that they will not bring any action against any person who had acted in the prosecution of them by order

of those who had power to command them, or that a new bill, with a clause of indemnification, be transmitted for Her Majesty's approbation; and it not appearing that such recognizance was given and the act now transmitted declaring and enacting that the proceedings and prosecutions aginnst them, are and were undue and illegal, and no clause of indemnification being in the same, Her Majesty's order not being complied with, the same objection remains to this act as was made to the act formerly transmitted.

EDW. NORTHEY.

March 14, 1705-6.

(8.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the power of the Assembly of Connecticut to make laws.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships ;

In obedience to your Lordships' commands signified to us by two letters from Mr. Popple, transmitting to us copies of the charter of the colony of Connecticut, and of the memorial of John Winthorp Esq., hereunto annexed, and desiring our opinion in point of law, whether the said colony have thereby any power vested in them of making laws which affect property, or whether that power is not confined to the making of by-laws only, and whether if they have not the power of making laws affecting property, they have not forfeited their charter by passing such laws ; we have considered the said charter and memorial, and are of opinion, that by the said charter, the general assembly of the said prov-

ince have a power of making laws which affect property; but it is a necessary qualification of all such laws, that they be reasonable in themselves and not contrary to the laws of England; and if any laws have been there made, repugnant to the laws of England, they are absolutely null and void.

P. YORKE.

Aug. 1, 1730. C. TALBOT.

(O.) *The opinion of Mr. Lamb on an usurped Assembly in South Carolina.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In pursuance of your Lordships' commands, signified to me by Mr. Hill's letter of the 2d instant, wherein you are pleased to desire my opinion in point of law, upon the following act, passed in South Carolina, the 12th of February, 1719, I have perused and considered the same, viz: "an act for regulating the courts of justice."

This act is of a very extraordinary nature, and, was it now sent over for His Majesty's approbation, I should make many objections thereto; but, as it is not sent over for that purpose, I shall omit those objections as being unnecessary, and only observe how this act appears to me, which I find to have been passed in the time this province belonged to the Lords Proprietors, but the same has never been confirmed by them or the Crown. And the time it passed was when this province was in great confusion and the inhabitants opposed the power of Mr. Johnson, the Governor then appointed by the

Lords Proprietors, and chose a Gov. themselves who passed this act without any authority so to do; and as it appears by Governor Glen's letter, without the proper consent of the other branches of the legislature, the assembly having before that time been dissolved by Mr. Johnson, the legal Governor. I am therefore of opinion, that this act which was obtained and passed by an usurped authority, should not be considered as a law; and it appears by Governor Glen's letter, it has not been considered so by the practice that has been in use since then concerning matters contained in the said act. As to what is contained in Governor Glen's letter, about removing one of the assistant judges how far he has acted in that respect conststent with his commission and instructions and whether there was sufficient reasons given for so doing, must be submitted to your Lordships, from the information he has given you on that head.

MAT. LAMB.

May 30, 1750.

(10.) *The opinion of Mr. Fane, on the same topic.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered an act passed in Carolina, during the government of the Lords Proprietors, entitled "an act relating to the biennial and other assemblies, and regulating elections and members," by which act, I observe, that there is a power given to the assembly of this colony to meet without the consent of the Crown. The charter granted to the Lords Proprie-

tors does not in the least warrant a proceeding so derogatory of the power and authority of the Crown. The power of calling parliaments is admitted to be an inherent privilege in the Crown; and I believe this is the first instance that such an attempt has been made to deprive the Crown of it. I think your Lordships should show your disapprobation of a law, which in so high a degree encroaches upon the prerogative of the Crown; but I must observe to your Lordships, if the facts are true which are stated in the memorial of Mr. Smyth, the Chief Justice, I think it cannot be considered as an act in force, not having received a due confirmation, agreeable to the rules settled by the Lords Proprietors themselves.

FRAN. FANE.

April 1, 1737.

(11.) *The opinion of the Attorney and Solicitor-General, Harcourt and Mountague, on similar topics of incompetence.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

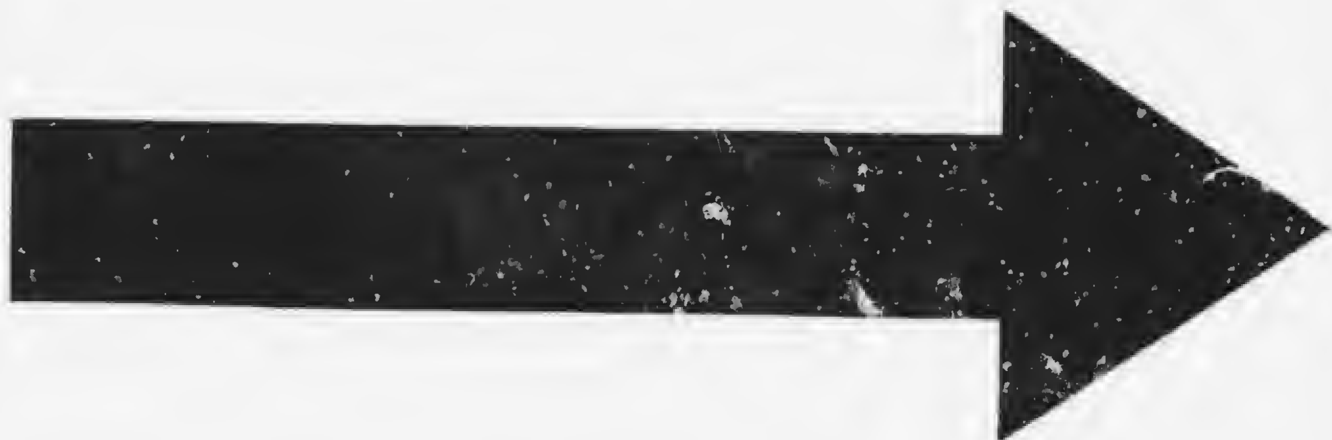
In obedience to your Lordships' commands, signified to us by letter from Mr. Popple, hereunto annexed, we have considered the manner of passing the act of revenue, sent to Lord Colepeper, in the year 1679, under the broad seal of England

We have likewise perused the extract of the commission granted to the said Lord Colepeper, bearing date the 6th of December, 1679, and the extract of Colonel Hunter's commission, both which have been transmit-

ted to us by Mr. Popple, and by them it appears that the method now used in passing acts for Virginia, is extremely different from what it was in the year 1679.

By Lord Colepeper's commission, the Governor and council at Virginia, are to lay before the King in council here, such bills as shall be prepared for making new laws for that colony, in order to have the sovereign's approbation thereof; and if that be obtained, such bills are to be transmitted under the great seal of England to the assembly in Virginia, where (if what shall be so tarnsmitted be assented to by the major part of such assembly) it becomes a law from thenceforth, until it shall by repealed by the like method and authority: but, by the constitution which seems now to be established, the general assembly in Virginia have a liberty of enacting among themselves such laws as they think convenient and the same are to be looked upon as in force until the sovereign, upon a transmission hither, shall disapprove the same; provided the transmission be made within three months after the act passes in the assembly at Virginia, for the sovereign here either to confirm or annul the same.

The former of these ways for enacting new laws seems to be the rule that must govern in the present case, concerning the said act of revenue which passed in 1679 under Lord Colepeper's government, and the method that was then taken for passing that act appears to be directly opposite to the said method that ought then to have been pursued; for the bill was originally begun here in England, and from thence transmitted under the great seal of England to the general assembly in Virginia; there the bill was not assented to as was transmitted, but was returned back with two



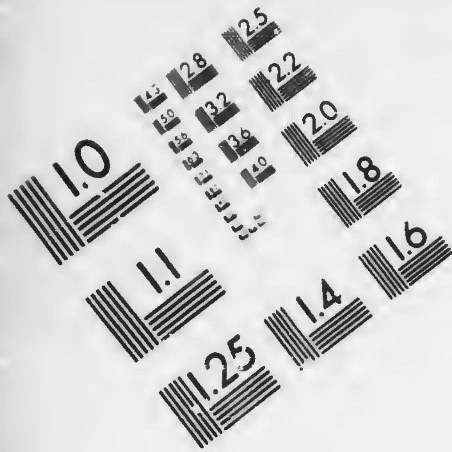
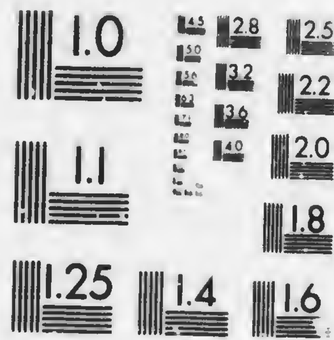
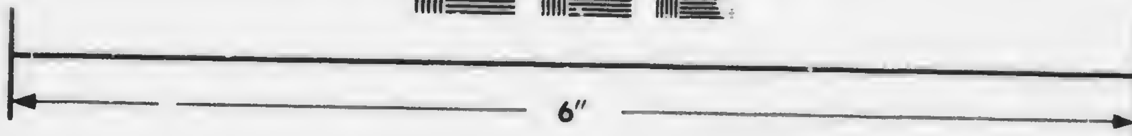
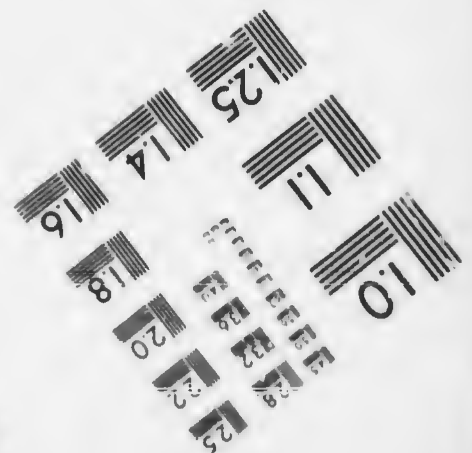


IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

provisos added thereunto, which provisos being made part of the said bill ought regularly to have been wholly approved of or rejected by King Charles the Second; but neither one or the other was directly done, for the bill with one of the provisos was ratified and confirmed by the said King, and the other proviso was disallowed of and annulled. On consideration whereof, we are humbly of opinion that the ratification and confirmation of the said act with one of the provisos only, did become null and void by the disallowance of the other proviso.

If any part of her present Majesty's revenue subsists by the authority of this act only, we conceive it may be for Her Majesty's service to have a new bill pass in the general assembly at Virginia and be transmitted hither for Her Majesty's approbation, pursuant to the method prescribed in Colonel Hunter's commission, which will take away all doubts concerning the collecting and payment of the said revenue.

SIM. HARCOURT.

Dec. 23, 1707. JAS. MOUNTAGUE.

(12.) *The opinion of the Attorney-General Northey, that care should be taken for the regular transmission, in order to the consideration of the Queen's Councils.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships.

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, by his letter dated the 14th day of February last, I have perused and consid-

ered of the inclosed act, passed at Barbadoes the 8th of August, 1706, entitled "an act for the better enabling the executors of Christopher Estwick Esq., to pay the debts of the said Christopher Estwick," in which act it is recited, that Richard Estwick, gentleman, having two sons, Richard and Christopher, and two daughters, Elizabeth and Anne, devised one half of his real estate to Richard and the heirs of his body, with cross remainders entail among them, charged with the payment of his legacies, remainders to his two daughters entail, remainder in fee to his widow. That Richard, the eldest son, dying without issue, the whole estate came to Christopher, and that he having made his will and thereby made some provision for his only son and two daughters, and made several executors, and not having fully discharged his father's legacies, died encumbered with debts to the amount of six thousand pounds; that the said Christopher was also seised of several negroes of his own purchase; that the creditors had commenced and threatened suits against his executors for recovery of their debts, whereby his personal estate and negroes were in danger of being wholly extented and sold to satisfy them; and if the negroes are taken off from the plantation whereof he was seised entail, the plantation would become of little value to the son, which could not be prevented by any way but by applying the whole profits of the estate to discharge the encumbrances, and by allowing the creditors interest in the mean while at ten per cent. and that the executors did conceive that this way the estate would in all probability be preserved entire and be cleared by the time the son should come of age; and therefore it is enacted that the executor be empowered to apply the profits of the whole estate tow-

ards payment of debts and encumbrances, and to allow the creditors ten per cent. interest till paid off: which act, I am of opinion, is unreasonable, in regard thereby the entailed estate, which descended to the infant and was not chargeable with debts of his father, is charged with the same, and also ten per cent. interest, and no provision whatsoever is reserved for the son during the time the debts are clearing.

I beg leave to take notice on this occasion that the Governors of the plantations do not observe their instructions in transmitting the laws passed in the plantations within the time prescribed for them to transmit the same. It appearing in this particular case that this act was passed the 8th of August 1706, and not received by your Lordships till the 12th of February 1711; and therefore I submit it to your Lordships' consideration, whether the Governors of plantations are not to be put in mind of taking care that laws passed, in Her Majesty's plantations, be transmitted for Her Majesty's approbation in due time.

EDW. NORTHEY.

April 25, 1712.

(13.) *The opinion of the same lawyer on the Queen's power of repealing the acts of the Maryland Assembly.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple jr., I have considered of the questions mentioned in the annexed letter; and as to the first of them, viz: whether Her Majesty do not signify her pleasure within eighteen months, the suspending

act do then expire, or whether the same do remain in force after the eighteen months, until Her Majesty's pleasure be signified; I am of the opinion, the suspending is to continue in force for eighteen months unless sooner determined by Her Majesty's pleasure; and the clause that no prosecution shall be until the expiration of eighteen months or until Her Majesty shall declare her pleasure, I think, can have no other construction; and therefore in all events, the act is to determine at the end of eighteen months without Her Majesty's pleasure declared, and sooner if she shall so please to declare: and as to the second question, viz: whether in case Her Majesty do signify her pleasure for the continuance of this suspending act for a certain time after the expiration of the eighteen months, or until Her Majesty's further pleasure, the said act will remain in force accordingly, I am of opinion, all the power reserved to Her Majesty by the act is to determine the act within eighteen months; but Her Majesty cannot by her declaration continue longer the suspension of the former act.

EDW. NORTHEY.

December 19, 1705.

(14.) *The opinion of the same lawyer on the unfitness of an act of the Jamaica Assembly, as inconsistent with the Queen's prerogative.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of an act passed in the island of Jamaica, entitled "an act to provide an

additional subsistence for Her Majesty's officers and soldiers, and for other uses;" on which law I observe, that the parts of it which relate to quartering and subsisting Her Majesty's forces are temporary, and are to expire on the 1st of November next; but other parts of the act which, I apprehend, intrench on Her Majesty's prerogative, are perpetual.

As to the provisions for subsisting the soldiers by deficiencies, I am not able to judge whether it be a sufficient provision or not, and being only temporary, if the same be found by the officers of Her Majesty's forces to be insufficient, it may be rectified when another bill shall pass: however, the clause in the act that no person have any share of the money to be raised by that act, that marries any inhabitant of that island, is unkind.

And as to the other parts of the act which are perpetual, viz: the clause that disables any officer or soldier (the Governor excepted) to use, exercise, or enjoy any civil commission, power, place, or authority, or in the militia in that island; and the clause that lays a penalty on all persons not being native born subjects of England, Ireland, or the plantations in America, that shall use, exercise, or enjoy any commission, civil or military, (except in Her Majesty's forces in that island under her pay): I am of opinion, they are both against Her Majesty's prerogative, and the latter carries the disability further than what is done by the act of the 7th William, which is restrained to the courts of law and the treasury, and that matter is not concerned in the title of the act, and therefore that this act is not fit to be confirmed.

EDW. NORTHEY.

July 9th, 1706.

Sixth.

Of the various modifications of the constituted Assembly's accustomed powers.

(1.) *The opinion of the Attorney-General Raymond that an act of Assembly has the same effect in the Colony as an act of parliament has in the mother country.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter, bearing date the 24th of July last, I have considered of an act which passed in Barbadoes the 1st of August 1712, entitled "an act to enable and empower the surviving acting executor of Johanna Parris, widow, deceased, to sell and dispose of certain lands, buildings, and negro-slaves, devised by the last will and testament of the said Johanna Parris, to, and for the use, and purposes therein mentioned ;" and though this act is not drawn as such acts are usually drawn in England, such acts here usually vesting the lands in the person who is to sell, and this act only giving the party a power so to do ; and though the sale is to made by *feme covert*, yet I take it, it will be sufficient in an act of assembly, which is of the same effect there as an act of parliament here ; therefore I have no objection in point of law against Her Majesty's confirming the said act, if Her Majesty shall graciously be pleased so to do.

ROBT. RAYMOND.

August 19, 1713.

(2.) *The opinion of the Attorney and Solicitor-General, Murray and Lloyd, on the usual privileges of the Jamaica Assembly.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

Pursuant to your Lordships' desire, signified to us by Mr. Pownall in his letter of the 15th inst., setting forth that your Lordships having lately received a letter from Mr. Knowles, Governor of the island of Jamaica, in which he acquaints your Lordships with his having dissolved the assembly there for calling in question His Majesty's right of issuing writs for electing members to sit in the assembly without waiting for a message first from them; and inclosing to us an extract of the said letter, together with a copy of the resolution of the assembly, upon which that dissolution was founded,(which extract and copy are herewith returned,) and desiring our opinion whether the assembly were warranted in coming to that resolution, and whether it be consistent with His Majesty's rights and prerogative; we have considered thereof, and do not think ourselves sufficiently informed to give an opinion upon the question so generally stated, because it depends upon the constitution of the assembly of Jamaica and the usage, whether whilst the assmbly is sitting all vacancies should first be signified by themselves to the Governor; and yet the case must frequently have happened.—Nothing is transmitted to us relative to the particular constitution or usage in Jamaica upon this point; and there are no parties to whom we could send for information.

What the assembly claims seems analagous to the law and practice here; but it does not from thence necessarily follow, that it is, or ought to be, the law there; that must depend upon their own constitution and usage, which, without further light, we cannot venture to give an opinion upon.

W. MURRAY.

April 29, 1755. RICH. LLOYD.

(3.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the general policy applicable to the same Assembly.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands signified by Mr. Popple, referring to us two acts of assembly passed in Jamaica in April 1728, entitled "an act for granting a revenue to His Majesty, his heirs and successors, for the support of the government of this island and for reviving and perpetuating the acts and laws thereof;" "an act to oblige the several inhabitants of this island to provide themselves with a sufficient number of white people, or pay certain sums of money in case they shall be deficient, and applying the same to several uses, for repairing the wall of Port Royal;" for our opinion thereupon in point of law, and transmitting the draught of a bill for raising a revenue in Jamaica, which was formerly prepared here, to be passed into a law in that island; as likewise a copy of the instructions given to Major-General Hunter for his direction in this matter; we have considered the said acts, together

46

with the said draught, and find sevral variances therein; but no question in point of law appears to arise upon any of those variances, except in the particulars following, viz ;

1st. By the draught it is provided, that where goods or merchandizes should be landed without the presence of the proper officer, or paying or securing the duties, the same should be forfeited, and should, and might be, seized by the receiver-general or any person authorized by him.

By virtue of which clause, when passed into a law, if any goods should be landed contrary thereto, an information, by way of *devenerunt*, might be maintained for the value thereof without an actual seizure of such goods.

By the act sent over it is provided, that goods so landed, being seized by the receiver-general, or any person authorized by him, shall be forfeited ; in consequence of which alteration no forfeiture can arise without an actual seizure of the goods, which is often impracticable in cases of clandestine importations ; and without a forfeiture, no *devenerunt* can be brought for the value of the goods.

2d. In the draught a clause is inserted, obliging the receiver-general of the island to deliver his accounts within a limited time to the auditor-general of the plantations, to be passed by him and transmitted to the lords of the treasury of Great Britain ; and the doing of this is made part of the condition of his bond, which, by the draught he is directed to give.

In the act sent over both these provisions are omitted and instead thereof a proviso is inserted that nothing in that act shall prevent the receiver-general's account

with the auditor-general of the plantations or such other person in the kindom of Great Britain as His Majesty, his heirs, or successors, shall think fit to appoint for that purpose.

Upon which we beg leave to observe, that by the act thus altered no new obligation is laid upon the receiver-general to account before the auditor of the plantations, but his being obliged, or not obliged, to render such account, will depend upon what was the duty of his office before this act passed; of which we can form no judgment, the constitution or appointment of that officer not having been laid before us.

3d. By the draught it is enacted, that the act to be passed in pursuance of that draught, and all other acts of assembly, formerly enacted and made to be of equal continuance and to expire together with the revenue act therein mentioned, and not thereby altered or repealed, should be perpetual; and also, all such laws and statutes of England as by usage and practice had been accepted and received as laws in Jamaica, should be, and continue, laws of Jamaica.

By the act transmitted it is enacted, that all the acts and laws of Jamaica which determined on the 1st day of October 1724, and not thereby, or by any former act of the Governor, council, and assembly, in force at the time of passing the said act, now transmitted, altered, or repealed, shall be revived and made perpetual; and also all such laws and statutes of England, as have been at any time esteemed, introduced, used, accepted, or received as laws in Jamaica, shall be, and continue, laws of Jamaica for ever.

The first branch of both these clauses relates to acts of assembly passed in Jamaica, and though they vary in

expression, yet we apprehend there is not any material difference in the sense.

The latter branch relates to such parts of the laws of England as are intended to be continued laws in Jamaica: and in this, the act sent over materially differs from the draught, by leaving out the words, as by usage and practice, have been accepted and received as laws in Jamaica, and instead thereof, inserting, as have been at any time esteemed, introduced, used, accepted, or received as laws in this island, which last descripton is so loose and uncertain that it will be very difficult to know what laws of England are thereby made laws of Jamaica, and what are not; and seems, therefore, to be liable to the same inconveniences as former clauses of the like nature which have been rejected.

Upon the second act no question of law arises, and it will expire upon the 29th day of this month.

P. YORKE.

March 25, 1729. C. TALBOT.

(4.) *The opinion of Mr. Fane, on the general policy of the same Assembly.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have considered the act passed in Jamaica, for foreclosing Smith, his heirs, executors, and assigns, from the equity of redemption of a certain plantation, called Pero Plantation, if the mortgage money be not paid to Mr. King and his wife, before the 30th of May, 1725; and the papers to me referred in relation to that affair. I

apprehend, I need not trouble your Lordships with a state of the case, as it stands upon the act, it being so fully known to you already.

I think, in general, that such laws would be greatly dangerous, and that the legislature should rarely interfere in matters of private right without the greatest necessity ; but I cannot see any great inconvenience in this case, but rather a necessity, indeed, for the passing this law, because of the act which Mr. West mentions in his report, that obliges all owners of land in this part of the island, to settle their plantations within two years, under the forfeiture of their respective interests to the King.

But what I chiefly ground my opinion upon, is the memorial itself of Gordon's which containing only general allegations and unsupported by any proof or evidence that I can take notice of, will be in this case a good foudation for confirming this act. For the memorial says, 1682 Sir Thomas Lynch sold this plantation to Pope and Harbin, which was the same year, the act says, Smith made the reconveyance of these lands to Sir Thomas Lynch. It likewise says, that the greatest part of the purchase money was paid by Pope and Harbin to Lady Cotton ; but I beg leave to observe that it does not set forth how much, nor at what time this was done. The memorial likewise says, that Pope conveyed a moiety of his share to Peers, but doth not say when ; and that he mortgaged the other part, but at what time, or whether it was to Sir Thomas Lynch or Lady Cotton, doth nowhere appear ; and yet this mortgage is made the title to Lady Cotton, to enter and take the profits all this time.

It seems a little odd she should have been suffered

to maintain this disseisin and usurpation on Harbin and his heirs and the other memorialists, and nothing be done in this length of time except a bill lately brought and that not prosecuted.

So that upon comparing the act and memorial together, there doth not seem to be a sufficient title set up, or allegations proved, to prevent the confirmation of this law ; for the act extends to foreclose only the representatives and assigns of Smith, no other right is concluded, and the memorialist's right is derived wholly from Sir Thomas Lynch, and is no ways dependent on that of Smith ; and I take it to be a settled rule in the construction of acts of parliament, that where land is even given to the King, or where a conveyance by a statute is made good against a particular person, all other men's rights are saved, of course, without any proviso.

The memorialists, after the passing this act, may be at liberty to controvert Mr. King's title; but there may be very great danger, at least great inconvenience, in not having this plantation settled, I think this law, which is to further that end, may be very safely passed; and that this case is out of the common reason of the legislatures' leaving the decisions of property to the legal course of justice.

Mr. West, in his report upon this matter, is of opinion that all facts alleged in the colony bills must be taken to be true. This rule may generally be true, but I think in adversary bills of this nature, which are only the party's own state of the case, this rule should not be extended further than the particular facts mentioned ; but I apprehend, it ought not to be presumed that every thing is fully stated and that all facts and circum-

stances are disclosed that are necessary to give a perfect insight into the merits of the bill; for though the facts alleged may be true, yet other facts my be sunk which may alter the case and defeat the allegations of the bill; neither do I think it safe to argue from the analogy and reason of penal laws in the plantatioins to a bill of this kind, because rules of state and policy are no proper measure to adjust private property. But for the reasons I have before offered, I can see no inconvenience from passing this act; it is doing no more than a court of equity would do after such a length of time; and if the memorialists are purchasers under Sir Thomas Lynch, they are not affected by this bill, but have a proper remedy at law.

FRAN. FANE.

March 3, 1725–6.

(11.) *The opinion of the Attorney and Solicitor-General, Ryder and Strange, on acts of North Carolina, that were not binding either on the Crown or people.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, in his letter of the 17th instant, transmitting to us the annexed copies of two acts of North Carolina and the annexed answer to certain *quaries*; we have considered the same, and likewise an extract from the general constitution, No. 83, stated in a late case from your Lordships, wherein it is ordered that "No act or order of parliament shall be of any force, unless it be ratified in open parliment during the

same session, by the palatine or his deputy and three more of the Lords Proprietors and their deputies, and then not to continue longer in force but till the next bienniel parliament, unless in the mean time it be ratified under the hands and seals of the palatine himself and three more of the lords proprietors themselves, and by their order published at the next biennial parliament;" and upon the whole circumstances of the case relating to these acts, we are of opinion, that they are not binding either on the Crown or people.

D. RIDER.

March, 1737–8. J. STRANGE.

(4.) *The opinion of Mr. West, on the mode of granting money by the Barbadoes Assembly, and the means.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered an act passed in the island of Barbadoes, entitled "An act for laying an imposition or duty on wines or other strong liquors imported into this island, in order to raise money to carry on the fortifications, for payment of such persons as are or shall be employed at the public charge, and for such other public uses as are herein contained." In relation to which I would beg leave to lay some observations before your Lordships.

I take it to be a general rule in the West Indies, that all taxes or impositions whatsoever, to be raised from or laid upon the subjects, ought to be enacted in the particular bills by which they are created, by way of grant

His Majesty, his heirs, and successors; but in this act there is no mention whatsoever made of the Crown, nor is there any grant of any thing to it: it is only said, that from and after the publication of it, such and such particular duties shall be paid the treasurer of the island for the time being; and in consequence of this omitting the King in their granting part of the bill, His Majesty seems to be included from any intermeddling with the collection or receipt of the money. For the general assembly themselves take upon them, in the body of the act, to nominate and appoint a treasurer and comptroler of this duty; and in case any vacancy should happen in those offices by the death of any persons named in the said act, the Governor is entrusted with the power of appointing persons to officiate in their stead, during the space of one month only, and no longer. So that in case any of those officers happen to die, a Governor must either suffer this duty to sink and be lost, or must summon a general assembly to meet, for them to nominate a new treasurer and comptroller.— How far this method of proceeding is consistent with the King's prerogative and instructions to the Governor, I submit that entirely to your Lordships.

Your Lordships will be also pleased to observe, that the money intended to be raised by this act, is to be raised by an imposition on strong liquors imported into that island. Beer, ale, cider and perry (which are the growth of Great Britain) are to pay a very considerable duty. How far such an imposition upon the British trade is to be countenanced, I submit entirely to your Lordships.

Besides what I have now mentioned to your Lordships relating to the subject matter of the duty, and to

the manner of granting it, I must beg leave to mention some other particulars to your Lordships relating to the manner of collecting this duty: it is provided (*inter alia*) that for securing the payment of this duty, the importer (where the sum of money to be paid exceeds ten pounds) may give bonds for the security of the money payable, which bonds are to be taken in the name of the treasurer for the time being, which is the natural consequence of the duty not being granted to the King, because if it had been granted to the Crown the bonds ought to be taken to the Crown, and then, by prerogative, those bonds would have the effect of judgments, and executions might be taken out immediately upon them; but yet though they seems industriously to avoid mentioning the King throughout the whole act, yet they think it reasonable to communicate that prerogative to their treasurer, and provide that these bonds given to the treasurer, for the time being, shall be of as strong and operative a nature as if they had been taken to the Crown; for in case any persons shall not perform the consideration of his bond, the treasurer is empowered to issue out his warrant for execution against the persons in arrear, and this power is so absolutely vested in him, that in case of any misuser of it, I do not see that, by this act, the party agrieved can have any relief by application to any court of justice within the island: I would also observe that in the issuing of those warrants there is a deviation from the common law that I do not well understand. The proper officer to whom writs or warrants of execution ought to be directed is the marshal there, as the sheriff is here at home, but these warrants from the treasurer are to be directed to any two constables, who are expressly to proceed in

the same manner as marshals are to proceed at common law; and, therefore, I do not see any reason why the execution of these warrants should be taken out of the hands of those officers whom the common law appoints for that purpose.

I must further observe to your Lordships, that for the better discovery of any frauds that may have been committed in breach of this act, the treasurer and comptroller are empowered (and that without any information given upon oath or otherwise) to summon and examine any persons whom they in their discretion may suspect of having acted contrary to this act; and those persons suspected are to answer, upon oath, to all such interrogatories as they shall think fit to put to them, relating to the landing, removal, or importation of any strong liquors, &c. It is true that tha penalties they are to be under (in case of refusing to answer) are not so great as in case of conviction by other evidence; but I submit to your Lordships whether it is not always unreasonable for any man, in any case to be obliged, under any penalty whatsoever, to accuse himself, the tempation to perjury is so very great in such cases, and the oaths *er offici* (of the nature of which this is) have been so often and so much condemned, that I think I need not say any thing further concerning it.

Another observation which I shall lay before your Lordships is the penalty which is enacted upon the removing or landing any liquors contrary to the act.—The penalty is not restrained to any strong liquors that should be removed or landed by the consent or privity of the master or owner of each respective uessel, but it is worded in so loose a manner, as e. g. no wines or strong liquors shall be removed or conveyed, &c. or land-

ed, &c. under the penalty of forfeiting, &c. so that for aught I can see to the contray, a common sailor's running a dozen of beer on shore may make the owner of the vessel and cargo liable to the penalty of this act, which is no less than the forfeiture of all such wines or other strong liquors as shall be attempted to be landed, or the value thereof in money, together with the ship or vessel in which they were imported, with all her guns, tackle, furniture, ammunition and apparel. I think I need not say any thing more concerning the unreasonableness of this penalty than barely to state it.

The observations which I have now laid before your Lordships contain all the objections which I have to this act; and, upon consideration of them, your Lordships will determine whether it will be proper to be passed into a law or not.

RICH. WEST.

January 21, 1723-4.

(7.) *Mr. West's objections to various acts of the Barbadoes Assembly, showing their unfitness.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified unto me by Mr. Secretary Popple, I have perused the several following acts passed in the island of Barbadoes in the years 1717 and 1718; and as to the several acts, of which the titles are as follows, viz: "an act, enabling the representatives of the parish of Christ Church to sell six acres and thirty perches of land in the said parish, formerly the land of Philip Howell, deceased"

(no objection); "a supplemental act to the act laying an imposition or duty on all sugars, molasses, rum, cotton and ginger, imported into this island, which are not the natural product and manufacture of some of His Majesty's colonies" (no objection); "an act to prohibit masters of ships and other vessels from landing aliens or foreigners in this island without a license for so doing from the Governor or Commander-in-chief for the time being" (no objection); "an act for providing a recompence for Thomas Whaley, attorney at law, clerk to the commissioners of contracts, for repairing the fortifications, for his drawing several articles, and other writing for the country service, and also for satisfaction of some charges, &c." (no objection); "an act, the better to enable committee of public accounts of this island to settle the accounts of Richard Downs, late treasurer of this island, deceased (no objection); "an act, appointing agents to transact and negotiate the affairs of this island in Great Britain" (no objection); "an act, to prevent His Majesty's subjects, within this government, from having any trade or commerce with, or giving any protection, encouragement, or assistance, whatsoevsr, to any of the rebellious subjects of his most Christian Majesty, belonging to the island of Martinique" (no objection); "an act for the encouragement of David Aubin, gentleman, in two several projections, by him invented,, (no objection); "an act to empower the treasurer of this island to defray the expense of the late great sessions, held on the second Tuesday in December, 1717" (no objection); "an act to raise a levy on the several inhabitants of this island" (no objection); "an act for the better ordering and regulating His Majesty's high and honorable court of exchequer, and pleas of the

crown" (no objection); "an act, for the better ordering and regulating His Majesty's courts of common pleas within this island" (no objection); "an act, appointing in what manner salt and all sorts of grain, imported into this island, shall be sold or disposed of" (no objection); "an act to raise a levy on the several inhabitants of this island" (no objection); "an act, for encouragement of Thomas Sainthill, gentleman, in his projection of a mill for grinding sugar-canes" (no objection); "an act, for the furhter and better enabling the committee, appointed for settling the public accounts of this island, to proceed to the balancing accounts of the honorable Thomas Maycock Esq., late treasurer of the said island" (no objection); "an act to empower the treasurer of this island to defray the expense of the late grand sessions, held for the body of this island, on the 10th, 11th and 12th days of June, 1718" (no objection); "an act granting a free liberty to the inhabitants of this island, in general, to load and unload, to and from any the bays, creeks, or harbors, in and about this island" (no objection); "an act to confirm an assessment of negroes' labor and carriage of carts, laid on the owners of said negroes and carts, within the parish of Christ-Church, by the gentlemen of the vestry of the said parish" (no objection); "an act, appointing agents to transact and negociate the affairs of this island in Great Britain," I have no objection to their being passed into law.

But, as to the act, entitled "an act, requiring all persons to bring into the treasurer's office, a list of all orders due to them from the public," I must beg leave to observe to your Lordships, that, as only fifteen days are allowed to bring into the treasurer's office all orders which any man may have due to him from the public,

upon pain of being postponed in the payment of his debt, that it may be very injurious to persons dwelling out of the island; and; therefore, I submit it to your Lordships, whether it would not have been reasonable to have allowed unto such persons a longer time for the producing of their orders.

Besides the above mentioned acts, [among which your Lordships will observe, that there are several private acts] there are four other private acts, all them intended to dock the entails of particular estates, of which I cannot report any one to be proper to be passed into law: the first of which is an act, entitled "an act to dock the entail of a plantation in the parish of St. James's, and the negro slaves therunto belonging, and to vest the fee simple thereof in William Thorpe, gentleman, youngest son of Robert Thorpe, deceased." On which act, I must observe to your Lordships, that though there is a reservation of the right of Thomas Thorpe, who, in case he should return into the island of Barbadoes, would be entitled unto the estate in fee, yet it is upon this condition, that he should live in the island now, though this is in pursuance of the testator's will, yet, while it stood upon the foot of the will, Thomas Thorpe might, and perhaps with success, have disputed the validity of that condition, but, if it be annexed unto his estate by the passing of this act into law, he is then bound down to the performance of that codition without remedy, and his removal out of the island, to reside even in England, might be construed to be a forfeiture of his estate; I submit it to your Lordships to determine, how far conditions of this nature are to be encouraged or not.

The second is an act. entitled "an act to dock the en-

tail on certain plantations, in the parishes of St. Thomas and St. James, and to vest the same in Joseph Gibbs Esq. Upon which act, I must observe to your Lordships, that the estates by this act to be vested in Joseph Gibbs Esq. are derived from the wills of two different testators, who created the entails the remainder in fee to their respective right heirs, and yet there is no recital in this act [by which it is proposed to dock the said several entails,] of the several consents of the next heirs of either of the said testators, which I conceive to be not only requisite, in consequence of the Governor's instructions, but even of natural justice and equity.

The third is an act, entitled "an act to dock the entail on two messuages and three pieces of land in the town of Saint Michael, and on certain negro slaves, and to vest the fee simple thereof in Martha Lenoir, wife of John Lenoir Esq., and daughter and heir of William Craggs Esq., late of the town of St. Michael, merchant, deceased. The end of this act is to dock the entail of an estate which is supposed to be vested in Martha Lenoir, by virtue of its having been granted to her and her heirs lawfully begotten. My objection to this act is that it is impertinent, for without the assistance of this act she hath an estate in fee simple already.

The fourth is an act entitled, "an act to dock the entail limited on certain lands, &c." in the parish of Saint Philip, and to invest the fee thereof in John Jones, gentleman. My objection to this act is, that though there is in it a reservation of the right of the Crown, yet it is not proper to be confirmed upon the account, that a clause is wanting to save the rights of all bodies

politic, and all other persons whatsoever, not mentioned in the act.

RICH. WEST.

August 3, 1719.

(8.) *Mr. Fane's objections to an act of the same act, as unfit.*

To the Right Honorable, the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter, referring to me an act passed in Barbadoes, in 1722-3, entitled "an act for supporting the honor and dignity of the government;" and also a copy of a petition from Mr. Worsley, late Governor of Barbadoes, praying His Majesty's directions for the recovery of the arrears due upon the said act, and desiring my opinion, whether any, and what method, by law, can be taken for recovering the same, I have considered of the said act and petition, and humbly observe to your Lordships, that I apprehend the following questions may arise upon the construction of this act, as to the method of proceeding for the recovery of the arrears, and which I beg leave to state to your Lordships with my opinion thereon.

By the act, certain duties were laid on negroes, &c. and granted to His Majesty, his heirs and successors, for the uses therein specified, the first whereof was for the payment of the Governor's salary, which was settled on him during the whole time of his government, and di-

rections are therein given for the collecting and levying the said duties.

By the tenth clause in the act, if any person charged or chargeable, by virtue of the act, neglect to give in the number of his negroes, &c. or who having given in the number of his negroes, &c. neglect to pay at the time prescribed, he shall forfeit double. A question seems to arise upon this clause, whether, although the representatives should not return a list of defaulters, according to the directions of the eighth clause, whether the treasurer may issue executions upon the defaulters, or in what other method he may proceed ?

The act of assembly is not so clearly penned upon this point as it ought to be, but, upon considering the several clauses, I think if the persons chargeable neglect to give in their number of negroes, or neglect to pay, having given in as is directed, notwithstanding the representatives should not return a list of the defaulters, according to the eighth clause, they will forfeit double ; and the treasurer may levy the forfeiture according to the directions of the twelfth clause, and in order to proceed thereto, he is to receive any legal evidence that shall be given, but he cannot examine the party himself because it may tend to subject him to a penalty : this method of proceeding may perhaps be the most expeditious, but the most certain will be, by filing an English bill in the proper court in the attorney-general's name, on His Majesty's behalf, for the recovery of the single duty, waiving the penalty.

By the fourth and sixth clauses in the act, lawyers and patent officers are charged with a sum certain, respectively, but the non-payment of it is omitted to be made a forfeiture. A question may, therefore, arise,

whether the treasurer may issue executions for the single duty? I think there is no authority given for the treasurer to proceed in the summary way he is empowered to do upon a penalty, and, therefore, the proper way of proceeding in this case, will be by English bill, in the attorney-general's name, on His Majesty's behalf.

The committee for settling the public accounts, and who, by the fourteenth clause of this act, are vested with power to proceed against the treasurer for any neglect, the same manner as he ought to have done against the owners themselves, are by a former law made up of four members of the council and six of the assembly. Now it happens that all these last are defaulters themselves, and have incurred penalties for not pursuing the act, and, therefore, it is apprehended they will either avoid making a committee to settle the treasurer's accounts, in order to screen him or themselves (who, it is said, have given him security to indemnify him,) or else if they do meet, they will adjust his accounts without proceeding against him for his neglect, by which means there will be, as there has been already for two years past, a great deficiency in the collection, and consequently, great arrears due to His Majesty. A question may arise upon this: if it appears that the treasurer has neglected his duty, whereby a deficiency in the collection has been occasioned, what method will be proper to be taken against the treasurer, for what is due to the Governor, although the committee of public accounts should do as above-mentioned? I think by the fourteenth clause, the party charged with the duty, who was the original debtor, is expressly discharged, and the treasurer, by reason of his neglect, is put in his place,

and, therefore, in cases where the treasurer might clearly by law have levied the penalties, and has wilfully neglected to do it, he will be liable to answer the single duty, and a bill may be brought against him, in the attorney-general's name, for the recovery thereof.

The treasurer, who is chosen annually, is obliged by the annual excise act, to enter into a recognizance to His Majesty's Governor, with such good and sufficient securities as the said Governor and council shall approve of, in the sum of £10,000 for the faithful discharge of the said office. A question may arise upon this, if the treasurer has in any instance neglected the duty required of him, by the act now in consideration, whether the recognizance for the faithful discharge of his office can be put in suit by a *scire facias*, unless such neglect should appear by the procedings of the committee, and in what manner; if judgment should be obtained upon this recognizance, will the money levied thereon be applied? I think it is not necessary that the accounts should be first adjusted by the committee, or that they should determine the neglect before the treasurer's recognizance is put in suit. I think the wilful neglect of the duty required of him by the act will be such a breach of the condition as may be assigned upon a *scire facias*, because, I observe, the recognizance was entered into after the passing of the act, whereby the several matters mentioned in the act are made part of his duty.

I have now stated to your Lordships the several questions that I apprehend may arise upon the consideration of this act, as to the method of recovering the several duties granted, and have given your Lordships my thoughts upon them. I beg leave to say, that upon

the whole, I think there is a very plain remedy for the recovery of these arrears.

FRAN. FANE.

May 11, 1732.

(9.) *The opinion of the Attorney-General Rawlin, of Barbadoes, on the act of Assembly creating paper money.*

May it please your Excellency;

I presume, with your Excellency's permission, and under your pardon, since I am disabled from waiting on you, to give your Excellency my thoughts on the act relating to the payment of the bank bills, the occasion of which was on the act for establishing a method of credit, &c. which said act of credit Her Majesty hath been graciously pleased to repeal, finding it against her prerogative, and for the disadvantage of her subjects and trade.

This act being repealed, I take the whole act to be as if no such act had been made, as to any thing in force now, and, by the repeal, the whole is gone, and cannot stand in part good and as to the other part void, the act being an entire act must take its fate together.

This act being repealed and in this state, it is to be considered, what power, or rather, whether the legislative authority had any power, after this repeal, to make any other law relating to it, and I presume they had not any sufficient authority to that purpose in themselves, which Her Majesty, in her great wisdom foreseeing, by her instructions appointed what was her will and pleasure to be done in this case, and therefore appointed that by some new law, those people, who

were obliged to part with their legal securities, be no sufferers thereby, but be restored as far as may be to the same state they were in before the passing the said act. So that it seems clear and plain the assembly had no other authority to enact a new law but from Her Majesty's instructions; and, therefore, I conceive they had no other foundation to enact this new law but from Her Majesty's said instructions, and which they have themselves made the chief ground of the said act, and by the said instructions were limited and tied up, and the legislative power only qualified to make a new law to those particular ends and purposes appointed by Her Majesty's instructions and no other, and whatever they do beyond or different from such authority, is void.

Wherefore, it is fit to be inquired into and considered what the said instructions appoint and empower, and I take Her Majesty's words to be certain and plain, only to restore or re-instate those persons who had parted with their legal securities into the same state and condition they were in before, and no otherwise; but, on the contrary, they had exceeded the said instructions and power, and enacted many strange and illegal things, both different from, and repugnant to, the said instructions, for I cannot find that by any part of Her Majesty's instructions these law-makers were any ways empowered to any of the several things following, all which are enacted by the said act.

That they had any power to alter the nature of any debt, and to give bonds the force of judgments, without any legal proceeding thereto.

That act cannot declare the said bonds to be judgments, and so to appoint that execution shall issue, and be levied on any estate, real or personal, of the debtor,

and in default thereof, on his person, without being illegal and contrary to law.

For that the great statute of Magna Charta, which is so dear to all English subjects, and hath been two and thirty times confirmed, positively declares that no man shall be disseized of his freehold but by due process of law.

And how this act, contrary to this and many other statutes of the kingdom of England, can enable the disseizing any person of his freehold by a bare warrant, without trial, whether the debt is due or not, or whether, if due, it is satisfied or not, seems very strange and contrary to common right and reason as well as law; further, I take it, that the then Governor's commission could not empower the passing any such act, for, that the words of the said commission are that no laws shall be passed that are repugnant to the laws of England, but all such laws as shall be passed here shall be, as near as may be, agreeable to them, and this act, being almost in every branch repugnant, nay and further to take away all the power and force of Magna Charta, is contrary to the said commission as well as law, and therefore void, for it is a maxim, that an act of parliament that is against common right or reason, or is repugnant or impossible in itself, is void.

That all limited authorities must be strictly pursued, otherwise, whatever is done under the pretence of such authority, is not warrantable thereby, and having no foundation to support and maintain it, must by consequence cease and become insignificant with all things acted thereby, and as I take it the assembly had but a limited authority, which they in most parts of the act exceed, and in very few truly pursued the power and

authority given to the gentlemen therein mentioned, by the very act itself, is but as commissioners, without investing them, in the least, with the qualification of a court of justice, and a commission granted against law or the empowering particular persons to do things against law, is void, and so it would be, if they had enacted it themselves, and the express words of the law are, that no commissions may be given or granted, to do any thing against the law of God or the nation. as to take or imprison men's bodies, enter upon their lands, or take their goods, without due order of law, and, if any such be granted, the law declares such commissions void.

It is to be allowed, that the legislative authority of this island hath sufficient power to do many and noble things, for the well being thereof and for the ease and safety of the people, and the more they keep themselves within the limits of the Governor's commission and Her Majesty's instructions, the firmer will their acts be, and of much greater force, when supported by law and regal power.

But, on the other hand, it cannot be granted them, that they are capable to enact at their own will and pleasure what they think fit. For they cannot, by a law, alter the common law of England, and and the settled course of proceedings thereon; they cannot change the common securities of the kingdom. They cannot enact any thing against Her Majesty's prerogative.—They cannot take away, by any act they can establish, any authority vested in the Governor by Her Majesty's commission, with many other things, too many here to be enumerated : they cannot pretend to have an equal power with the parliament of England.

So I observe, that many branches of this act are, that in case the debtor fail to perform many requisites appointed by the said act, though without any legal trial, or hearing, or judgment, whether he hath really offended against the commands of the said act, shall, *ipso facto*, be committed to the common gaol and there to remain without bail or mainprize, he and his cause being unheard and debarred of any benefit of law or equity, and when and how to be delivered, though never so much justice on the prisoner's side, is not appointed or permitted, and, if this can be called justice, it is *summum jus*, which is, *summa inquiria et misera est gens ubi jus est vagum.*

Indefinite imprisonment is against the law of the land, and I take it to be expressly against Her Majesty's instructions, for any persons to be committed without bail or mainprize for any crime under felony or treason, for Her Majesty hath been graciously pleased to command her judges to take bail for any person, committed for any crime except felony or treason, and that too must be plainly and clearly expressed in the warrant of *mitimus*, and, therefore, I cannot but be of opinion, that all those branches of the said act, ordering such illegal commitments, are against law and the Queen's instructions, and therefore become void.

There is a settled maxim in the law that no person shall be obliged to accuse himself, yet, by the said act, persons are obliged to swear whether they have had larger credit than warranted by the late repealed law, and thereby bring themselves within the penalty thereof, though the person may not know the real title or value of his estate, yet the commissioners have absolute power without any legal trial, to commit such to gaol, &c.

The statute of Magna Charta is express, that no person shall be restrained of his liberty, or disseised of his lands or tenements, but by due trial according to the law of the land, the benefit of which statute is wholly taken away by this act, and the subject debarred of his liberty without trial or any other due course of law.

Also, in most of the branches of the said act, it is enacted that if compliance in payments &c. is not exactly as the act directs, then the commissioners are empowered to issue out executions and thereby levy not only on the debtor's real estate, but also on his personal estate he shall then be possessed of, and this without legal trial, whether the said estate is liable to such execution, or whether the party hath right or title to the same or not, for many persons may be possessed by several lawful ways, as by late management, executorships, as attorneys, &c. who have no legal right to such personal estate, by which means, by the borrower's act, the right owner may be stripped of his estate without trial, and, by the said act, is afterwards debarred of any remedy either in law or equity, for, by the words of the act, a bare possession entitles to an execution ; and, if the officer find not sufficient to satisfy what is required, then the person may be committed to gaol, without being tried whether he hath offenc'ed against the said act or not, or being admitted to the liberty of relief in equity, writ of error, or appeal to the Governor or Her Majesty herself, which (with submission) I cannot conceive to be consonant to Her Majesty's order or her gracious intentions therein.

By this act, all entailed estates are liable to execution, and thereby all remainders and reversions may be defeated, which is tacitly the docking all such estates

against the law of England, and infants and strangers that have no privity or knowledge, persons beyond the seas that may have interest and right in those estates, may have their estates torn to pieces and they stripped from their possessions without trial or any process of law, by a pretended execution, without any record or judgment to support it, and this without any relief or remedy after by any process of law, or appeal, whatsoever.

The authority given to the said commissioners, being to them, or to either of them, I conceive to be uncertain and inconsistent, for, that each person having the same fullness of power, two executions may issue at one and the same time, for the same cause, which is against justice; but I cannot conceive that the power of issuing out executions can be lodged in two persons at one and the same time, and I presume no such precedent can be produced, for it was never known that the power of issuing out execution was placed in any other hands than the chief judge of a court.

The great and principle clause in the second folio of this act, which makes all the estates liable to answer the bonds entered into, depends entirely on the repealed act, and is so expressed, which act, from the time of Her Majesty's repeal, became void in law, as if no such act had ever been made, and if this stands, there is the same reason for all the rest of the said act, and this would be to oppose Her Majesty's authority, and make that act of force and valid which Her Majesty hath positively repealed, and thereby deny her authority, the danger of which ought to be highly regarded.

By the great general clause in folio 3, it is enacted, that the commissioners, or either of them, are, on non-

payment, immediately required to issue out a warrant or execution, under his or their hand and seal, to be directed unto such marshal or officer as the said commissioners (note the power is here jointly in both the commissioners, though separately before,) may choose to attach all, or any, the estate of inheritance, or other estate real, whereof such person or persons, are, or were actually seized at the time of entering into the said obligations, in whose hands soever the estate shall be found.

On which clause I observe, that no other estate is made liable to such attachment but such estate only as the debtor was seized of at the time of entering into the allegation, and how that can be determined without a legal proceeding and trial will be difficult to be justly determined.

By the clause, empowering marshals to give bills of sale, it is thereby declared that such bill of sale given by the said officer or marshal and duly executed, shall be valid to all intents and purposes whatsoever, to convey any the lands, buildings, or negroes, to the purchaser, which, I conceive cannot be anywise valid according to law, there being no record or legal proceedings to maintain or warrant any such sale or deed to the purchaser to make him a legal title when it shall come hereafter to be tried in a court of justice according to due form of law.

My Lord Coke, in folio 587 and 588, saith, that if an act is impossible and inconvenient to be observed, it is void, as in the case, there put, of the common seal being put into the custody of the prior and four of the worthiest and discreetest of the convent, which was observed to be impossible and inconvenient and therefore

resolved by the whole cuort of common pleas to be; and Bracton giveth us a rule, that *lex est sanctio justa jubens honesta et prohibens contraria*, so as every law must have three qualities: first, it must be *justa*: secondly, *jubens honesta*; third, by *prohibens contraria*; and if it must be *justa*, it must have five properties: first, it must be *possibilis*; secondly, *necessaria*; thirdly, *conveniens*; fourthly, *manifesta*; fifthly, *nullo privato comodo, sed comuni utilitati edita*, and this grounded upon holy writ, *legum condite res justa decernant, væ qui condunt leges iniquas et scribentes in justitiam scripserant*; and how many of these requisites are contained in the present act in dispute, I leave to any considerate judge to determine, and I take it, that this act falls under the said rules of being impossible and inconvenient, for the enacting persons to be disseised of their estates and their bodies to be imprisoned contrary to common law of the land is legally impossible to be done, and it cannot be denied but that it is very inconvenient, against common justice to be stripped of our freedom, rights and properties, without any judicial hearing; and what is the highest injustice and the greatest of hardships, that how unjust, irregular and severe, any proceedings are, or may be, the party grieved is debarred of any remedy, either by writ of error, injunction of chancery, appeal to the government, or to Her Majesty herself, though the party lies under the greatest grievances whatsoever.

These things I take to be legally impossible and what no act of this island can lawfully establish.

Lastly, if the act itself was passed by a lawful authority, whether it is not of so extraordinary a nature and so variant from Her Majesty's instr . tions, and con-

tains so many insufficiences, and is so repugnant, in most of its material parts, of the laws of the land, the rights of the kingdom, the liberty of the subject, your Excellency's power and authority, and Her Majesty's prerogative, that it ought not to be put into effect and have any force till Her Majesty's pleasure and approbation or disapprobation shall be made known.

If these, my present thoughts on this, may be any way satisfactory to your Excellency and serviceable to the island and Her Majesty's interest, I shall think myself happy to have acquitted myself of the duty incumbent on me, and pray your Excellency would be pleased to accept of it, as my sincere opinion, according to the best of my judgment.

WILL. RAWLIN.

(10.) *The objections of the Attorney General Northey, to the same act creating paper money.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have perused and considered of an act, entitled an additional act to the act entitled an act to ascertain the payment of such bills as have been issued, pursuant to a late act of this island, entitled an act to supply the want of cash, and to establish a method of credit for persons having real estates in this island, and passed in Barbadoes, the 12th of July 1716, as also the said original act; and do humbly certify your Lordships, that the said additional act is to constitute a new commissioner and new marshal (those

mentioned in the first act being dead or removed,) to execute the powers in the original; and this additional act is part executed, or not executed, and provides several remedies, where monies bid on sales at outcries, pursuant to the first act, have not been paid; and lays several penalties on such bidders not paying what they shall have bid; and empowers a person to bid in behalf of the government, where no person appears to bid, by which I apprehend is meant a real bidder; for in the oath of the persons empowered to bid, he swears he will not bid, but where no other person will bid, or unless a person shall endeavor to purchase the laws at an under rate, and swears he will not exceed in such bidding, two-thirds of what he shall, in his conscience, esteem the land worth; which seems to be a penalty on the owner for keeping away bidders, otherwise I do not see why the bidder should not give the value of the estate.

And the said additional act gives several powers for the better executing the design of the former act, which was to discharge the debts and engagements contracted by reason of an act, entitled an act to supply the want of cash by a method of credit, for persons having real estate in this island, (called the paper act) which was repealed by her late Majesty: and I have no objection, in point of law, against the said additional act. There is therein a pretty extraordinary punishment on persons bidding for lands which they were then incapable of paying for, viz: imprisonment for a year, to be set in the pillory, and to have their ears cut off; but that being only for persons who knew their own inabilities, I have no objection thereto.

EDW. NORTHEY.

December 23, 1717.

(11.) *The objection of the same lawyer to act of Barbadoes, as unreasonable.*

To the Right Hon., the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered the following acts passed at an assembly of Barbadoes, in March 1701-2 and April 1702, viz: "an act for the further supply of fire-arms and other stores, &c., dated the 19th of March, 1701-2;" "an act to secure the peaceable possession of negroes and other slaves to the inhabitants of this island, and to prevent and punish the clandestine and illegal detinue of them, dated the 27th of April, 1702;" which laws, I conceive, are agreeable to law, and do not contain any thing prejudicial to Her Majesty's prerogative, except the act to secure the peaceable possession of negroes, &c., as to which I am of opinion, that though many parts of this law (which is not temporary but perpetual) may be of use to the planters in Barbadoes; yet that part of it which prohibits the carrying away white servants without consent of the owners, under the penalty of one hundred pounds, and obliges masters of ships to swear not to carry them away, is not fit to be approved of; for that children stolen from England and carried to the Barbadoes cannot be reclaimed and carried away at the instance of their parents; and as it is worded (if otherwise fit) it is unreasonable, being, if any person shall directly or indirectly carry off, attempt, or cause to be carried off, any white servant without knowledge of the owner, which a man may innocently do, the words (knowing such

person to be a servant) being omitted; and therefore I think this law, with these clauses in it, not fit to be approved.

EDW. NORTHEY.

Oct. 22, 1703.

(12.) *The report of Mr. West, in favor of a Jamaica act upon general principles of colonial policy.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, on the 27th of June 1723, I have reconsidered an act passed in the island of Jamaica, entitled an act for encouraging the speedy settling of the plantation, commonly called Pero or Pera plantation, situate at Port Morant, in the parish of St. Thomas in the East, in this island; and for obliging all persons entitled to the equity of redemption thereof to redeem the same by a prefixed time.

In the consideration of acts passed in the American colonies, when the Governor, council and assembly of any province take it upon them, in the preamble of an act, to recite and aver a matter of fact transacted within their own bounds, and to which no objection or opposition is made, I apprehend that I ought to take those facts for granted, and upon that foot only to consider whether an act, referred to me, is reasonable to be passed into law or not.

And if this act be considered in that light, it seems to me to be much stronger than the common foreclosure of an equity of redemption upon a mortgage; for the act

recites, that it appears upon record in the island that the estate in question did originally belong to one Sir Thomas Lynch, and that he, so long ago as the year 1682, agreed for the sale of this estate to one Joshua Smith, for the sum of £6000 ; it also appears upon record that Smith never paid the purchase money but instead thereof, upon the 23d of November, 1682, reconveyed back to Sir Thomas Lynch his own estate, as a security for the said sum of £6000, with interest. Upon this Smith was let into possession of the estate, and enjoyed the same until the year 1693, and received the profits of it to a greater sum than the purchase money amounted to. In the year 1694, by an invasion of the French, this estate was wholly ruined and made desolate ; so that from that time to this, it has been wholly unoccupied.

The act also takes notice, that this mortgage, that was made in the year 1682, appears to be unsatisfied, and therefore if it is considered that the legal estate was originally in Sir Thomas Lynch, that all the claim of Smith is founded upon a deed of purchase, for which he never paid any part of the consideration money, that the estate is now desolate, and if to this is added the consideration of what a vast sum £6000 principal money with interest from the year 1682 to this day must amount unto, in a country where common interest has been always, I believe, at least after the rate of eight or ten per cent. per annum, I think it very obvious that this act, which is only to give a family their own estate both in law and equity, cannot be considered but as much stronger than the common foreclosure of an equity of redemption ; and yet, even in that case, if a mortgage is very old, as e. g. above twenty or thirty years

from the execution, and no interest has been paid upon it. I apprehend that the court of chancery would not admit a mortgagor to redeem against a mortgagee in possession, but would look upon the equity of redemption as extinguished by the antiquity of the debt: in the present case the demand is of above forty years standing, and the equity of redemption, (if any) is founded upon so unequitable a foot, that I am of opinion, it is just it should be foreclosed; nor do I think it an objection, that the case of infancy is not excepted; because, if they were major, a court of equity would not admit them to redeem: and, therefore, an exception in their favor would be to no purpose.

But, however, this act is not an immediate foreclosure of the equity of redemption; but time is given to the representatives of Mr. Smith, until the 30th of May 1725, to come in and redeem if they think fit; and, that they might, if possible, be acquainted with this act, a public advertisement is directed to be made in the Jamaica Courant, and that your Lordships may see that the act was pursued in this respect, I have annexed a Courant to my report wherein this advertisement was made. But, this is not the only consideration that induced me to be of opinion that there was no objection to this act being passed into law. It is allowed in all the American colonies as a maxim of law, that a title to the possession of lands must necessarily be supported by an actual culture and planting of it; and that consequently the neglect of the one will extinguish the other.

This notion is founded in the nature of things; since it is obvious that no colony can ever be supported upon any other foot; and, in consequence of this, I be-

lieve it has been the practice in every one of the provinces in the West Indies, when the patentees of lands have for a considerable time neglected planting of their lands, which is a condition in law either expressed or implied annexed to their title, that the assembly of such provinces have passed acts for the resumption of those grants, in order to enable the Crown to grant those lands *de novo* to other persons, who would in time comply with the condition above mentioned to be annexed to their estates.

And as to this island of Jamaica, I find, that in an act passed in the year 1696 and confirmed anno 1699, and entitled "an act for the more speedy collecting His Majesty's quit rents, fines, forfeitures and amerciaments," there is a clause, by which it is enacted that every person not inhabiting within the islands, and who was possessed of land whereon no settlement had been made, should forfeit the same unless they accounted for the arrears of quit rents and made some settlement upon their lands within two years after passing the act: I mention this only to show that it was the notion of the people of this island that patentees were obliged to plant their lands. And in another act of this island, entitled "an act for settling the northeast part of the island," and which was sent to me by your Lordships together with the act now under consideration, it is (*inter alia*) enacted that a very large tract of land, for which the quit rents from the year 1692 had not been paid, should be absolutely vested in His Majesty; and it is also enacted that every person claiming any part of the said lands, although the quit rents had been paid, if he did not settle the same within two years after passing the act, his land should be absolutely vested

in His Majesty; but for the better understanding of this particular, I beg leave to refer your Lordships to the last clause of the last mentioned act; and, moreover, the preamble of this act is very full as to what I before mentioned, of a settlement being necessary to secure a title to an estate: to apply this observation to the act now under consideration, your Lordships will be pleased to observe that the remarkable period of time which they both refer to is the French invasion of the island in the year 1694; and it is recited in the preamble to the present act, that, from that time to the passing of the act, the lands have been wholly deserted; and that during all that time no quit rents have been paid for the same, and this is the only reason assigned for the forfeiture of lands in the other act.

I would also observe to your Lordships, that the estate in question is part of those desert lands in the parish of Saint Thomas, in the east part of the island, and which, consequently, by virtue of the act I last mentioned to your Lordships, are to be forfeited unless they are settled within two years after the passing of the said act; and, therefore, I cannot but think the present act is for the benefit of all parties; for if the lands are not settled within the said two years, they will be forfeited to the Crown, and both will lose them. That the heirs of Mr. Smith will make a settlement there is no reason to imagine after so long a dereliction, nor can it be supposed that the representatives of Sir Thomas Lynch will lay out their money without some act of this kind for their security; and it is observable, that in this act the time given to the Smiths to redeem does not determine till the year 1725, whereas the time given by the government for making settlements, upon pain

of forfeiture, expires in the year 1724, so that the Smiths have for almost a whole year the option whether they will or will not take in such improvements as must be made within the said two years.

I shall not trouble your Lordships any further upon this occasion: the consideration of these particulars, which appear upon the face of the records themselves, did formerly, and do still, oblige me to be of opinion, that there is no objection to this act being passed into law.

RICH. WEST.

July 11, 1723.

(13.) *The Attorney-General, Northey's, objection to Barbadoes acts, as unreasonable and unjust.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the several laws of Bárbadoes, mentioned in the printed book of laws for that island, therein numbered 41, 42, 108, 145. The design of which acts being to ascertain the fees of the several officers of that island concerned therein, and to oblige them to hang up tables of those fees in their respective offices and courts wherein they execute their employments, thereby to prevent extortion and oppression there, if the fees be reasonable (of which I am not a judge,) I have no objection against the design of the said acts, but I am of opinion that one of the remedies appointed by the said acts for punishing the offenders against the said acts, is unreasonable and unjust, especially as to the secretary, provost-marshal, and the register in chancery of that island, who held their offices

by virtue of letters patent of His Majesty or his predecessor; for by the act No. 41, it is provided that no officer whatsoever belonging to that island, &c. by himself, deputy, clerk, or servant, shall, after publication thereof, receive or take any other fee or fees for any business named therein, than is for the same in that act expressed, under penalty of forfeiting or losing his or their office or offices, and lying in the common gaol without bail or mainprize the space of one month, the same to be immediately executed upon him or them, upon his or their conviction, upon the oath of one or more witnesses, or other sufficient proof, before the Governor or any justice of the peace; which offence, I am humbly of opinion, ought to be determined by a trial in the courts of law, where the officer may defend himself, and not by the Governor or any justice of the peace, upon the oath of one witness, as it may be by that law. The act, No. 42, depends upon, and is only for the better execution of that act.

Against the act No. 108 there is the same objection; for, by that act, the officers taking fees contrary to the establishment therein, are to lose their offices, and be committed to the common gaol, without bail or mainprize, for the space of three months, and the same to be immediately executed upon him or them, upon his or their conviction, by the oaths of two credible witnesses, or confession of the party accused, before the Governor or any justice of the peace.

Against the act No. 145 there is the same objection, for thereby it is provided that the secretary of the island, or his deputy or deputies, taking fees contrary to that act, shall be proceeded against as extortioners, and for ever after be made incapable of acting in any such

office or any office of public trust whatsoever within that island, and the same to be executed upon him or them, upon his or their conviction, by his or their confession, or by the oath of one or more witnesses, before the Governor or any two of His Majesty's justices of the peace there; wherefore, I am humbly of opinion that the said acts, with the said powers, are not fit to receive His Majesty's approbation, if they have not already had the approbation of the Crown.

EDW. NORTHEY.

December 16, 1717.

(14.) *Mr. West's objection to an act of the same Assembly, for licensing lawyers upon the same principle.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused a law passed in the general assembly in the island of Barbadoes entitled "an act to empower licentiate lawyers to practise as barristers in the said island, 1715," by which law it is enacted that every person that is, or shall be for the future, licensed under the hand and seal of the Governor ot the said island, shall be authorized to practise the law as fully as if he were a regular barrister.

1. The committee of correspondence of the said island do, in their letter to their agents in England, as reasons for passing the said law, urge that it had been the custom of the said island to permit licentiates to practise as lawyers and that such custom had never been attended by any evil consequences.

2. That the said custom had, in their opinion, been approved of by the Kings and Queens of Great Britain:

since the Crown had frequently appointed such licentiates to act as attornies and solicitors-general in the said island.

3. They urge, that the said island was liable to several inconveniences, from their not having a sufficient number of barristers to transact the law business of the said island.

I have also, my Lords, been attended by Mr. Walker, and other gentlemen, who approved of the said acts being passed into a law, who, in answer to the before-mentioned reasons (1.) of the committee of correspondence, did allege that the usage of licentiates, practising as lawyers, did, as appears from the preamble to the act, arise from necessity, and there being no such necessity, so much as pretended to be, now existing, there can be no reason drawn from thence to discourage the profession of the law (so much as it would be) by the perpetual establishment of the said custom in passing this act.

(2.) That though, at the first settling in the said island, the affairs of the Crown were left to the management of licentiates, it was owing to the necessity be[illegible]-mentioned, but that ever since the said necessity has been removed (which is now two and thirty years ago,) the Crown has always, by patent, appointed regular barristers to be attornies-general in that island.

(3.) And as to the third reason, they urge, that their not having a sufficient number of barristers among them is owing to the permitting licentiates to practise as barristers.

I beg leave, therefore, to observe to your Lordships, that as the ignorance of the British law does naturally tend to weaken that connexion and union which ought to be kept up between the mother country and the col-

ony, therefore I cannot but think this law may be attended with very ill consequences: since it is obvious that English gentlemen, who are regularly called to the bar, will have but little encouragement to venture abroad, when they see a perpetual establishment of licentiates in that island; and which may probably create such a precedent as may induce all the other colonies in the West Indies to apply for and obtain the like law, which, as it will leave them little or no reason to send their sons to be educated here, in England, will naturally alienate them from the knowledge and love of the laws of Great Britain.

I must further take notice, that there are no qualifications whatsoever relating either to oaths or religion prescribed by the act, in order to obtain such license to practise the law, but is wholly left to the arbitrary disposition of the Governor, who in consequence of it is enabled to permit even his footman or his black to practise as a barrister; and since the Governor has no particular power, by his instructions, to grant such licenses. I believe your Lordships will think it more for the honor of the prerogative, that in case there should be any deficiency of barristers in the island, they should be obliged to apply for licenses at home.

However, I cannot but own that it would be a hardship to take away the privilege of practising from those who have applied themselves to the law in that island, and have already been, *bona fide*, licensed; therefore, upon the whole matter, I am of opinion that the law should not be wholly rejected, because that might perhaps deprive the present licentiates of the benefit of practising; but ordered to lie by; and I hope your Lordships will think proper to write to the Governor

not to grant any such licenses for the future, but I submit the whole to your Lordships.

RICH. WEST.

June 25, 1718.

(15.) *Mr. West's objections to an act of the South-Carolina Assembly, incorporating Charlestown, upon a new principle.*

To the Right Honorable, the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered an act, passed in Carolina, entitled "an act for the good government of Charlestown," by which act Charlestown is erected into a city, and the government of it, as such, is lodged in a mayor, six aldermen, twelve common councilmen, and a recorder, besides whom there are several other subordinate officers appointed.

And, for the better administration of justice within the new erected city, the mayor, recorder, and four aldermen, have power to determine petit larcenies, &c. according to the laws of Great Britain; and are also empowered and obliged to hold, every two months, a court of common pleas, to determine all actions not exceeding fifty pounds sterling; and also to hold plea in ejectment for lands within the said city, and to determine the same.

There are also a great many other privileges and powers in the bill that are usually granted to new erected corporations, to the greatest part of which I have no objection to their being confirmed; but yet there are two or three particulars in the bill, which to me seem altogether unreasonable and contrary to the method of

establishing the government of cities in England.

1st. It is usual, in England, and most equitable, that the offices, at least the mayor, and common councilmen, should be annual; but in this new erected city, though indeed there is a rotation as to the office of mayor among the persons first nominated in this act, yet the persons so named are to be possessed of their several offices during their lives.

2d. Whenever, by death or any other means, a vacancy happens in any of the said offices of mayor, aldermen, or common council, the freemen at large of the city are totally excluded from having any share in the election of a successor; but the mayor, aldermen and common councilmen, for the time being, are empowered from time to time to fill up every vacancy that shall happen among them with such persons only as they themselves shall think proper.

3d. The mayor, aldermen and common council are also, by this act, invested with the sole power of making such by-laws and ordinances as they shall think proper, which are to be binding to all the freemen within the city.

If the act, therefore, is considered in this light, that the nineteen gentlemen who are nominated in the act to be first mayor, aldermen and common council, are possessed of their offices for life, have the sole power of choosing their own successors, and the sole power of making such by-laws as they shall think fit, the government established by this act is the completest oligarchy that ever was seen; since the entire government of this city and of all the persons who shall ever dwell in it, seems to be vested in these nineteen gentlemen, their heirs, and assigns, forever.

But besides what I have already mentioned to your Lordships, there is another objection to this act which has been represented to me by Mr. Shelton on the behalf of the major part of the inhabitants of the parish of Charlestown, which is, that this act of incorporation was passed against their consents and contrary to their inclinations, and in order to justify what he affirmed, he left with me the copy of a petition to the assembly of the province of Carolina, of which he did, at the same time, produce the original, signed by no less than one hundred and thirteen of the inhabitants of the town, which, as I am informed, does not contain in it quite three hundred persons, complaining of this act (then a bill depending in their house,) and praying that it might not pass into law.

How far the allegations of Mr. Shelton are true or not, I cannot pretend to say, but if, upon inquiry, they shall appear to be well founded, for that and the other reasons I have before-mentioned, I am of opinion, that this act is not proper to be passed into law.

April 11, 1723. RICH. WEST.

(3.) *The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the uncircumspect mode of continuing laws, used by the Jamaica Assembly.*

To the Right Honorable the Lords Commissioners of Trade and Plantations,

May it please your Lordships.

In obedience to your Lordships' commands, signified to us by letter from Mr. Popple, transmitting to us copies of two bills sent over from Jamaica, the one entitled "an act for granting a revenue to His Majesty, his heirs and successors, for the support of the government of this island, and perpetuating the acts and laws thereof as they now stand and are used;" and the other, entitled

"an act to augment the salary of his Grace the Duke of Portland during his residence in this island as Governor;" together with an extract of his Grace the Duke of Portland's letter, and copies of other papers upon this subject, and requiring us to let your Lordships know whether we have any objection to the said bills in point of law: we have considered the said copies of bills, and other papers referred to us, and herewith returned, and do certify your Lordships, that the principal considerations arising upon these two bills, appear to us to be rather matters of prudence and policy, than law, and, therefore, not to be strictly within your Lordships' direction to us.

As to the revenue bill, we cannot but observe to your Lordships, that though we do not find any species of commodities charged with imposts by this bill which were not charged by the former revenue act, yet the imposts upon several species are greatly increased, and particularly upon certain liquors imported from Europe.

The duties upon sugars and indigo are much lessened by this bill, particularly that upon indigo, from 1s. 6d. to 3d. per pound. We observe by the copy of his Grace the Duke of Portland's *queries*, sent down to us, that it was a matter of doubt, in Jamaica, whether this reduction of those duties was consistent with his Grace's 32d instruction; but upon consideration of that instruction, this reduction does not appear to us to be contrary to the terms of it, because it cannot take off, or in any wise affect the general prohibition of trade with the subjects of France, for the duty can take place only upon indigo lawfully imported, and not such as is prohibited. But if the trade of that commodity be chiefly in the hands of the French, and, notwithstanding the general prohibition of trade, has been carried on with them in a

clandestine manner (which the Duke of Portland's letter imports,) whether this reduction of the duty will in consequence tend to encourage that clandestine trade, or rather to increase the open importation of indigo in a lawful way, is what we are not sufficiently enabled to judge of, but is proper for your Lordships' consideration.

It is further to be observed upon this bill, that the revenue given by it is made perpetual, and the laws continued by it are continued for ever, which makes it the more necessary to consider whether the provision be such as will be sufficient to answer the exigencies of the government; for if it should happen in the event not to prove so, the people of the island having their laws secured to them in perpetuity, may think themselves in a better condition to withstand even reasonable demands which may hereafter be made by the government, to supply any deficiencies on that head, than they have hitherto been whilst their laws were temporary and precarious; and this seems to us to be of the greater weight, by reason of the unusual method taken to annex to this bill an estimate of the annual expenses of His Majesty's government in this island, by way of debtor and creditor, which by reference is made a part of the bill itself, and is computed to amount to £8000 per annum, and the clause whereby the assembly have engaged themselves to supply deficiencies, is only upon the contingency of this revenue falling short of that sum, and to make that good.

The clause concerning the laws of the island and their continuance is penned in a manner much less liable to exception than that sent over the last year, though not so free from objection as might have been.

The effect of it is, that this act and all acts and laws

as they now stand and are accepted and used in Jamaica, are thereby declared to be and remain in force for ever, (except the present revenue act, and four acts of assembly lately passed, which are particularly specified.)

This clause concerns two kinds of laws ; 1st, such laws of England as have been accepted and used in Jamaica ; 2d, acts of assembly of the island : we apprehend from the words of this clause, and from the council's answer to the Duke of Portland's 4th and 5th *quæries*, that the first sort of laws are what the assembly had now especially in view.

But as it is confined to acts and laws as they stand accepted and used in the island, we conceive no inconvenience can follow from it, because no other part of the law of England will be established thereby, but such as by acceptance and usage in Jamaica has already gained the force of a law of that island, and such would continue to be the laws there without the assistance of this bill.

The greatest objection to this clause concerns the acts of assembly of the island ; for as it is now penned, all their temporary acts of assembly which are at present in force will be made perpetual (except the four, which are particularly excepted.) and it can hardly happen but some of their temporary laws are not fit to be continued for ever, at least it seems fit, that they should be fully looked into and considered, before they receive such an establishment.

As to the bill for augmenting the Duke of Portland's salary, we have no objection, in point of law, against the same.

P. YORKE.
July 6, 1725. C. WEARG.

(17.) *The Solicitor-General Eyre's objections to an act of the Jamaica Assembly, for its unreasonableness.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified by Mr. Popple, in the letter hereunto annexed, I have considered of an act passed at Jamaica, entitled "an act for regulating fees," and particularly of a clause which obliges lawyers to take retaining fees under a penalty, and of one other clause for qualifying of writing clerks; and having heard Mr. Baber, on behalf of himself, of Mr. Compier, receiver-general of that island, and of Mr. Winter, clerk or register of the court of chancery there, against the said act; and colonel Lloyd and Mr. Aylmer, one of the members of the assembly of Jamaica, for it; and having compared this act with an act which passed in Jamaica by the same title in 1684: I most humbly certify your Lordships, that in my humble opinion the officers have no reason to complain, for this act is more for their fair profit and advantage than the former; but the clauses which oblige lawyers to take retaining fees under a penalty, and restrain plaintiffs from retaining more counsel than one, till ten days after declaration be delivered or a subpœna in the cause served on, the defendant, and the clause which requires certain qualifications in writing-clerks, seem to me to be very unreasonable, and there is nothing in the law or practice of England which favors any such regulations. I have no objection to any other part of the act, but think it reasonable and for the good of the island.

R. Eyre.

May 12, 1710.

(18.) *The objections of the Attorney and Solicitor-General, Ryder and Murray, to a law of North Carolina, as being contrary to reason, inconsistent with the laws, and prejudicial to this kingdom.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us by Mr. Hill, in his letter of the 2d of April last, representing that your Lordships having under your consideration a memorial of several British merchants, praying the repeal of an act passed in the province of North Carolina in the year 1715, by the proprietors of the said province, entitled "an act concerning attorniees from foreign parts, and for giving priority to country debts," and transmitting the annexed copy of the said act, and desiring our opinion with respect to the validity thereof, and whether the same is or is not repealable by the Crown, it having been continued in use and submitted to in the said province from the time of the passing thereof: we have considered the annexed law, and are of opinion that such part of it as postpones the execution on judgments for foreign debts, in the manner therein provided, is contrary to reason, inconsistent with the laws, and greatly prejudicial to the interests of this kingdom; and, therefore, unwarranted by the charter, and, consequently, void, and we are of opinion, that His Majesty may declare the same to be so, and his royal disallowance thereof.

D. Ryder.

June 3, 1747. W. Murray.

(19.) *Mr. Fane's observations on the act of the Virginia Assembly, for relief of the College of William and Mary.*
To the Right Hon., the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter of the 20th instant, wherein your Lordships are pleased to desire my opinion, in point of law, whether the £200 per annum, appropriated by the act (passed in Virginia in 1726, entitled an act for laying a duty upon liquors) for the relief of the college of William and Mary, is thereby directed to be solely applied for, and towards, maintaining and supporting the full number of masters and professors who are to reside in the said college. I have considered of the same, and am humbly of opinion, though the preamble to the clause which appropriates the £200 per annum seems particularly calculated to provide for the maintenance of the full number of masters and professors; yet, the enacting part is for the relief of the college in general, and directs the payment of the duties to the trustees, until the transfer be made to the corporation itself. This being, I apprehend, altogether relative to the methods prescribed by the charter, the trustees were enjoined to lay out what money was given them, in the first place, only for building proper edifices for the society, and for the purchase of books and other necessaries, until the said college shall be actually built and founded; then they were to assign what land and money they had to the president and masters, so that the charter expressly excludes the masters and professors from any advantage, until the college was finished and provided with all necessaries.

The legislature had, indeed, in view, the provision and maintenance of the society, to encourage them in their studies and the service for which the college was founded,—that was their principal design; but their intention being plainly subjected to the charter, must be guided by it; and, indeed, those general words of relief may, I conceive, very properly receive the construction here given, because the sooner the college is built, by this additional income of £200 per annum, the sooner will they receive this allowance.

That the president, master and fellows, cannot have immediately this £200 a year, is, I apprehend, self-evident, because the treasurer is directed to pass it half-yearly to the trustees until it shall be transferred, and from such transfer, then to the support of the masters and professors; it is not to be for their support till after the transfer, and, by the charter, no transfer can be, until the college be built. If there had been the same words in that part of the clause concerning the payment to the trustees half yearly, that the trustees should pay these sums to the support of the masters, as there are after the transfer, they might then have had some color for this demand; but it is wholly relative to the charter, which orders and directs the building and other necessaries to be first made and provided, before any salary can be allowed the professors. But what makes it clear, I apprehend, even to a demonstration, that the clause cannot be considered without having relation to the charter, is, that no trustees are actually named in the clause, but the trustees of the college: and, therefore, should it not have a reference to the charter, the clause itself would be entirely void and of no effect, for there would be then no one empowered to receive this

£200 per annum, for any purposes at all.

But I would submit it to your Lordships' consideration, whether it might not be proper to prevent designing men hereafter from putting a construction upon that clause different from what seems to be the most equitable and natural one, for your Lordships to recommend to His Majesty, to signify to the Governor of this colony, that the construction I humbly put upon this clause, (supposing it is agreeable with your Lordships' sentiments) is the sense His Majesty would have it taken in. This, with humble submission, would entirely prevent future misapplications, supposing there was an inclination in any one to do it.

FRAN. FANE.

April 25, 1727.

(20.) *The objections of the Attorney-General Northey, on some of the Virginia acts, in* 1701.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In humble obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have perused and considered of the several laws hereafter mentioned, passed in the general [illegible]sembly of Virginia in Dec. 1700, August 1701, and Ma[illegible] and August 1702, viz: "an act, for continuing the act [illegible]hibiting the exportation of Indian corn;" "an act, making the French refugees inhabiting at the Mannikin town and the parts adjacent, a distinct parish by themselves, and exempting them from the payment of public and county levies, for seven years;" "an act, for more effectual and speedy carrying on the revisal of the laws;" "an act for the raising a public levy;" "an act, for the more effectual apprehend-

ing an outlying negro, who hath committed divers robberies and offences;" "an act, giving power to the sheriffs attending the general court, to summon jurors and evidences, within the city of Williamsburgh, and one half a mile round the same;" "an act, continuing the acts laying impositions on liquors, servants and slaves, until the 25th of December, 1703;" "an act, giving further directions in building the capitol, and for building a public prison;" "an act for dividing King and Queen county;" "an act for the better strengthening the frontiers, and discovering the approaches of an enemy;" "an ordinance of assembly, prohibiting the ordinary keepers to entertain, &c. the workmen employed for building the capitol;" "an ordinance of assembly, for settling the bounds of Isle of Wight, Surrey, and Charles City counties, on the south side of Black Water Swamp;" "an act, for continuing, meeting, and sitting, of general assemblies, in case of the death, or demise, of His Majesty, his heirs, and successors;" "an act to prevent masters of ships or vessels running away after embargoes are laid;" "an ordinance of assembly, for settling the dividing lines between the counties of Isle of Wight, Surrey, Charles City, and Nansimond, on the south side of Black Water Swamp;" "an act for the regulation and settlement of ferries, for dispatch of public expresses, and for the speedy transporting of forces over rivers and creeks in time of danger;" "an act, for prohibiting seamen being harbored or entertained on shore;" "an act for dividing Charles City county;" "an act for raising a public levy;" "an ordinance of assembly, for the defence of the country in time of danger;" some of which laws, viz: the act, for continuing an act prohibiting the exportation of Indian corn; the act made in

1700, for raising a public levy; and the act, for continuing the acts laying impositions on liquors, &c. I find are expired; and the ordinance of assembly, made in 1701, for settling the bounds of the Isle of Wight, &c. is repealed. The rest of the said laws, I conceive, are agreeable to law and justice, and do not contain any thing prejudicial to Her Majesty's prerogative, save only such of them, and in such points and particulars only, as are hereinafter mentioned and observed to your Lordships, viz: as to the act for exempting the French refugees from the payment of public and county levies for seven years, I have no objection to it, provided that the public and county levies be taken to be such as were in force at the time of making that act.

As to the act for the revisal of the laws, as I have not seen the powers given by the act of the 27th of April 1699, referred to by this act, I cannot judge whether this be proper to be confirmed: if the powers thereby given to make laws, it is not (I conceive) fit to be confirmed; if only to prepare to lay before the assembly, it will need no confirmation.

As to the act for apprehending an outlying negro who has committed divers robberies and offences, the act attaints a negro slave, alleged to be a robber, without giving him a day to render himself, which I think is not reasonable.

As to the act for the better strengthening the frontiers, and discovering the approaches of an enemy, I have no objection to it, if your Lordships be of opinion the quantity of land allowed to the settlement on the frontiers be not too much.

And as to the act to prevent masters of ships or vessels running away, after the embargoes are laid, this

act being to oblige all masters of ships, when they make their entries, to give bond not to depart while an embargo is laid in Virginia, I am of opinion it is not fit to be confirmed absolutely, but for a certain time, and till Her Majesty, her heirs, or successors, shall, in council, order otherwise, for it may happen that ill use may be made, by laying embargoes there for private ends, to the prejudice of trade.

EDW. NORTHEY.

(21.) *The Solicitor-General Harcourt's reports, on the acts of the Bermuda Assemblies, in* 1690-91-93-94.

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered the several acts passed at a general assembly held in the Bermuda Islands, (under the government of Mr. Richier) in 1690 and 1691, viz: "an act for vacating the indefinite acts, made at the last session of assembly;" "an act for the strict observation of the Lord's day, commonly called Sunday;" "an act against swearing and cursing;" "an act against bastardy and incontinency;" "an act to prohibit from retailing rum and liquors publicly, without license of the justices of the peace;" "an act against gaming;" "an act for keeping a diligent guard at the castle and Pagitt's Fort;" "an act for keeping a good look out at the mount in St. George's;" "an act for the speedy recovery of debts and damages, by merchants, strangers, mariners, &c.:" "an act for trying any debt or difference, not exceeding twenty shillings, by the justices of the peace;" "an act for recovery of debts from persons insolvent;" "an act to prevent par-

ish charges, by poor persons removing from one tribe to another;" "an act against buying and ingrossing corn and merchandize;" "an act directing what warning shall be given to a tenant at will;" "an act to prevent destruction of boundaries;" "an act to prevent the destruction of fish by hawling;" "an act to prevent the destructio Button Wood;" "an act against removing and taking away boats from their mooring place;" "an act against deceit in making up tobacco;" "an act for putting out apprentices, and setting idle people to work;" "an act to prevent buying, selling, or bartering, with negroes and other slaves;" "an act for trying negroes and slaves;" "an act for young men to pay parish duties;" "an act for vessels paying powder money;" "an act to prevent stealing corn, palmeto tops, and provisions;" "an act for repairing the highways;" "an act to prevent damage by cattle, poultry, &c.;" "an act for maintaining the public bridges;" "an act to prevent the destruction and transporting of palmeto tops and brooms;" "an act for settling intestates' estates;" "an act for preventing differences about dry goods imported into these islands;" "an act for the liberty of the subject;" "an act about pleading;" "an act, appointing the number of the assembly, and the registering the acts;" "an act for establishing and regulating courts of judicature;" "an act for quieting men's estates, and preventing law-suits;" "an act about shipping;" "an act to regulate the militia." And I have likewise considered of the several other acts, passed at a general assembly, held in the Bermuda Islands, (under the government of Captain Goddard,) in 1693, viz: "an act for the due regulation of weights and measures;" "an act for the alteration and amendment of several acts of assembly;" "an act for set-

tling a yearly revenue upon the ministers of these islands;" "an act for liberty of the subject (from illegal imprisonment;") "an act for selling the governor's old house, and erecting of a new house, fitted for the entertainment and accommodation of the present and succeeding governors;" "an act to prevent false alarms;" "an act to prevent the destruction of young cedars;" "an act to prohibit any from retailing rum and liquors publicly, without license of the justices of the peace;" "an act to prevent the destruction of fish, by hawling;" "an act for raising a public revenue, for the support of these their Majesty's islands;" "an additional act, for raising a public revenue for the support of the government of these their Majesty's islands."

And I have likewise considered of the several other acts, passed at a general assembly, held in the Bermuda islands, (under the government of Captain Goddard,) in 16[illegible]4, viz: "an act for settling the Governor's, and all his officers' fees;" "an act for limiting the time when appeals shall be prosecuted, that are claimed from the courts of common law, to the Governors and council of Bermuda;" an act, laying an imposition on all Jews, and reputed Jews, trading or merchandizing in these islands:" "an act for the continuance of an act, entitled, an act for raising a public revenue for the support of the government of these their Majesty's islands;" "and one other act, entitled, "an additional act, for raising a public revenue for the support of the government of these their Majesty's islands, for one year longer after the expiration thereof."

As to such of the said laws as are hereinafter particularly mentioned, I humbly lay before your Lordships my opinion thereupn, viz: "an act to prohibit from re-

tailing rum and liquors, publicly, without license of the justices of the peace."

This act is, by a particular proviso therein, to continue for two years from the publication thereof, and, I presume, was intended to commence at twenty days' end after the publication, but, by mistake in penning, the act commences immediately and lasts no longer than twenty days.

"For keeping a diligent guard at the castle, and Pagitt's Fort."

In the clause, for the further encouragement of the watch and guard, by distributing the fourscore ears of corn, there is an omission of a line or two, which makes that clause nonsense. In the same act, No. B, the clause is right.

"An act for trying any debt or difference, not exceeding twenty shillings, by the justices of the peace."

By this law, the justice is enabled to allow what he pleases to be evidence, whereas he ought not to determine but by legal proof.

This act also provides, that after judgment shall be awarded by the justice of the peace, if satisfaction shall not be made within ten days, the justice is to grant his warrant to levy the debt and charges by distress and sale of the party's goods, and for want of such distress, the justices are empowered to hire out to service the defendant, till the debt and charges shall be satisfied; but there is no rule to determine when the debt is satisfied, or by what means the party shall again obtain his liberty.

This is not agreeable to any execution which can be awarded according to the law of England: it gives an arbitrary power to the justice, to make any defendant,

from whom such debt shall be owing, a servant, if not a slave, to whomsoever, and wheresoever, he thinks fit: for these reasons, I think this act not fit to be confirmed.

"An act for recovery of debts from persons insolvent."

By this act, every person, of what quality soever, as well strangers as inhabitants, within the island, who shall be in prison for debt, and shall not pay the same within ten days after such publication as is mentioned in the act, is to be hired forth to any person, in any place, and upon any employment, as the Governor and council shall order, for satisfaction of the said debt, but no rule is laid down to ascertain the rate or price for which such person is to serve, nor when the debt is to be satisfied, nor how the debtor shall be discharged from his service. Persons of very good ability, (especially strangers,) through misfortunes or accidents, may be in prison for debt, and unable to pay the same within ten days, yet such persons are equally liable as persons really insolvent, to become servants, to work out their debts.

Though persons insolvent, only, are mentioned in the title of the act, yet this law extends to all persons whomsoever, and to all debts, without any distinction: I think this act not fit to be confirmed.

"An act for putting out apprentices, and setting idle people to work."

This act directs such as are of the age of fifteen years, and living idly, and not having wherewithal to maintain themselves, to be forced to work or go to service, as is required by the statutes made 7 Jac. I. cap. 25, and 28 and there are not any such statutes; but this act refers

also to several other laws, which may be of great use, and therefore may, without prejudice, be confirmed.

"An act for settling intestates estates."

This act in No. A, is right, referring to the act made in the 22 and 23 of Car. II. chap. 10; but in No. B, there is a mistake in the chapter it refers to, it mentioning the 11th, instead of the 10th.

"An act for the liberty of the subject."

The statutes of Hen. III. and Edw. III. referred to in this law, are unnecessary to be enacted within these islands, being declaratory of the common law of England. If the 16th Car. I. should be there in force, the jurisdiction and authority of the Queen in council, in making any determination concerning any lands, tenements, goods, or chattels, on appeal or otherwise, is wholly laid aside.

This law likewise enacts, that all laws in force in England, relating to liberty and property, shall be also in force within those islands, which I conceive to be very improper, and ought by no means to be approved of.

"An act for quieting men's estates, and preventing law-suits."

A statute of limitation is undoubte[illegible] least as necessary in these islands as in England; but this act is so very imperfectly drawn, that it will rather destroy men's undoubted rights than quiet them, and create law-suits than prevent them.

An actual enjoyment, for twenty years before the making this law, without any claim, rent, service, or acknowledgment, and five years continued enjoyment afterwards, or the like enjoyment for twenty years at any time after the making the act, is turned into an absolute estate of inheritance.

As to the limitation of five years after the making the act, I conceive that time to be short, and persons who had a right of entry might be surprised thereby; and as this act is penned, persons who have an undoubted title in reversion or remainder, may be barred thereof, by the possession of the tenant, for years, during whose possession, they in reversion or remainder, cannot, by law, make any entry or claim.

The provision in this act ought to have been agreeable to the statute of limitations, made in the twenty-first year of King James I., whereby persons having any right or title, are obliged to enter within a certain number of years after such right and title of entry accrued to them, or, in default thereof, are debarred.

For the imperfect drawing of this act, and the ill consequences that may arise thereby, I conceive it ought to be rejected.

"An act for the alteration and amendment of several acts of assembly."

Part of this act varies part of the act before mentioned, for trying any debt or difference, not exceeding twenty shillings, by the justices, but leaves it liable to the objection before made to it; and, therefore, I think this act not fit to be confirmed, though I have no objection to the residue of the act.

"An act for liberty of the subject from illegal imprisonment."

This act gives the entire benefit of the habeas corpus act, made in the 31st King Charles II. to the inhabitants of this island.

They have all the benefits of the writ of *habeas corpus*, which the common law of England gives against illegal imprisonments. It must be submitted to your

Lordships, whether such an act, in those parts, will not lessen the dependence upon the Crown. If such a law should not be thought improper there, yet the granting a *habeas corpus* ought not to be in the power of every justice of the peace.

"An act to prohibit any from retailing rum and liquors, publicly, without license of the justice of peace."

The same mistake is in this act, as in the act with the same title, made in the general assembly, held in 1690-1; however, this act also is long since determined, according to their intentions.

As to the residue of the several acts, concerning which I have made no particular remark, your Lordships will observe that very many of them were but temporary, and are determined several years since, and few of them drawn so carefully as they ought to be; and in many of them there seem to be mistakes in transcribing: however, I have no such objection, in point of law, as to advise the rejecting of them.

SIM. HARCOURT.

Dec. 6, 1703.

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered the several acts, passed at a general assembly, held in the Bermuda Islands, (under the government of Mr. Richier,) in 1690-1, viz: "an act for vacating the indefinite acts, made in the last general assembly;" "an act for the strict observation of the Lord's day, commonly called Sunday;" "an act against swearing and cursing;" "an

act against bastardy and incontinency;" "an act against gaming;" "an act for the keeping a diligent watch and guard, at the castle, and Pagitt's Fort;" "an act for keeping a good look out at the mount in St. George's;" "an act for the establishing and regulating the courts of judicature;" "an act for the more speedy recovery of debts and damages, by merchants, strangers, mariners, &c.;" "an act for trying any debt or difference, not exceeding twenty shillings, by the justice of the peace;" "an act for the recovery of debts, from persons insolvent;" "an act preventing mischiefs by dogs;" "an act to prevent parish charges, by poor persons removing from one tribe to another;" "an act against buying and ingrossing corn and merchandize;" "an act, directing what warning is to be given to a tenant at will;" "an act to prevent destruction in boundaries;" "an act to prevent destruction of Button Wood;" "an act against the removing and taking away boats from their mooring places;" "an act against deceit in making up tobacco;" "an act for putting out apprentices, and setting idle persons to work;" "an act to prevent buying, selling, or bartering, with negroes, and other slaves;" "an act for trying negroes and slaves;" "an act for young men to pay parish duties;" "an act for vessels paying powder money;" "an act to prevent stealing corn, palmeto tops, and provisions;" "an act for repairing the highways;" an act to prevent damage, by cattle, poultry, &c.;" "an act for maintaining the public bridges;" "an act to prevent the destruction and transportation of palmeto tops and brooms;" "an act for settling intestates estates;" "an act for preventing differences about dry goods, imported into these islands;" "an act for the liberty of the subject;" "an act about plead-

ing ;" "an act, appointing the number of the assembly, and registering the acts ;" "an act for regulating the militia ;" "an act for liberty of vessels going out, and coming into, these islands ;" "an act for quieting men's estates, and preventing law-suits :" all which laws are contained in the book of laws, under seal, &c. marked B.

I apprehend the said laws to be a duplicate of the laws contained in the book of laws marked A, which passed in the years 1690, and 1691, excepting only, that each of the said books contains a law or two, which are not contained in the other ; and, by comparing the acts it will appear, that in very many places there is some difference in the expression, or some few words omitted or transposed, which may, perhaps, have proceeded from a negligent transcribing them from the record.

As for such of the acts above mentioned, which have the same title with those of the book marked A, against which I have made any objection in my report to your Lordships thereupon, are liable to the same objection, the acts being either *verbatim* the same, or containing no material variance.

SIM. HARCOURT.

Dec. 6, 1703.

(22.) *The same lawyer's report on the acts of the same Assembly*, 1698.

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships.

In obedience to your Lordships' order of reference, signified to me by Mr. Popple I have considered the several acts passed at a general assembly at Bermuda, under the government of Samuel Day Esq. the 31st of October, 1698.

1. An act for the restraining and punishing privateers and pirates.

2. An act to prevent stealing of oranges and other fruits.

3. Additions and alterations to the act, entitled "an act for repairing the highways."

4. An addition to the act for the trying of negroes in criminal causes.

5. An act for addition and amendment to an act, entitled "an act to prevent the destruction and transportation of palmeto tops, and brooms."

The act for restraining and punishing privateers and pirates, as penned, seems liable to several objections.

By the first enacting clause it is made felony, without benefit of clergy, for any person who then did, or within four years then past, had, or at any time afterwards, should inhabit or belong to this island, to serve in America, in a hostile manner, under any foreign prince, state, or potentate, against any other sovereign, prince, state, or potentate, in amity with the King of England, without license from the Governor.

There is a proviso that this clause should not extend to any person then in service to any foreign state or potentate, who should quit such service by the 4th of August then following.

As this part of the law is framed, persons not guilty of any crime whatsoever may be liable to suffer death : they may enter into the service of any foreign prince, state, or potentate, who are not in hostility with any of the allies of England, and if afterwards war should break forth between such foreign prince, state, or potentate, into whose service they entered, without being guilty of any crime, with any other sovereign, prince,

state, or potentate, in alliance with England, though they are forced to continue in the service, and should quit the same so soon as they have an opportunity so to do, and return home, and submit themselves to the Governor, yet are they guilty of felony, without benefit of clergy, for such their involuntary continuing in the service, after the hostility begun.

By the next clause in the act, all treasons, felonies, piracies, robberies, murders, or conspiracies, committed, or to be committed, upon the sea, or in any haven, creek, or bay, where the admiral hath any jurisdiction, may be inquired, tried, and judged within the island, as if such offence had been committed within the island, and for that purpose a special commission is to issue, and such proceedings thereupon to be had, as by the statute for pirates, 28th Henry VIII. is appointed.

By this part of the act, there is as large a jurisdiction given to try all high treasons, piracies, murders, and other offences committed upon the high seas, as is given by the said statute of Henry VIII. to commissioners to be appointed under the great seal of England, for trying any of the said offences in England.

The said offences, by virtue of this act, to be tried by special commission within the island, are not confined to offences committed within any particular limits, but in what part of the world soever, upon the sea where the admiral hath jurisdiction, any treason, piracy, felony, robbery, murder, or conspiracy shall be committed, or supposed to be committed, any person may be taken, and carried prisoner to the Bermuda islands, and there tried and executed for the same.

By another clause in the act, every person who shall knowingly entertain, harbor, conceal, trade, or hold cor-

respondence with any person deemed to be a pirate, or other offender within the construction of this act, and not endeavor to apprehend such offender, shall be prosecuted as an accessory, and suffer the like pains and penalties.

A person may knowingly trade with a man that is a pirate or other offender within the act, not knowing him to be a pirate or such offender.

This clause, as penned, may subject very innocent persons to be prosecuted for their lives, for trading or corresponding with persons they neither know, nor suspect, to be pirates or offenders.

For these reasons, (however necessary some law of this kind may be within these islands,) I humbly conceive this law not fit to be approved.

As to the other four acts, I have no objection to either of them in point of law.

SIM. HARCOURT.

July 28, 1704.

(23.) *The same lawyer's report on the acts of the same Assembly, in* 1704.

To the Right Honorable, the Lords Commissioners of Trade and Plantations.

May it please your Lordships:

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered the several acts passed at a general assembly of Bermuda (under the government of Benjamin Bennett Esq.) the 3d, 6th. and 27th of July, 1701, viz:

1. An act for an imposition on liquors and sugars imported and landed in these islands.

2. An act to prevent the oppression and extortion of officers.

3. An act laying an imposition on liquors, &c.

4. An act for establishing fast days, to be celebrated in these islands in an anniversary course.

5. An act for the speedy reparation of the castle, forts, and platforms belonging to these islands, and for building barracks with chimnies to each fort, where needful; and for raising a present supply of monies for that end.

6. An act to prevent the evading of payment of just debts, and satisfaction of damages.

And I humbly observe to your Lordships, that the act for imposition on liquors, &c. expired on the 3d of July, 1703, notwithstanding which, the fact recited in the preamble of this act may deserve your Lordships' consideration.

It is recited that an imposition had been laid on liquors, to continue for two years only, at a former sessions of assembly, held under the government of Samuel Day Esq., but that, by the clerk's neglect, a whole paragraph in that act, which is recited to be temporary, was entered on record as a perpetual law, and that the late Governor, Mr. Day, had extorted several sums of money after the determination of that act, as if the act had had continuance, and had transmitted it to his late Majesty as a perpetual law to be confirmed.

It is further recited, that Mr. Bennett, the present Governor, upon a representation thereof by the assembly, had assured them to represent the same to his late Majesty, and that the collection of the rates, imposed by that act, should cease till his Majesty's pleasure was known.

Whether that act, entered upon record amongst the acts of the assembly of the island as a perpetual law,

and transmitted as such by the former Governor to be confirmed, be yet confirmed or not, does not appear to me.

But it appears from this recital, that the present Governor, by his own authority, at the request of the assembly, has stopped the further collection of the rates imposed by the act, passed under the government of Mr. Day, upon the allegations recited in this act.

The act to prevent the oppression and extortion of officers, passed the 6th of July 1701, appears to be repealed the 14th of November 1702, otherwise the said act is liable to objections.

As to the four other acts, I have no objection to either of them in point of law.

SIM. HARCOURT.

July 28, 1704.

(24.) *Mr. West's objections to an act of the same Assembly, as it imposed a duty on the importation of British manufactures.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, in a letter dated the 5th of this instant, February, I have perused and considered an act of assembly, passed in the Bermuda islands, entitled "an to supply the deficiency of several funds in these islands, for finishing and completing a house for the present and succeeding Governors, and repairing the castle and other fortifications, and for defraying the other public charges of these islands."

The act recites, that an act had been passed, anno 1713, by which a duty of 3l. per cent. was laid upon all

goods imported into those islands, to be applied for the purposes in that act mentioned, which act was to continue for the term of two years only. It also recites, that by another act, passed anno 1715, the former duty was continued for the term of seven years, and an additional duty of 2l. per cent. more was laid to continue for the same term.

As to the present act, though I cannot say there is any great objection to it directly, in point of law; yet, I think, I ought to observe to your Lordships, that the purport of the present act is to continue the last mentioned increased duty of 5l. per cent. for no less a term than one and twenty years longer; and as a duty of this nature must chiefly, as I apprehend, affect the importation of British goods into those islands, I submit to your Lordships how far this act is consistent with the Governor's instructions, more especially when it is considered that the duty is not to continue, as formerly, for two or seven, but for one and twenty years.

RICH. WEST.

February 13, 1721.

(25.) *The objections of the same lawyer, to similar laws of the same Assembly.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered an act, passed at Bermuda, *alias* Somer islands, in America, in 1723, entitled "an act to supply the deficiency of the several funds in these islands, and for the immediate support of the government, and for the repairing the fortifications:" by which act it is proposed to raise, as I am informed, a sum not much

exceeding one thousand pounds per annum, and to that end a duty is laid upon all goods imported into those islands, which is represented unto me by those who have attended on the behalf and in maintenance of this act, as the only fund by which the inhabitants are able to provide for the support of the government; and if that be fact, I can have no objection to the laying a duty in general; but I must observe to your Lordships, that there is a distinction made between the inhabitants of the island and strangers, the inhabitants being to pay after the rate of forty shillings per cent. and strangers after the rate of four pounds per cent.

In relation to which distinction, it has been represented to me as a reason for it, that the inhabitants are obliged very often, upon any intelligence of pirates, to be three or four days under arms at once, and very often obliged to fit out after them to sea, all which is a very great expense to them, and which strangers are not liable to.

If your Lordships are of opinion, that this consideration is sufficient to balance the above-mentioned difference in the tax, I have no objection to this act being passed into law.

I have also perused and considered the several other acts passed in the same island, entitled "an act for the better security of all such as are lawfully possessed of any negroes or other slaves in these islands, whereby to secure their lawful rights, interest, and property of and to the same;" "an act for prolonging and making some alterations in an act, entitled an act for the attaching the goods or effects of any persons, inhabitants, or others, not residing in these islands;" a second additional clause to an act, entitled, "an act for vessels paying

powder money." To which (if the act to which they refer have been confirmed by his Majesty) I have no objection to their being passed into law.

RICH. WEST.

March 28, 1724.

(26.) *Mr. Lamb's observations on an act of the Carolina Assembly, relative to coins.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

I received your Lordships' commands, signified to me by Mr. Hill's letter of the 9th instant, wherein you are pleased to desire my opinion upon the following act passed in South Carolina, in June 1746, viz: "an act for stamping, emitting, and making current the sum of £210,000 in paper bills of credit, and for ascertaining and preserving the future value thereof, to be lent out at interest on good security at eight per cent. per annum, and for applying the said interest to the purposes thereinafter mentioned, and for exchanging the paper bills of credit in this province, and making them less subject be counterfeited."

Upon this act I made a report to your Lordships in July 1747, and the several steps that had been taken in relation to this act, prevented my making, at that time, any further observations than are contained in the said report; but as your Lordships are pleased to desire my further opinion upon this act, I must observe, that this act is drawn and worded in so loose and incorrect a manner, that it is with difficulty to be understood what is meant and intended by it, or how it would properly be carried into execution. What I take it to be the in-

tent of the act I shall here mention, and then observe the difficulties that attend the executing of it.

It appears to me that this province is at present indebted to several persons, upon bills formerly emitted, the sum of £100,000, for which there is no security or fund for the payment, and that by this act a fund is intended to be provided for the paying them off, and for creating an additional currency of £110,000. By this act £210,000 new bills are to be emitted, out of which, bills, to the amount of £100,000 are to be issued to exchange the said old bills of the same value, and the remaining £110,000 is to be lent out on securities at eight per cent. interest, five-eighths of which interest is to be the fund to pay off the old debt of £100,000 and when the debt is discharged, then the borrowers of the £110,000 are to begin, from that time, to pay off their principal money, one-tenth part yearly, together with the interest for ten years, till the whole is discharged, and the bills taken up. The interest money is to be paid in silver or gold, at the rates mentioned in the said act.

As to the expediency or utility of this act, that is a matter under your Lordships' consideration; what I have to observe is, if it shall be thought expedient that such an act should pass, that this act will be very defective, and liable to be evaded.

It is enacted, "that the trustees shall exchange £100,-000 of new bills for the present paper bills, that all the bills of credit of this province may, as soon as conveniently they can, be brought and put upon one and the same foundation."

In this clause there is no limited time for exchanging the new bills for the old, nor any directions for the burning and cancelling the old bills when they are taken up,

which is usual in these cases, and was particularly provided for in the act passed in this province the 20th of August, 1731, for the emitting of new bills in exchange of old bills.

It is also enacted "That five-eighth parts of the silver and gold which shall be paid as interest into the hands of the trustees, shall by them be annually put out on interest, at the rates or value aforesaid, until the whole principal out on bonds, secured as aforesaid, shall amount unto the sum of £210,000 at which time (as it is therein mentioned) the said debt of £100,000 will be entirely paid off and discharged."

Then follows the direction about the application of the interest, over and above the five-eighths, which is very imperfectly worded.

It is also enacted, "That in order to sink the said bills of credit, so let out at interest, that the repayment of the principal shall commence at the time aforesaid of the old debt being paid off and discharged; and thenceforward, annually, the obliger or borrower shall, over and besides the interest due on his or their bonds respectively, pay to the said trustees one-tenth part of the principal, and such payments yearly, and every year to be made, so that the whole principal be fully paid and discharged in the space of ten years, and the sums, so received, in discharge of the principal aforesaid, shall be annually burnt by the trustees.

By these clauses there is no time fixed, nor is there any compulsion upon the trustees to apply the interest money they shall receive to discharge the old debt of £100,000 (which is the fund for that purpose) and to take up and cancel the bills, as they are paid off, which should be provided for, otherwise they will have it too

much in their power to evade the intention of this act, by continuing a larger currency than even by this act (loosely worded as it is) seems to be intended. Whereas, if it was enacted that the trustees should annually pay the five eighths of the interest as they received it, towards paying off and calling in the bills for the old debt, until the whole of the old debt is discharged, and the bills are cancelled, or to place out the interest annually on securities (for which this act does not give proper directions) till the accumulated sums make up £100,000 and then be obliged to discharge all the bills for the old debt, and take them up and cancel them, and from that time the borrowers of the £110,000 which will be the only bills remaining, to begin to pay annually one-tenth part of their debt and interest, till all their bills are paid and cancelled ; this would, in a course of years, sink all the bills.

It is also enacted, "That the interest money shall be paid in Spanish or English silver coin, or in gold, at the rates therein mentioned."

By the act of Queen Anne, the rates of foreign coins in the colonies and plantations are ascertained ; and this province cannot alter the same, but by a new law made for that purpose. This is designed to be a new law, and includes English silver coin, therefore it must be submitted to your Lordships how to advise any new law, setting a rate or value upon such coin.

For the reasons I have before given, however it may be thought expedient and useful to pass an act for the purposes intended by this act, I am of opinion, that this act is not fit to pass into a law.

MAT. LAMB.

Lincoln's Inn, Dec. 14, 1748.

(27.) *Mr. West's observations on the continuance of the revenue acts of the Jamaica Assembly.*

To the Right Hon., the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have considered the following state of a case, and *quære*, relating to some acts of Jamaica, transmitted to me by Mr. Popple, in his letter of the 17th of February, 1721-22.

Several laws of Jamaica were confirmed by King Charles II. in the year 1684, for the term of twenty-one years only, during which time, viz: in the year 1688, a revenue act passed, supposed to have been perpetual, but never confirmed by the crown.

In 1703, a new revenue act passed, for the space of one and twenty years, whereby all the laws of Jamaica, formerly confirmed for twenty-one years, by King Charles the Second, were further continued for the term of that act, which was for twenty-one years more, excepting a revenue act, passed in 1683, and a subsequent act in the year 1688, which are repealed, by the abovementioned law of 1703; but the last mentioned law being only temporary, and it being expressly declared therein, that the said act, and all and every clause or clauses therein contained, shall be and remain in force for the space of twenty-one years from the 1st of October, 1703: *quære*, Whether the two revenue acts of 1683, and 1688, thereby intended to be repealed, are absolutely repealed or only suspended, during the time prescribed for the continuance of the act in 1703?

I have also considered the two annexed clauses

of the above-mentioned revenue act of 1703.

Every act whatsoever, that passes into law, is in itself perpetual, unless there are words, in the body of it, to determine its duration.

And in relation to the revenue act of 1703, I must beg leave to observe, that the clause for its duration is altogether in the affirmative, "that it shall be, and remain in force, for the space of twenty-one years;" but, then, as there are no negative words, by which it is enacted that "it sh. ll continue so long, and no longer," it may be made a question in law, whether that act of 1703 is not, in itself, perpetual.

The revenue in Jamaica has been provided for by two several acts, one in 1688, and the other in 1703.(for, as to that in 1683, there is no doubt but that is not in force,) and the act of 1688 is said, in the state of the case, to have been enacted for a perpetual law, and consequently, would be still in force, was it not for the repealing clause in the act of 1703. But, as I suppose it is indifferent to the government, whether the revenue is settled either by one or the other of these acts, so I think it is most certain, that one of the two must be still in force, for, if the act of 1703 be construed to be not now in force, but to be temporary, then the act of 1688 must revive, by reason that the operation of the act of 1703 ceases and determines; but if the act of 1688 be supposed to be absolutely repealed, it can only be by reason that there are not any negative words, and no longer, (as is usual in all the temporary acts passed in England,) to determine its duration; and, consequently, the act of 1703, and the provision for the revenue thereby enacted, must be still in full force.

RICH. WEST.

March 2, 1721-22.

(29.) *The observations of the Attorney and Solicitor-General, Ryder and Murray, on the acts of the Jamaica Assembly, in 1751.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us by Mr. Pownall, in his letter of the 2d of February last setting forth, that your Lordships had taken into consideration our report upon four acts passed in the island of Jamaica in November and December, 1751, and had been attended by the agent for, and by several of the principal merchants, and others, trading to, and interested in, that island; and they having expressed a concern, that they had not an opportunity of bein heard before us upon these acts, when they were under our consideration: your Lordships had directed them to be transmitted back to us for our further consideration; and that we should, in our report thereon, state to your Lordships the particular objections which we say in our former report we have to each of those laws, both in matter and substance, to the end that if they should be laid before His Majesty for his disapprobation, as having been passed without clauses of suspension, contrary to the twenty-second of His Majesty's instructions, your Lordships may be enabled to point out the particular objections to the Governor, and direct him to get such parts of them as shall be for His Majesty's service and the public utility and advantage of the island re-enacted with proper clauses of suspension. Also transmitting, by your Lordships' directions, the two following acts, passed in the said island in No-

vember and December, 1751, the latter of which had been complained of by Mr. Forbes, the prevost marshal, as invading the rights of his office, and desiring our opinion thereupon, viz: "an act for making good and wholesome provision, for raising and establishing the credit of this island, and repealing of an act, entitled a supplemental and explanatory act;" "an act for the further regulation of the provost-marshal's proceedings, establishing priority of judgments, quieting possession of slaves, purchased upon *venditioni*, and for limitation upon bonds, mortgages, judgments, and other securities, and empowering the assistant judges to sign writs, and other process."

We have, according to your Lordships' desire, re-considered the four acts of assembly, passed in Jamaica in November and December, 1751, and have also consider-ed the two other acts of the same assembly, mentioned in Mr. Pownal's letter, on which your Lordships are pleased to desire our opinion, and have been attended by John Sharpe Esq., as for the said island, upon those acts.

We did, in our former report of the 22d of January last, confine ourselves to one general reason for disap-proving the first four acts, arising from their being passed without a clause of suspension, in breach of the twenty-second article of the Governor's instructions; as the obedience to that instruction has been always thought most necessary to be secured, and can be no way so effectually secured, as by constantly denying the royal approbation to every act passed in contradiction to it; and we apprehend, the suffering any plain devia-tion from that rule to take effect, will be attended with inconvenience to His Majesty and his subjects both here and abroad.

But there are other objections to each, sufficient in our opinion to prevent His Majesty's approbation. As to the first, entitled "an act, providing that all the judges of the supreme court of judicature of this island, shall hold their offices *quamdiu se bene gesserint,*" it directly affects the royal prerogative in a point of great moment, and for which no occasion is pretended to be given, by the abuse of any power committed to the Governor; or, if there had been any, it would be much more suitable to His Majesty's honor and dignity to reform it by his own authority, fully sufficient for that purpose, in such manner as to his royal wisdom should seem meet, than by the imposition of an act of assembly; nor does it appear to us, that in the situation and circumstances in which this island or the other American plantations stand, it would be advisable, either for the interest of the plantations themselves, or of Great Britain, that the judges in the former should hold their places *quamdiu se bene gesserint.*

As to the second act, entitled "an act for choosing the members of the assembly of this island by ballot, and for the more effectual preventing abuses and indirect practices in elections:" as the present method of election has been established by virtue of His Majesty's instructions, and long usage, agreeable, in general, to the practise here, and in all the other plantations except one, and nothing has happened in this to show the inconvenience of it, we think it very dangerous and imprudent to make so great an innovation as is intended by this act.

As to the third act, entitled "an act for explaining an act for the further quieting possessions, and regulating resurveys, and for establishing reputed boundaries,"

we think it by no means advisable to confirm a law which has a retrospect for twenty years, from the year 1731, (when the former recited act was made,) in points which do not appear to have been within either the words or meaning of that act, and without excepting cases that may have been adjudged, or where the parties have enjoyed otherwise, and whose quiet and legal possessions may be disturbed by an act passed under the color of quieting possessions.

As to the fourth act, entitled "an act for appointing commissioners of *nisi prius*, and enlarging the jurisdiction of the justices of the peace, in matters of debt;" this is so extensive a change in the constitution of the government, with respect to the administration of justice, and so great an encroachment upon the royal prerogative, to which the erecting and establishing courts of justice belongs, that we cannot think it advisable to admit of such a precedent, nor do we think that the variation proposed by the act would be beneficial to His Majesty's subjects, if carried into execution.

As to the fifth act, entitled "an act for making good and wholesome provision for raising and establishing the credit of this island, and repealing of an act, entitled a supplemental and explanatory act:" the part relating to the increase of costs seems to us unnecessary and dangerous, the practice, already, of giving costs, including counsel's fees, and all other expenses that are reasonable; and more ought not to be allowed.

The clause that prescribes a new writ of execution, proceeds partly on a mistake, as if lands are now subject to judgments for debt, which they are in fact, both by the general law and the British act of the fifth of his present Majesty, where the judgment is against the orig-

inal debtor; and if against his heir or executor, his own lands ought not to be subjected, unless he has embezzled his testator's assets, as this act unjustly does, without distinction.

The clause for giving five per cent. to present creditors in Great Britain, for money lent there to debtors in Jamaica, means either to give them an interest they have now no right to, or, by confining them to five per cent. to take away part of their right, where the contract was for a higher rate. In both cases the law is unjust, and we think it not proper to be approved.

As to the sixth act, entitled "an act for the further regulation of the provost-marshal's proceedings, establishing priority of judgments, quieting possessions of slaves purchased upon *venditioni*, and for limitation upon bonds, mortgages, judments and other securities, and empowering the assistant judges to sign writs and other process:" the clause that establishes certain fees, with restitution of what has been been paid already beyond them, has an unjust retrospect.

The prohibiting writs of execution to issue till the next court day after judgment, is an unnecessary and dangerous delay of justice, and may give great opportunities of fraud, concealments, and embezzlements.

The clause relating to presumed satisfaction of mortgages, &c. from twenty years acquiescence, &c. is without any limitation, or exception, arising from the circumstances of age, place, or capacity, of either creditor, or debtor, and has a very unjust retrospect; and we think this act not proper to be approved.

D. Ryder.

June 22, 1753. W. Murray.

(30.) *Mr. West's observations on an act of the Virginia Assembly, tend ng to prohibit the importation of convicts.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered an act passed in the province of Virginia, entitled "an act for amending the act concerning servants and slaves, and for the better government of convicts imported, and for the further preventing the clandestine transportation of persons out of this colony."

To such part of this act as relates to the government of their servants and slaves, I have no objection; but, then, I must submit the other part, which relates to convicts transported from Great Britain, to your Lordships' consideration.

By act of parliament, persons convicted of felonies and other crimes, are liable to be transported to the American colonies, there to be disposed of to the planters, for several terms of years. This act of assembly, therefore, recites, that frauds have been committed by the persons entrusted with the transportation of felons, &c. and that many crimes had been committed in that colony by the transported persons; for remedy of which it is enacted, first, that no person importing felons, &c. into that province, shall dispose of any convict for a less term of years, or time, than what such convict was originally ordered to be transported for, as the acting otherwise than what is here provided for, is an abuse of the law here, as well as of the planters there. I think this clause is very proper, and that the penalty of ten pounds upon offenders is very reasonable. After

this they enact, that if any convict person be permitted to go on shore at large unless he be actually sold or disposed of to some master, that, then, the master of the ship, wherein such convicts are imported, shall forfeit twenty shillings, whenever any convict person shall be apprehended on shore. If the mischief they would remedy by this clause, be, that the importers of convicts permitted them to go at large, without ever disposing of them to proper masters, the penalty seems to be much too small to answer that end.

After this they enact, that every master of a vessel who imports any convicts, shall give bond, upon condition that he shall not suffer any convict to go on shore in the province, till he be actually, and *bona fide*, sold and disposed of. To this clause it has been objected on behalf of the persons who contract with the Lords of the treasury for the transportation of felons, that if it subsists they cannot execute their contracts, since it obliges them to keep to their ships lying there, until they have disposed of all their convicts on board, when, as they cannot afford to keep their ships there so long, without taking in a loading homewards: I am not merchant enough to know what force there is in this objection; but, according to my apprehension, the same end might be obtained by obliging the persons on shore, to whom the convicts should be consigned, and not the masters of ships, to give security, not to permit the convicts to go at large or out of custody, in the province, until they should be, as above, actually and *bona fide* disposed of; since, by that means, the country would be as effectually secured against any mischief the convicts might do.

In the two following clauses it is enacted that every

person, who, upon importation, has the disposal of any convicts, shall, before he be permitted to dispose of them give security in the penalty of £100, for the good behavior of such convicts during the space of two months after they shall be disposed of to any master ; and that every person who shall purchase any of the said convicts, shall immediately give security, in the penalty of ten pounds, for the good behavior of such convicts, during the whole time for which they are respectively transported.

To these clauses the objection is, that they amount to a prohibition of any convicts being imported into that province, since the contractors for transportation have represented to me that they cannot get any masters of vessels who will give the above mentioned security, nor can it be expected that any persons will purchase any of the said convicts upon those terms.

The transportation of felons, &c. is by act of parliament ; and, if the example set by this province should be followed by the other colonies, the execution of the laws concerning transportation will be rendered wholly impracticable.

And, therefore, upon the whole matter, if your Lordships shall think that the above mentioned clauses will amount to a prohibition, I am then of opinion that this act is not proper to be passed into law ; but if, on the contrary, you shall be of opinion that they import no more than a reasonable security to the inhabitants of that province against any mischiefs or crimes that may be committed by the convicts, I have then no objection to the act.

RICH. WEST.

July 3, 1723.

(31.) *The observations of the same lawyer, on an act of the same Assembly, tending to prevent free black men from voting at elections.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered the several following acts, passed in the province of Virginia, in 1723.

And as to the act entitled "an act, appointing a treasurer, and empowering him to receive the monies in the hands of the late treasurer," I have no objection to it, in point of law, only I would observe to your Lordships, that it seems to be now a practise, in all the American colonies, for their respective general assemblies to assume to themselves the nomination of all officers relating to the revenue.

As to the act, entitled "an act, directing the trial of slaves committing capital crimes, and for the more effectual punishing conspiracies, and insurrections of them, and for the better government of negroes, mulattoes, and Indians, bound or free," there is in it a short paragraph by which it is enacted that from and after the passing the act, no free negro, mulatto, or Indian, whatsoever, shall have any vote at the election of burgesses, or any other election whatsoever.

Although I agree that slaves are to be treated in such a manner as the proprietors of them (having a regard to their number) may think necessary for their security, yet I cannot see why one freeman should be used worse than another, merely upon account of his complexion. I have no objection to the putting such limits

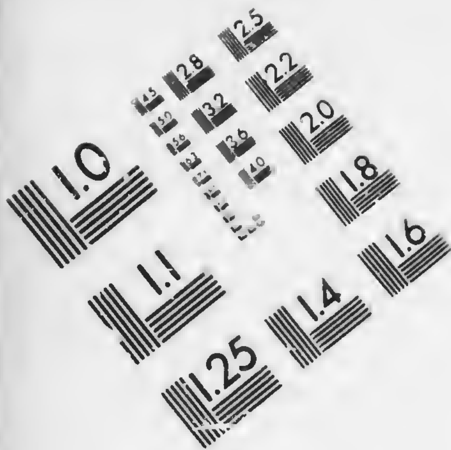
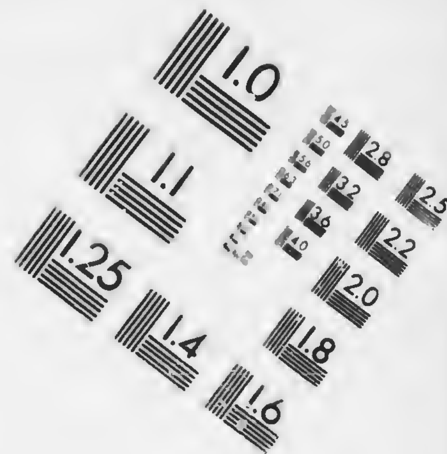
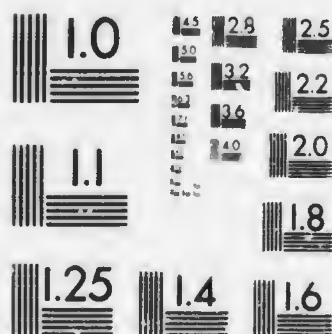
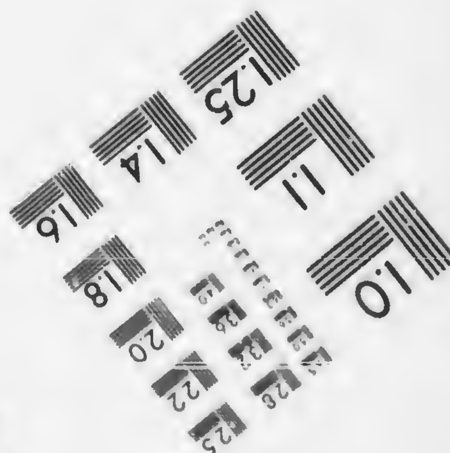



IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

and conditions upon those persons as may be enfranchised for the future, as they please; but to vote at elections of officers, either for a county, or parish, &c. is incident to every freeman who is possessed of a certain proportion of property, and, therefore, when several negroes have merited their freedom and obtained it, and, by their industry, have acquired that proportion of property, so that the above-mentioned incidental rights of liberty are actually vested in them, for my own part I am persuaded that it cannot be just, by a general law, without any allegation of crime, or other demerit whatsoever, to strip all free persons of a black complexion, (some of whom may, perhaps, be of considerable substance,) from those rights which are so justly valuable to every freeman. But I submit the consideration of this to your Lordships.

As to the several other following acts, passed in the same province in the said year, 1723, entitled "an act for the settling and better regulation of the militia;" "an act for the better securing the payment of levies, and restraint of vagrant and idle people, and for the more effectual discovery and prosecution of persons having bastard children;" "an act for enlarging the jurisdiction of the court of Hustings, in the city of Williamsburgh, within the limits thereof;" "an act for raising a public levy;" "an act for reviving an act, entitled an act for security and defence of the country in times of danger;" "an act for dissolving the parish of Wilmington, in the counties of James City and Charles City, and adding the same to the other parishes;" and "an act for dividing Saint Stephen's parish, in the county of King and Queen:" to all which, I have no objection to their being passed into law.

Jan. 16, 1723. RICH. WEST.

(32.) *The same lawyer's objections to an act of the Pennsylvania Assembly, establishing a paper credit.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered the four following acts, passed in Pennsylvania, in 1722 and 1723, entitled "an act for the emitting and making current £15,000 in bills of credit;" "an act for the better and more effectual putting in execution an act of assembly of this province, entitled an act for emitting and making current £15,000 in bills of credit;" "a supplementary act to the act entitled an act for emitting and making current £15,000 in bills of credit;" and "an act for emitting and making current £30,000 in bills of credit."

These four acts relate to the establishing a paper credit in Pennsylvania; and your Lordships have lately, in other cases, been of opinion against all projects of that kind, I think they ought not to be passed into law.

I have likewise perused and considered an act passed in the said island, entitled "an act directing the process of summons against freeholders."

The intent of this act is to exempt all freeholders, to the value of fifty acres of land, from arrest; but, as they may contract debts to a hundred times or more that value, and have considerable personal estates which they may run away, I think it is an unreasonable privilege, and not proper to be passed into law.

I have likewise perused and considered the three following acts, passed in the said island, entitled "an act

for respiting executions upon certain judgments of courts in this province;" an act to rectify proceedings upon attachments;" "an act for regulating and establishing fees:" to all which, I have no objection to their being passed into law.

RICH. WEST.

May 10, 1725.

(33.) *The observations of the same lawyer, on the peculiarities, and unfitness, of other acts of the same Assembly.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused the several acts of the province of Pennsylvania, transmitted to me by Mr. Secretary Popple; and as to those acts, which are contained in the bundle, entitled "acts passed between the 14th of October, *annoqne domini*, 1712, and the 27th of March, *annoque domini*, 1713, I have no objection unto any of them being passed into laws," only I must beg leave to observe unto your Lordships, that in the act entitled "an act for establishing orphans court," there is a clause, by which the justices of the orphans court are empowered to exercise all the authorities and jurisdictions granted unto them by another law of the province, entitled "an act for the better settling intestate estates;" and also in the act entitled "an act for mending divers laws therein mentioned," there is a clause, by which it is enacted that every person convicted of felony, in pursuance of another law of the province, entitled "an act against robbing and stealing," shall be committed to gaol.

As the two clauses in these two several acts refer to

other laws of the province not transmitted to me, I believe that your Lordships will judge it necessary to give directions to your secretary, to examine whether those two acts have been confirmed or not, since if upon such examination, it should appear that the said acts have been repealed, I am of opinion that your Lordships will think it highly improper to pass these two acts into laws (though otherwise there be no objection unto them,) since by the general words of the clauses above-mentioned, your Lordships may confirm two other acts to which the royal assent has already been denied.

I have also perused the several acts contained in the bundle, entitled "acts passed between the 14th of October *annoque domini*, 1714, and the 28th of May, *annoque domini*, 1715, among which there is an act, entitled "an act of privileges to a freeman," which act I take to be the same, or at least to the same purpose, with that act which is mentioned in Sir Robert Raymond's report, 22d of December, *annoque domini*, 1713, to which I would crave leave to refer your Lordships; and, indeed, if the inhabitants of that province do not, by the general words of this act, intend to interfere with the act of the 7th and 8th of Will. III. entitled "an act for preventing fraud, and regulating abuses, in the plantation trade," it is very difficult to imagine what other intention they can possibly have, since, by the law already in being, the freemen are entitled to all the privileges mentioned therein, so far as is consistent with the above-mentioned act of King William, or any other laws of this kingdom.

There is also another act, entitled "an act for the ease of such as conscientiously scruple to take the solemn affirmation formerly allowed in Great Britain." As no

man is a greater friend to liberty of conscience than myself, as to my own particular, I have no objection to this act being passed into a law ; yet I think it my duty to observe to your Lordships, that, as the affirmation to be allowed by this act is materially different from that practised in Great Britain, (the name of Almighty God being not mentioned therein,) your Lordships may possibly think it proper particularly to consider how far the circumstances of this province may render it necessary to extend the toleration to Quakers, further than by the laws of Great Britain has yet been done.

There is also another act, entitled "an act for laying a duty on wine, rum, brandy, and spirits, cider, and hops, imported into this province;" and there is also another act, entitled "an act for laying a duty upon negroes imported into this province:" I submit it to your Lordships' consideration, how far it may be proper for the inhabitants of Pennsylvania to lay duties upon the above-mentioned commodities: to which consideration may be added, that in the act relating to negroes, there is a power given to the officers to break open houses, upon suspicion of negroes being there, generally, without any limitation or restriction for the exercise of it, which power extends to nights as well as days, a power which is rarely admitted by the laws of Great Britain in offences of an inferior nature.

As to the other acts contained in the above-mentioned bundles, I have no objection to them.

RICH. WEST.

March 6, 1718-19.

(34.) *The observations of the Solicitor-General, Thomson, on an act of the New Jersey Assembly, for ascertaining the seat of government.*

Sir.

In obedience to the commands of the Lords Commissioners for Trade and Plantations, signified by yours of the 5th instant, I have considered the act to repeal a former act of general assembly of this province, entitled "an act for the ascertaining the place of the sitting of the representatives to meet in general assembly." And as the act to be repealed was made so lately as the eighth year of Queen Anne and is found to be inconvenient, and asserted to be contrary to the royal instructions, I do not apprehend that there can be any scruple, why His Majesty should not approve of this act sent over, which leaves the place of the meeting of the assembly to be appointed as shall be found most convenient; and the rather, for that the act to be repealed was a restraint of the King's prerogative.

WILL. THOMSON.

December 9, 1717.

(35.) *Mr. West's remarks on an act of the same Assembly, tending to lessen the jurisdiction of the supreme courts of justice.*

To the Right Hon., the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Secretary Popple, I have perused and considered of three acts, passed in the province of New Jersey, in America, entitled as follows, viz: "an act for shortening of law-suits, and regulating the practice of the law;" "an act, enforcing the observation of the or-

dinance for establishing fees within this province;" "an act for acknowledging and recording of deeds and conveyances of land within each respective county of this province."

As to the general purview of which acts I have no objection; but inasmuch as those acts are represented by the Governor and by the judges of the supreme courts of justice in that province, to be entirely destructive of their jurisdiction, and, as in their opinion, not fit to be passed into law, especially considering that they are intended to be perpetual, and have also been represented unto me that those acts are very prejudicial to the right of those officers who are appointed by patents from the Crown, by lessening their usual and accustomed fees in such a manner as that there is not a sufficient encouragement for any person to undertake the execution of those offices; I am therefore of opinion, that those acts are not proper to be passed, unless there be clauses inserted into them to save the jurisdiction of the superior courts, and the rights of those few officers in the province, who are appointed by patent from the Crown.

RICH. WEST.

December 11, 1718.

(36.) *The report of the Attorney and Solicitor-General, Ryder and Murray, on some singular acts of the New Jersey Assembly.*

To the Right Honorable, the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' directions, signified to us by Mr. Hill, in his letter of the 17th of July, 1749, with the five hereinafter-mentioned acts passed in the province of New Jersey in February, 1747-8, desiring

our opinion thereupon as soon as we conveniently can, viz: "an act for naturalizing Peter Landerbouch, Catherine, Elizabeth, and Barbara, his three daughters;" "an act for punishing the coiners and counterfeiters of foreign coin passing current, and the counterfeiters of bills of credit of this province;" "an act for avoiding actions of slander, and for stay of proceeding, until the first day of October, 1748, in other civil actions against the late rioters;" "an act for the suppressing and preventing of riots, tumults, and other disorders within this colony;" "an act to pardon the persons guilty of the insurrections, riots, and disorders, raised and committed in this province."

Mr. Hill is further directed by your Lordships to acquaint us, that the first of these acts appears to be of an unusual nature, and that you do not find that acts of this sort have, at any time, been passed in his Majesty's colonies in America; that the four last mentioned acts were passed on occasion of great riots and disorders having been committed in that province, and which now are arisen to such a height as to claim the serious attention of his Majesty's ministers, who have had one meeting thereupon, and are to meet again in a few days: your Lordships, therefore, desire that you may be favored with our opinion with all possible dispatch, the province being in the utmost confusion.

As to the act for punishing coiners, &c. we do not see any objection to that part which concerns the coiners of foreign coin made current by lawful authority; but the extending the penalty to coiners of foreign coin, that is, or shall be, by common consent, usually passed, and taken or received as full satisfaction for debts, appears to us very improper, both on account of the great uncer-

tainty of the description on which the capital punishment is to depend, and the too great credit that is given to what is called common consent, not founded on the act of his Majesty, or of the general assembly.

As for the act for naturalization of Landerbouch, &c. since your Lordships have been pleased to acquaint us, by Mr. Hill's letter, that you do not find any acts of this sort have, at any time, been passed in his Majesty's colonies in America, and there appears nothing special in this case: we cannot think it advisable to begin the precedent now, and in this colony.

As to the act of pardon to the persons guilty of the late insurrections, which by the act itself appears to have been thought to amount to high treason in some of the parties, it is a mattor that must rest entirely in his Majesty's royal breast, weighing all the circumstances and consequences that may be foreseen or apprehended.

But it appears to us very extraordinary, that in a matter of so great moment, in which the peace of the whole province has been disturbed, and the conduct of the rioters seems to have been no less than a rebellion, and the only alleviation, so much as insinuated as to any of the criminals, is their being artfully misled, a pardon of all should be granted, without excepting even those who misled the rest, or leaving any one to the justice of the law, besides those who have been actually indicted for treason, and their trial suspended.

As to the act for avoiding actions of slander, and for stay of proceedings in other civil actions, we do not know enough of the grounds of those actions of slander to form any judgment upon that part of it, much less to see how that is so connected with the late insurrections,

as to make those any reasons for such a suspension.

With regard to the other part of the act relating to the stay of other civil actions against the late rioters, we do not see upon what reason it can be founded, that his Majesty's subjects, who have been so grossly injured in their property, should be delayed in the recovery of that satisfaction which the law gives them.

As to the act for suppressing riots, &c. it appears to us to have a tendency not to suppress, but encourage riots, as it inflicts a much less punishment than what the law at present does, the penalty of ten pounds, and their own security in one hundred pounds for good behavior for three years, being by no means adequate to the crime.

D. RYDER.
July 21, 1749. WM. MURRAY.

(37.) *Mr. West's opinion on the revenue acts of Jamaica, upon special questions put on them.*

In November, 1716, three acts were passed, viz: "an act to oblige several inhabitants of this island to provide themselves with a sufficient number of white people, and to maintain such as shall come over;" an act, entitled "an act to encourage the bringing over and settling of white people in this island;" and an act, entitled "an act to impose duties upon several commodities, to defray the extraordinary charges of the government, and applying the same to several uses," wherein are the clauses annexed, marked Nos. A. B. and C.; and in August, 1717, an act entitled "an act for continuing an act to impose duties on several commodities, to defray the extraordinary charges of the government, and applying the same to several uses," wherein is also the clause annexed, marked D.

In pursuance of the aforesaid acts, the commissioners severally entered into the bonds annexed, marked F. C. G. for duly complying with the said act.

The four acts above-mentioned, being transmitted to Great Britain, were, upon their being taken into consideration, severally rejected by his Majesty.

n August, 1718, an assembly was called, and after ten weeks sitting, were prorogued to the 10th of November, without answering the ends of their being called, or appropriating any of the sums in the commissioners' hands, which, upon auditing the accounts, appeared to be upwards of £18,000.

On the 10th of November the assembly met again, according to the prorogation aforesaid, and sat some days; but the Governor finding, by the temper they were in, that the public was not to be served, prorogued them to the tenth of March, and has since dissolved them.

Though it appeared to the assembly that the treasury would want, by the 25th of March, by the receiver-general's computation, upwards of £9000 to answer the demand upon the public, yet they resolved to put only £5800, part of the aforesaid £18,000, in the several commissioners' hands.

This being the condition of the government, and it being likewise uncertain if another assembly be called, whether the majority may consist of such persons as will be for supporting the government, or supplying the treasury, and framing the laws they make agreeable to the King's instructions, or in such manner as they can be consented to by the council, as well as the Governor, without disregarding his Majesty's instructions, and rendering themselves entirely useless and insignificant :

It is proposed, that in order to provide for the support of the government, and the peace and quiet thereof, that the several commissioners be required to pay the money in their hands to his Majesty's receiver-general.

But though it seems highly just and reasonable that at all times the government should be in a capacity to pay its debts, and put into such a condition as that it may not want either credit or money to enter upon, and go into any proposition for the security of the trade and interest of government; and notwithstanding it is notorious the money in the hands of the commissioners is greatly wanted, as well to pay the debts of the public, as put in execution some service for the public good of the government, and that it is, on many accounts, apparently for the benefit and advantage of the inhabitants, that the money raised upon them should not lie useless in the hands of the commissioners, as has been practised of late years, or in the manner it does, and has done for a considerable time, whilst many poor people want their money due from the public, or the government has just demands upon it, but that it should be forthwith ordered by the Governor and council to be paid into the treasury there, to be issued thence for the public service generally, by their order; yet lest it may be said it is against law to order the money as aforesaid, and the commissioners should refuse to pay the said money by such an authority, it is thought advisable to ask the following *quæries*;

Quære 1st. Whether the bonds are of force after the repeal of the said acts?

2d. If the bonds and conditions are in force, notwithstanding the rejecting the acts, whether they are satisfied by the commissioners having accounted to the assembly?

3d. What shall become of the money, raised by the acts, in the commissioners' hands, the appropriation and uses being determined by the rejecting the acts; and how may the commissioners dispose of the money, and be discharged of their bonds, if in force?

4th. Whether the Governor may not direct the commissioners to pay the several sums or balances into the treasury, generally, for the use of the government, free from the appropriation of the acts or penalty of the bonds, and thereupon order the bonds to be vacated?

5th. What method must be taken to oblige the commissioners (upon refusal) to pay and account for the money as aforesaid; or what otherwise may be done for the service and support of the government under these circumstances?

My Lords;

Quære (1.) In obedience to your Lordships' commands I have considered the above-written *quæries*; and, in answer to the first of them, I am of opinion that the bonds are not in themselves void, inasmuch as *non est factum*, which is the general issue in all actions upon bonds, cannot be pleaded by the obliger; but they are voidable as to such part of the condition of them, by which they are obliged to apply the monies lying in their hands, to uses directed by an act of assembly that is not in force, and, therefore, the money cannot be applied accordingly.

(2.) As to the second, I think that the conditions are satisfied by the commissioners accounting to the assembly.

(3.) As to the third, I am of opinion, that the money, resting in the commissioners' hands, is to be considered as public money, and (like the surplus, unappropriated,

of a fund in England) is subject to the furture disposition of the general assembly.

(4.) As to the fourth, I am likewise of opinion, that since the act by which the commissioners were appointed is repealed, that the Governor may direct the commissioners to pay all such sums of money as they might have received by virtue of the said acts before it was known that the royal assent was refused, into the public treasury; but here I would beg leave to observe to your Lordships, that if the act herewith returned to your Lordships' board, entitled "an act to oblige the several inhabitants of this island, &c." be confirmed, then this power of the Governor would be eluded; since, though the monies would be in the hands of the receiver-general, yet it would be in his capacity of commissioner, and not as receiver. But if it is not confirmed, the Governor may order the bonds to be cancelled, since the obligers have done all that they possibly could towards towards the peformance of the condition of them.

(5.) As to the last *quære*, I am of opinion, that the commissioners being appointed by acts which are now to be considered as none, and it being certain that this is public money, which, by law, is to be lodged in the public treasury, and not in private hands, therefore the commissioners are in the case of any common persons into whose hands public monies may chance to come without any particular right to receive the same, and may be prosecuted and sued in the common method of their exchequer, &c. for the recovery of the money in their hands.

Rich. West.

July 8, 1719.

(38.) *The report of the same lawyer on the Jamaica act of Assembly, for colonizing the island.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered an act of general assembly, passed in the island of Jamaica, entitled "an act to oblige the several inhabitants of this island to provide themselves with a sufficient number of white people, or pay certain sums of money in case they should be deficient, and applying the same to several uses." As to the general purview of which act, I have no objection to its being passed into law; but I must beg leave to observe to your Lordships, that by a clause contained therein, it is enacted "That all vessels trading in or about the island, which shall have blacks on board above the number of one-fourth part of the hands employed in the management of such vessels, shall be forfeited, with all its tackle." I submit it to your Lordships to determine whether these words are not too general, and whether they should not have been restrained to such vessels as are actually owned by the inhabitants of the island? I have been but very little conversant in matters of trade, but I have been informed that in the East India trade, the commanders of ships, by reason of a mortality among their sailors, are frequently obliged to man their ships with Indians, blacks, or such other men as they can get, to assist them in their voyage homeward.—Whether such accidents may not also happen in the West India trade, especially on board such ships as trade from the coast of Guinea, and transport blacks into that island, as may necessitate them to employ more blacks

than a fourth part of the number of their crew, I cannot say; however, as your Lordships are the proper judges whether the inhabitants of that island are of a disposition to take any advantage of this nature, I thought it proper to observe this particular, which, if not pertinent, I hope will be excused, that your Lordships may consider how far this clause may be proper to be passed.

There is also a clause in this act, by which the estates of all persons, not resident in the island, are higher taxed than those of persons who dwell upon the spot. I submit it to your Lordships how far this may be prejudicial to persons residing in Great Britain, and inconsistent with that equality which ought to be observed in the levying of public taxes.

I beg leave further to observe to your Lordships, that the general assembly, reflecting upon the reasons for which their other acts were repealed, have, indeed, so far complied with his Majesty's instructions as to make the monies to be collected by virtue of this act, payable into the hands of the person who is to be receiver-general of the island; but then with a view, doubtless, to continue their claim of nominating commissioners for the receipt of public money, they do not make the money payable to him in the capacity of receiver-general, but as your Lordships will observe, they appoint the person who is employed by the King as his receiver-general, to be their commissioner, for the receipt of this money: and consequently, not content with that obligation which every receiver-general is, *ex officio*, under, faithfully to account for the public money, they enact "that he shall give an additional security for his fidelity, by entering into bond, and taking a fresh oath for the faithful discharge of a distinct office, which they

judge proper to bestow upon him."

Your Lordships will permit me further to observe, that the assembly, anticipating any resolutions which may be thought proper to be taken upon those *quæries*, which your Lordships have been pleased to send to me concerning the monies collected by virtue of the repealed acts, have inserted into this act a clause to direct the payments of the monies remaing in the hands of the former commissioners, unto the present commissioner, the receiver-general, who is to account for that money in the same manner as he is for what he shall receive in consequence of this act.

I have also perused an act for the encouragement of voluntary parties, to suppress rebellions and run-away negroes, and observing only that the parish of Westmorland is excepted, I know not for what reason, from any benefits to be derived from that act, I have no objection to this being passed into a law.

RICH. WEST.

July 8, 1719.

(39.) *The opinion of the Attorney and Solicitor-General, Murray and Lloyd, on four acts of the Jamaica Assembly, which, after hearing parties, they deemed of such a nature, as the Governor ought not, according to his instructions, to have passed.*

To the Right Honorable the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' commands, signified to us by Mr. Pownall, in his letter of the 30th of October last, transmitting to us four acts lately passed in the island Jamaica; together with an address of the council and assembly to his Majesty thereupon, referred to

your Lordships by order of the Lords of the committee of council for plantation affairs, the 10th of September last; and likewise extracts of all such parts of his Majesty's commission and instructions to his Governor of Jamaica, as relate to passing of laws, all which papers are herewith returned: and as those acts appeared to your Lordships to be of great importance, and might greatly affect the welfare and interest of that island, and the rights and properties of his Majesty's subjects residing there, desiring our opinion upon them, in point of law, as soon as might be, the titles of which acts are as follows, viz: "an act for removing the several laws, records, books, papers, and writings, belonging to the several offices of secretary of this island, clerk of the supreme court of judicature, clerk of the crown, clerk of the patents and register in chancery, and provost-marshal, from the town of St. Jago de la Vega, to the town of Kingston; and to oblige the several officers to hold and keep their respective offices, with the respective records and papers, in the said town of Kingston; and also for holding the supreme court of judicature in the said town of Kingston for the future;" "an act to appoint commissioners to erect and build a house and offices in the town of Kingston, for the residence of the Governor of this island, and to empower the justices and vestry to assess and levy a tax upon the proprietors of houses and lands, inhabitants and traders in the said town;" "an act, appointing commissioners to inquire into, and state what losses some of the freeholders of messuages and tenements in the town of St. Jago de la Vega, and the lessees of such freeholders, may sustain in the value of their said freeholds or leased premises, by the removal of the supreme court of judicature, and of the public

records, from the said town to the town of Kingston ;". "an act to enlarge the jurisdiction of the several inferior courts of common pleas :" we have taken the said four acts into consideration, and have been attended by counsel for inhabitants, who desired to be heard in opposition to the said acts ; and also by Mr. Sharpe, as agent for the said island, and counsel in support thereof, and we are of opinion that they are of such a nature, as the Governor, by his instructions, ought not to have assented to, in the manner in which they are passed.

W. MURRAY.

Dec. 27, 1755. RICHD. LLOYD.

(40) *The opinion of the Attorney and Solicitor-General, Henley and Yorke, that circuit courts in Jamaica could not be established, in the proposed mode, but by the legislature of the island, or by an act of parliament.*

Case.—By laws heretofore passed in the island of Jamaica, and confirmed by the Crown (a reference to which laws is hereunto annexed), the masters of all ships and vessels are obliged, before they can trade or land any goods, to wait upon the Governor, and give security in the secretary's office at St. Jago de la Vega, not to carry any person off the island without the Governor's ticket, nor depart themselves without the Governor's leave ; and the receiver-general and naval officer are obliged to hold and keep their offices at Kingston.

It is represented by the merchants, and others, trading to and residing in the island of Jamaica, that the trade and commerce of that island is greatly obstructed, and merchants and masters of ships exposed to great risk and expense, from being obliged, by the above-mentioned laws, to wait upon the Governor at St. Jago de

la Vega, before they can unload their ships, and from masters of vessels taking in cargoes at the out-ports, being obliged to come to Kingston to clear out with the proper officers.

It is apprehended that the opening ports of entry and clearance of ships in different parts of the island, and directing the receiver-general, secretary, naval officer, and collector of the customs, to keep offices therein, will remedy these inconveniences and grievances complained of.

Quære.—What will be the legal and proper method of carrying such measure into execution, consistent with the above-mentioned laws of the island, and the acts of parliament passed for regulating the plantation trade, particularly those of the 15th and 25th of Charles II. chap. 7, and 7th and 8th of William III. chap. 22?

Upon the consideration of the several laws above-mentioned and referred to, we are of opinion, that his Majesty may open ports of entry and clearance of ships, in such different parts of the island as he thinks proper, and may direct the proper officers to attend for the business of such ports, and to take security there, which, we conceive, will remove the inconveniences and grievances complained of.

Case.—By laws heretofore passed in the island of Jamaica, and confirmed by the Crown (a reference to which laws is hereunto annexed,) the supreme court of judicature, and most of the offices of record, are directed to be held and kept at the town of St. Jago de la Vega.

It is represented by the merchants, and others, trading to and residing in the island of Jamaica, that the trade and commerce of that island is greatly obstructed,

and merchants and masters of ships exposed to great risk and expense, from being obliged, by the abovementioned laws, to attend the supreme court there, either as prosecutors in suits which they may have depending therein, or as jurors.

It is apprehended that the establishing of circuit courts in the several parishes and districts of the island, will remedy these inconveniences and grievances complained of.

Qære.—What will be the legal and proper method of carrying such measure into execution, and how far is the law passed in the island of Jamaica, on the 14th of December, 1751, entitled "an act appointing commissioners of *nisi prius*, and enlarging the jurisdiction of justices of the peace in matters of debt," a copy of which law is hereunto annexed, adapted to the remedy proposed? We are of opinion that circuit courts cannot be established in the manner proposed, but by an act of the legislature in Jamaica, or by the parliament of Great Britain; and we are also of opinion, that the act of the 14th of December, 1751, a copy of which (*inter alia*) was sent us, and is hereto annexed and returned, is not adapted to the intended purpose, but is very imperfect, undigested and defective: but to form a plan for such a law, the divisions of the intended counties must be settled by persons well acquainted with that island, as a necessary foundation to proceed upon.

ROBT. HENLEY.

May 18, 1757. C. YORKE.

(41.) *The opinion of the Attorney and Solicitor-General, Ryder and Murray, how far an act of Assembly ought to be repealed, which would endanger the rights*

of purchasers under it, when a long acquiescence has occurred.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships ;

In pursuance of your Lordships' desire, signified to us by Mr. Pownall's letter of the 25th of June last, inclosing the copy of an act passed in the island of Barbadoes in the year 1713, entitled "an act relating to the spring, or rivulet, called the Three Houses Spring, in the parish of St. Philips," which act your Lordships are pleased to desire opinion upon in point of law: we have taken the said act into consideration, and the agent of Mr. Braithwaite, desiring to be heard against the act, we have been attended by his counsel and agent, and also by the counsel and agent in support of it.

Upon hearing what was offered on both sides, we are of opinion that there appears no objection to the act in point of law; and, considering the long acquiescence under it, and the danger of repealing an act by which purchasers on the credit of it may be greatly affected, we think it may be advisable to put an end to any fears of that kind, by a confirmation.

D. RYDER.

July 25, 1753. W. MURRAY.

VII. Of the colonial judicatories and their proceedings: their jurisdictions emanate from the King, under the various modifications of the several acts of assembly.

(1.) *The several remarks of the Lord Chief Justice, Sir Thomas Parker, and Sir Peter King, on the draught of a letter from the Board of Trade to the Earl of Sun-*

derland, on the judicial proceedings in Bermudas.

My Lord;

In obedience to her Majesty's commands, signified to us by your Lordship's letter of the 8th of December last, upon a petition and remonstrance to her Majesty from the council, assembly, judges, justices of the peace, clergy, officers both civil and military, and other, the inhabitants of the Bermuda islands, praying that Mr. Jones may not be restored to his offices in the said islands, until the petitioners, by their agents, be heard to the articles formerly exhibited by the assembly of that island against the said Jones; and directing us to hear them accordingly: we have, accordingly, been attended by the petitioners' agent, and Mr. Jones, with their counsel; and have heard the petitioners' counsel to the said articles.

The proofs which they offered to several of the said articles, consisted* chiefly of presentments and indictments from the grand jury, at an assize held at Bermuda, against the said Jones; and of judgments of the courts upon the said indictments.

The counsel for the said Jones offered† to give reasons why those indictments and judgments ought not to be received as evidence against Jones. To which the counsel for the petitioners objected, alleging that‡ according to law, no averment against the record of a

Remarks of Sir Thomas Parker, Chief Justice.

*Were judgments and convictions, upon record, for the crimes in those articles charged? (The presentments are nothing; we rely on the convictions.)

†Notwithstanding, to prove by affidavits, the innocence of Jones in those particulars. (The judgments were read in evidence, and not objected to; but Jones' counsel, when they came upon the defence, went to contest the truth of the matter of them.)

‡These convictions, upon record, before a court having jurisdiction, ought not to

court that has the judicial cognizance of the case, ought to be admitted, whilst the said record remains in force; that Mr. Jones, if he found himself aggrieved, might have proceeded in the regular way, by writ of error, to have had the said judgments reversed; and till that was done, the said judgments ought to be received as full evidence. To which Mr. Jones' counsel replied* that he had several times applied to the Governor for a writ of error, but was denied it; and that if he was not allowed to invalidate the evidence upon which the aforesaid judgments were grounded, he had no way to clear himself from the crimes objected against him by those articles. The counsel on the other side† observed, that Jones having petitioned that a writ of error might

Remarks of Sir Thomas Parker, Chief Justice.

be averred against, but are conclusive proof of his guilt, they standing unreversed by writ of error, and unimpeached by any complaint against the manner of obtaining them.

*That as to the judgments not being reversed, the reason was, because the Governor refused him writs of error, which ought not to turn to his disadvantage; and to prove it, they produced a copy of his petition presented to the Governor, praying a writ of error, and proved the Governor refused it, upon presenting the petition, and upon several applications for the same purpose after. And as to the manner of obtaining the judgments, not being impeached, he was ready now by affidavits to shew one of them, which was by verdict to be obtained by great partiality and refusal to hear his evidence; and that was the reason he made no defence to the rest, urging likewise other matter.

†Observed, that the petition was not till May, 1706, about three months before Jones came away, and they owned the Governor had refused to grant the writ of error, prayed in Jones' petition to him, because they observed, he could not grant it; for the petition did not pray a writ of error, returnable before the Governor in council, where only a writ of error, in that island, lies; nor prayed a writ of error generally, but prayed a special writ of error, returnable in the assembly, urging reason in his petition, why such writ of error should be granted. And his applications to the Governor, after, were, by the affidavit produced by Jones, expressly proved to be for the same writ of error; that, therefore, this was no excuse for not reversing the judgments, but rather a fresh instance of his slighting the Governor and council there, whose judgment he thus endeavored to evade; writs of error, by the constitution, certainly. (This stated as if two distinct things were asked by the petitioner: First a writ of error; Second, a hearing before assembly.)

be granted him, and that the trial of his case might be heard before the general assembly, the Governor could not allow thereof, as being a matter appertaining to the cognizance of the Governor and council, and not of the assembly, who, alone, by the constitution, have not a power to reverse the judgments of inferior courts.

But* the counsel for Mr. Jones, on the other side, adhering to their opinion, we desire your Lordship will please to lay this matter before her Majesty, that we may know her Majesty's pleasure, whether we are to hear the said Jones' counsel against the said judgments, or whether they are to be accepted as good evidence against him concerning those articles; and in that case, whether her Majesty will not be pleased to direct that writs of error be granted him, to the end he may proceed in the regular way for endeavoring the reversal of the said judgments.

Whitehall, May 12, 1709. T. PARKER.

My Lord;

In obedience to her Majesty's commands, signified to us by your Lerdship's letter of the 8th of December last,

Remarks of Sir Thomas Parker, Chief Justice.

*That as to the pretences now started of partiality in the trial, they ought not to be taken notice of, because the agents for the island are not, nor could be, prepared to justify judicial proceedings, against which, to this day, there had never been any objections made. But, that if Mr. Jones had just cause of exception on that head it had been proper to have laid it before her Majesty, that there might have been an opportunity of giving an [illegible] which yet he has been so far from doing, that, though upon a petition by himself only, to her Majesty, he has exhibited near one hundred articles against the governor, judges, justices, and others in the island, some of them for matters of far less moment, and concerning proceedings against others, wherein himself was unconcerned, yet he has not one article that in the least touches upon these judgments, or the proceedings in order to them; and, therefore, ought not now to be admitted to set us these pretences, thus to invalidate the proceedings of the supreme ordinary court of justice in the island, and arraign the judges, who know nothing of the charge, nor have an opportunity of making a

upon a petition and remonstrance to her Majesty from the council, assembly, judges, justices of the peace, clergy, officers both civil and military, and other, the inhabtants of the Bermuda islands, praying that Mr. Jones may not be returned to his offices in the said islands, directing us to hear the petitioners by their agents, to the articles formerly exhibited by the assembly of that island against the said Jones: we have accordingly been attended by the petitioners' agents, and Mr. Jones, with their counsel, and have heard the petitioners' counsel to the said articles.

The proofs which they offered to several of the said articles consisted chiefly of presentments and indictments from the grand jury, at an assize held at Bermuda, against the said Jones, and of judgments of the courts upon the said indictments.

The counsel for the said Jones offered* to give reasons why those indictments and judgments ought not to be received as evidences against Jones. To which the counsel for the petitioners objected, alleging, that, according to law, no averment against the record of a court that has the judicial cognizance of the case, ought to be admitted whilst the said record remains in force;† that Mr. Jones, if he found himself aggrieved, might have proceeded in the regular way, by writ of error,

Remarks of Sir Peter King, Chief Justice.

defence. (We hope the board will not interpose in this, but go on now to hear the matter, and not assist Jones to obtain such a delay, especially not being a matter referred to the consideration of the board, nor (that we observed,) asked by Jones himself.)

*Offered to disprove by affidavits the truth and verity of the facts contained in the said indictments and judgments thereon.

†That the convictions and judgments on the indictments, whilst they remain unreversed, are conclusive proofs of the verity of the facts against the party so indicted and convicted.

to have had the said judgments reversed; and till that was done, the said judgments ought to be received as full evidence.* To which Mr. Jones' counsel replied, that he had several times applied to the Governor for a writ of error, but was denied it; and that if he was not allowed to invalidate the evidence upon which the aforesaid judgments were grounded, he had no way to clear himself from the crimes objected against him by those articles.

But the counsel on the other side observed, that Jones, having petitioned that a writ of error might be granted him,† and that the trial of his case might be heard before the general assembly, the Governor could not allow thereof, as being a matter appertaining to the cognizance of the Governor and council, and not of the assembly, who alone, by the constitution, have not a power to reverse the judgments of inferior courts. But the counsel on the other side adhering to their opinion, we desire your Lordships will please to lay this matter before her Majesty, that we may know her Majesty's pleasure, whether we are to hear the said Jones' counsel against the said judgments, or whether they are to be attested as good evidence against him concerning those articles; and in that case, whether her Majesty will not be pleased to direct‡ that writs of error be granted him, to the end he may proceed in the regular

Remarks of Sir Peter King, Chief Justice.

*Especially seeing, in this case, he never made any proper and legal step to get the said judgments reversed.

†That Jones never petitioned for a legal writ of error before the Governor and council, but before the Governor and assembly, which writ of error doth not, by the law or constitution of Bermudas, lie before them.

‡*Qære.*—Whether any occasion to pray this direction from her Majesty.

way for endeavoring the reversal of the said judgments.

Whitehall, May, 1709. P. KING.

(2.) *The opinion of the Attorney General, Northey, on the general policy of the colonial courts.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, by his letter dated the 2d day of November last, I have perused and considered of an act passed at Barbadoes, the 21st of March, 1709, entitled "an act to render more effectual certain legacies given and bequeathed by Captain Williams, deceased, to the parish of Christ Church, within this island," and am humbly of opinion, that the same is not fit to be confirmed by her Majesty, for that the occasion of passing the bill being to capacitate the churchwardens of the parish of Christ Church, in Barbadoes, to take an assignment of lands, which they could not take without the help of an act, not being a corporation, and for which purpose the act was reasonable, this act does enact that purchasers under the churchwardens, of the land so to be conveyed to them by the serj't of arms who had seized the lands by a decree of the court of chancery there, shall hold and enjoy the same against the heirs, executors, administrators, and assigns of Captain John Williams, who, by the act is stated to have devised a charity of £60 to that parish, and the churchwardens whereof had obtained a decree against Richard Williams, his administrator, with his will annexed, for payment of the same: on which decree, lands of inheritance of

the said John Williams had been seized, which I take to be unjust, for that it does not appear that the testator had charged his real estate with that legacy, and for that the heir of the testator was not made a party in that suit, and has a right to controvert that matter; and also for that the purchasers, under the churchwardens, are enacted to hold and enjoy, against the assigns of John Williams, deceased, which will make void the mortgages, conveyances, and settlements, made by the testator in his lifetime.

January 18, 1711. EDW. NORTHEY.

(3.) *The opinion of the Attorney and Solicitor General, Yorke and Wearg, on the establishment of a court of criminal jurisdiction in the Leeward Islands.*

William White, an inhabitant of the island of Spanish Town, which is one of the Leeward Islands, *kills one* Cary there; for which being apprehended by the Governor of that island, he, the said White, *petitioned the chief Governor of all the Leeward Islands (by whom all commissions of oyer and terminer, within that government, are issued) for a speedy trial in Spanish Town aforesaid*, or if that could not be, for want of proper officers in that island, that he might be sent for to St. Christopher's, and tried there.

Spanish Town is an island where no courts or officers are established for the administration of justice.

The chief Governor, therefore, caused the said White to be brought up to St. Christopher's, where he was examined before four of his Majesty's council there, and they thinking there was great cause to suspect that White was guilty of the said murder, the said chief Governor awarded a special commission of oyer and ter-

miner, for his trial in St. Christopher's, *and White has since been convicted of the murder of Cary, before those commissioners, by a jury of St. Christopher's,* and received sentence of death thereupon.

The statute, 33d Henry VIII. reciting that persons, upon vehement suspicion of treasons or murder, being many times sent for to divers shires of the realm, and other the Kings' Dominions, to be examined before the Kings council upon their offences, and also setting forth the charge of the Crown, and inconveniency of remanding such suspected persons after their examination, back to the places where their offences were committed, for trial, &c., enacts, that if any person being examined by the King's council, or three of them, upon any manner of treasons, misprisions of treasons, or murders, do confess any such offences, or that the said council, or three of them, upon such examination, shall think any persons so examined to be vehemently suspected of any treason, misprison of treason, or murder, that then, in every such case, by the King's commandment, his Majesty's commission of oyer and terminer, under his great seal, shall be made by the chancellor of England to such persons, and into such shires, as shall be named and appointed by the King, for the speedy trial, conviction, or deliverance, of such offenders; and that, in such case, no challenge for the shire or hundred shall be allowed: which statute, though it be repealed, by the 1st and 2d P. and M. as to treason; yet, it is apprehended, it is not as to murder.

Quære 1.—Does not this statute make such an alteration in the common law, and so enlarge the King's prerogative as to trials in murder, as well in his colonies as in his kingdom of England, that he may, if he thinks

fit, appoint any man (charged with that offence in any of his colonies, and examined as the act directs) to be tried in any place there, other than the place or island, where the offence was committed?

Quære 2.—If such power be in the King, can that power be executed by his Governor in St. Christopher's, who is expressly empowered by his Majesty's commission, to erect courts of justice, and issue commissions of oyer and terminer, within this government, as he shall think fit; and can a commission, in the King's name, under the seal of the Leeward Islands, and an examination before the King's council there, (who are actually nominated by the King, and by his instructions, called his council,) be taken to be such a commission and examination as is meant by, or comprehended within, the words or design of this act?

Quære 3.—If this commission, in this case, be not warranted by the statute, it is not, nevertheless, warranted by the King's prerogative in his colonies, and well supported by the powers *supra*, which his Majesty, by his commission, has given to the Governor of St. Christopher's, and, upon the whole matter, is the trial and conviction of White legal or not?

To quære 1.—We are of opinion, that the statute of 33 Henry VIII. cap. 23. does not extend to the plantations, and that there is no foundation from that act of parliament, to grant special commissions of oyer and terminer, for trial of offences arising out of the colony within which such commission is granted.

To quære 2.—This question depends upon the former, and is answered under that.

To quære 3.—The legality of the commission upon which White was tried, will de[illegible]d upon the constitu-

tion of the government of the Leeward Islands, and the jurisdiction of the courts of judicature in St. Christopher's, which is not sufficiently stated, so as to enable us to give [illegible] certain opinion thereupon. If the island of Spani[illegible]wn is dependent, as to its government, on St. Christopher's, and crimes committed in the former can be, and have usually been, tried by commissioners of oyer and terminer in the latter, then we conceive this commission was well warranted, and the trial and conviction were legal, in case there be no other objection against them; but if crimes committed in Spanish Town cannot, by the laws of that government, be so tried in St. Christopher's, then this commission, and the proceedings thereupon, were against law; and there being no settled courts of justice in Spanish Town, we apprehend the safest method of bringing White to Justice is to send him over into England to be examined before the privy council, according to the statute 33d Henry VIII. whereupon a special commission of oyer and terminer may be issued under the great seal of Great Britain, for trying him pursuant to the directions of that act; but as that may be attended with great trouble, if the Governor has authority by his commission and instructions to erect courts, and constitute officers of justice in Spanish Town, and there are sufficient inhabitants within that island, qualified to serve upon the grand and petty jury; then, we apprehend, the Governor may grant a commission of oyer and terminer, and appoint proper officers for summoning juries, and other purposes, in order to the trying of the prisoner within Spanish Town.

P. Yorke.

December, 18, 1725. C. Wearg.

(4.) *The opinion of the Attorney General Murray, on the jurisdiction of the Jamaica courts.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships.

In pursuance of your Lordships' desire, signified to me by a letter from Mr. Pownall, bearing date the 23d of May last, inclosing a letter from Mr. Knowles, Governor of Jamaica, acquainting your Lordships that Mr. Morse, one of the assistant judges there, had held a court of nisi prius, in the parish of Westmorland, by his own authority; together with the copy of an act passed in the island of Jamaica, in December, 1751, intitled "an act, appointing commissioners of nisi prius, and enlarging the jurisdiction of justices of the peace in matters of debt," and desiring my opinion whether Mr. Morse had any power to hold a court of nisi prius, and to hear and determine causes therein, without a commission from his Majesty; if not, what punishments is he liable to, and what will be the proper method of proceeding against: And also by his letter of the 21st instant, inclosing another letter from Mr. Knowles, Governor of Jamaica, acquainting your Lordships that he had ordered the Attorney General of the island to prosecute Mr. Morse for having held a court of *nisi prius*, without his Majesty's commission, and inclosing a copy of the proceedings of the court thereupon, and to acquaint me, that as this affair has occasioned much heat and disturbance in the island, and your Lordships are preparing to write to Mr. Knowles thereupon, your Lordships beg the favour of my opinion upon the case, stated in his former letter upon this subject, as

soon as I conveniently can; all which papers are herewith returned. I have taken the matter into consideration, and am of opinion, that Mr. Morse had no authority, by the words or meaning of the said act passed in Jamaica, to hold a court of nisi prius, and to hear and determine causes therein, without a commission from his Majesty. The said act expressly says, any of the justices of the supreme court of judicature are to be appointed by a commission under the broad seal.

It refers their jurisdiction to that of justices of assize and nisi prius in England, under the 13th of Edward I. and other laws. Now, justices of assize and nisi prius, in England, derive their authority from the King's commission, and never act without.

In that part of the act which gives power to enter up judgments by defaults, the actions are described to be such as are triable in the country, *upon the commissions hereinbefore mentioned.*

The power given by the said act is plainly copied from the case of justices of *nisi prius* in England, who act by commission, and has no relation to that authority which is given to the two chief justices and chief baron, by an act passed the 18th of Elizabeth.

If Mr. Morse acted ignorantly, and from a misapprehension and misconstruction of the act, I think he is not liable to a criminal prosecution, for a bare error of judgment in respect to his jurisdiction.

If he acted seditiously, in contempt of the King's authority, and in defiance of law, I think he was, and is, liable to be prosecuted by information, as for a misdemeanor; but in every light, I apprehend the court has done wrong in refusing to issue process upon the information, filed by the attorney-general, and taking upon them-

selves, as it were *exofficio*, to judge of the information, and to quash it, not for any irregularity, but upon the merits.

June 24, 1754. W. MURRAY.

(5) *The opinion of the Attorney and Solicitor, Ryder and Murray, on the jurisdiction of the Bermuda courts.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us by Mr. Hill, in his letter of the 8th of December last, inclosing letters and papers received from William Poppel Esq., his Majesty,s Governor of the Bermuda Islands, (which are herewith returned,) and desiring out opinion upon the cases therein stated: with respect to the case stated by the chief and assistant judge of the King's bench, in the Bermuda Islands, we have taku it into consideration, with the several *quæries* subjoined.

As to the first *quære*, we are of opinion, that the judges of the King's bench had full power to issue their precept to the freeholders, and compel them to execute it in the case put, of a justice of peace resigning, notwithstanding that particular instance is not mentioned in the enumeration, the plain intent of the act, in that part of it which is referred to, being to supply the want of a justice of peace where that might happen, from whatsoever cause that want might arise; nor are the words incapable of that precise construction, the word inability of any justice of peace being equally applicable, even in a proper sense, to the case of a justice who disables himself by resignation, as to that of one disabled by any other means.

As to the second and third *quæries*, we are of opinion

that the freeholders to whom the precept was directed, were guilty of a contempt of the court in disobeying it and may be punished in a summary way by order or rule of court, with fine and imprisonment. Though this method is proper to be taken to support the authority of the court, yet we think the court might have proceeded to hear the causes, and impannel juries, out of such as were returned, according to the act, and, therefore, were under no necessity of creating that delay to the suitors, which must have arose from the adjournment till this point on the construction of the act could be settled. We mention this in order to prevent the ill consequence for the future of such delays, in case, by any accident, due returns should not be made of jurors hereafter, which, we think, should not stop the course of justice, in case there are, on the whole, jurors sufficient for the business of the court.

With respect to the case and *quæries*, stated by Governor Popple, in his letter of the 8th of July, 1749. There are four *quæries* which he makes: to the two first, we are of opinion, that both the whole acts in the times of Governor Pitt and the present Governor's brother, are determined, and each ceased or expired on the determination of the goverment of the respective Governors in whose times those laws were made; to the third and fourth *quæries*, we think as the country had the benefit of the free enjoyment of the fishery, they ought, during the years of that enjoyment, to make good the one hundred pounds sterling a year to Governor Popple. The method of relief is by his Majesty's recommending it to their assembly.

D. Ryder.

April 13, 1750, W. Murray

(6.) *Mr. Lamb's opinion on the courts of South Carolina.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In pursuance of your Lordships' commands, signified to me by Mr. Hill 's letter of the 17th of October, 1747, I have perused and considered the following act, passed in South Crrolina in June, 1747, intitled " an act to empower two justices and three freeholders, or a majority of them, to determine in all actions of debt, where the matter in dispute doth not exceed twenty pounds current money, which is now equal to four pounds proclamation money and is not more then seventy-five pounds current money which is equal to fifteen pounds proclamation money."

Since this act has been under my consideration, I have been attended by the provost-marshal of this province, on behalf of himself and other patent officers there who have petitioned against the passing this act, and I have heard their several objections thereto, and also have heard the agent of the said province in support of the said act, and shall here represent to your Lordships in what light this act appears to me. I find that in the year 1692, an act passed in this province, intitled " an act for the trial of small and mean causes, wherein one or more justices of the peace were empowered to determine actions not exceeding forty shillings current money, which was to continue for two years." This act was afterwards revived, from time to time, and in 1712 was, by an act, made perpetual; and in 1721, an act passed wherein one justice of the peace was empowered to determine actions not exceeding ten pounds current money, or forty shillings. This act was repealed in 1726, and an act then

passed, wherein one justice of the peace was empowered to determine actions not exceeding twenty pounds current money: and there are fees appointed in these acts for the justices and other officers, for the execution of the same. Thus these acts stood till June, 1747, when the act now under reference to me passed; and I find this act to be, in many respects, different from the former acts, and that there are many good and proper clauses inserted, supposing that the foundation of the act was proper; but it must first be considered, whether the same reason will hold for so summary a way of determining actions not exceeding twenty pounds currency, as the law stood before, as for so large a sum as seventy-five pounds currency, which has been represented to me to be equal to tweleve pounds sterling, which is a large sum in that country, and the greatest part of the actions are within that sum. At present, the King's court of common pleas, by juries' determine these actions as they do here; but by this act, actions within that sum will not be cognizable there, but only before two justices and three freeholders, or the majority of them. This is, undoubtedly, a great power invested in such a judicature, and more so, when by this act one justice is empowered to make the whole court, by summoning any other justice and any three freeholders he thinks proper; and this would be further liable to the greatest objection, was there not, by this act, liberty to appeal from any judgment to the court of common pleas. This kind of judicature originally arose, I imagine, from the court of conscience in the city of London, which was at first confined to forty shillings, and now continues the same; but this has been as appears before, increasing from time to time, and was, as I am informed, attempted to be carried much higher

than by this act. At present, the execution of all process upon these actions, is by the provost marshal or his deputy, who is an officer by patent from the Crown, and gives security, and acts in the same capacity as sheriffs do here; but by this act, that part is thrown into the hands of the constable, who is to levy all money upon executions, and to pay it over to the justice of the peace, who is to pay it to the plaintiff. This appears to me to be liable to objections, on account of the sufficiency of the persons in whose hands the money is to come upon these actions, who give no security, and the difficulty of recovering the same from them; and I beg leave to observe, that there are no exceptions of debts due to the Crown within the compass of this sum, which must also be levied by the constable, and not by the King's officers. There have been many objections laid before me, as to the impracticability of executing this act, and the hardships of the present patent officers, who will be deprived of their profit by the business from which their fees arise being diverted to another channel; but to that it has been, and I think, may be, answered, that their fees are not by this act given to any other persons, nor are they lessened, and if it be necessary for the public good that such a judicature as is intended by this act should be erected, that private advantages of the officers ought not to interfere. I shall omit the many things that have been suggested to me for or against this act, as I think the two points upon which this act is to be determined are before mentioned, and am of opinion, that what is alleged in the preamble of this act (which is the same as was in the first act of 1692, for forty shillings currency) should be fully proved before the same should pass into a law, whereby the trial of such actions in the

King's court of common pleas, by juries, are taken away, and put into such a petty court of judicature; and that the officer under such court, to executed the process, should be of sufficiency to answer to the King, as well as the subject, for his behavior. This act took place immediately from the passing, and is to continue five years, and there is no clause suspending the execution thereof till approved pursuant to the Governor's instructions.

Lincoln's Inn, Jan. 30, 1747. MAT. LAMB.

(7) *On the court of chancery, in Barbadoes, by the Attorney General, Northey.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the annexed petition of Mr. Thomas Maycock, and have heard him, and also the agents for the island of Barbadoes who desired to be heard concerning the same, and who allege, that without time be allowed them to send to the island of Barbadoes, for authentic accounts of the proceedings of the court of chancery, complained of by the petition, they cannot give any answer to those complaints, and Mr. Maycock hath produced to me the affidavits hereunto annexed, to prove the matters suggested in his petition; on perusal of which, and the petition, it seems to me the petitioner hath been hardly dealt with if what is sworn be true; for by the course of courts of equity in England, if the defendant, being served with process to appear, is in contempt for not appearing, and the processes of contempt have been carried to a sequestration, the defendant appearing by

his attorney, and paying the costs the plaintiff hath been at in prosecuting on such contempt, the sequestration and all other process founded on such contempt is to be set aside, and the defendant hath right, if absent at distance from the place where the court is holden, to have a commission to take his answer. In this case, it appears by the petition and affidavits, that the attornies of the defendant did desire to appear for him, and the affidavit is that the costs were offered to be paid, but the attornies prayed to be made parties to the suit, which could not be; for if so, the plaintiff would have been deprived of the discovery he had a right to have from the defendant by his oath, but they should have appeared for him, and prayed a commission to take his answer, which I do not observe was done; yet it is alleged by the petitioner, that the prayer to have the attornies made parties is according to the constant practice of the islands, where the parties themselves are absent. But the defendant ought to have been admitted to appear by attorney, and was not bound to appear in person, as it is sworn was insisted on. This, however, is but the fact as it is stated by one side, the other not having had opportunity to be heard, and, for that reason, I am of opinion her Majesty will not be advised to make any such order for the petitioner's relief as is prayed by the petition; besides, it is not usual for her Majesty to interpose in causes between party and party, depending in her Majesty's courts of justice, by giving directions in what manner the judges of such courts shall proceed therein nor will it be proper, for that when there shall be an appeal from the final decree in such causes, the same, and all the proceedings therein, are to be laid before her Majesty for her royal determination thereon :

yet on the hard circumstances of the petitioner's case, appearing by the annexed affidavits, and for that it hath been admitted by the agents for the island of Barbadoes, that the manner of proceeding in this case is new, and what hath not been often, if at all, used in that island, I submit it to your Lordships' consideration, whether a copy of the petition may not properly be transmitted to the Governor of that island, with an account of the course of proceeding of courts of equity in England in case of contempts, and how the same have been here discharged, directing the Governor to see that justice be done the petitioner if it hath been denied him hitherto.

December 6, 1705. EDW. NORTHEY.

(8.) *The opinion of Mr. Jackson, on the power of the Governors, as Chancellors, over idiots.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In humble obedience to your Lordships' commands, signified to me by Mr. Pownall, by his letter of the 10th of December last, I have prepared the draught of a clause, giving to the Governors of the plantations, as chancellors, the necessary power to issue commission for the care and custody of idiots and lunatics, agreeably to the usage and practice of this kingdom.

And whereas it belongeth to us, in right of our royal prerogative, to have the custody of idiots and their estates, and to take the profits thereof to our own use, finding them necessaries, and also to provide for the custody of lunatics and their estates, without taking the profits thereof to our own use: and whereas while such idiots and lunatics, and their estates, remain under our immediate care, great trouble and charges may arise to

such as shall have occasion to resort unto us for directions respecting such idiots and lunatics and their estates, and considering that writs of enquiry of idiots and lunatics are to issue out of our several courts of chancery as well in our provinces in America, as within th , our kingdom respectively, and the inquisitions thereupon taken are returnable in those courts, we have thought fit to intrust you with the care and commitment of the custody of the said idiots and lunatics and their estates; and we do by these presents give and grant unto you full power and authority, without expecting any farther special warrant from us from time to time, to give order and warrant for the preparing of grants of the custodies of such idiots and lunatics and their estates, as are, or sh ll be, found by inquisitions thereof, taken or to be taken, and returnable into our cou . of chancery; and thereupon to make and pass grants and commitments under our great seal of our province of,—— of the custodies of all and every such idiots and lunatics, and their estates, to such person or persons, suitors in that behalf, as according to the rules of law, and the use and practice in the like cases, you shall judge meet for that trust; the said grants and commitment to be made in such manner and form, or as nearly as may be, as hath been heretofore used and accustomed, making the same under the great seal of Great Britain, and to contain such apt and convenient covenan' provisions, and agreements, on the part of the committees and grantees to be performed, and such security to be by them given, as shall be requisite and needful.

15th July, 1772. RD. JACKSON.

(9.) *A second opinion of the same lawyer, on the same subject, in a letter to the Secretary of the Board.*

Dear Sir:

This accompanies the draught of a clause to be inserted in the commissions of Governors in the plantations, respecting lunatics, &c. It is very nearly the same as the warrant under which the chancellors of Great Britain act; which I thought advisable (having at first framed it in words more different,) because the care and custody of lunatics, &c. under a known instrument (many years acted under in this kingdom) is more likely to be *agreeably to the usage and practice of the realm*, than under any set of words newly devised. The alterations I have therefore made, are only to suit the clause to that in which the two countries differ.

The warrant of the King to the chancellor assigns his custody of the great seal as the reason why the authority is delegated to him; that reason is preserved in the draught I send you, and so far the commission containing such a clause will give the power to the governor as chancellor (or as president of the court of chancery in colonies where he is so) but it cannot be more incorporated into the office of chancellor, as I conceive, because neither the warrant in England, nor the commission in the colonies does or should confer a judicial authority; that, the chancellor had before, in matters of equity, and the courts of law, in matters of common law, in the case of lunatics and their estates, as well as in the case of all others. The warrant in England, therefore, I think, only gives powers of *administration and management*, and for that purpose puts the chancellor in the place of the King. If a question in law or equity arises, that question can only be decided by bill or action, unless it be a question between the lunatic and his committee, which the lunatic himself

could have decided, had he enjoyed the use of his senses. These too should be the bounds of the Governor's power; and I have, therefore, chosen the expression of an instrument, the force and effect of which have been long understood.

15th July. RICH. JACKSON.

(10.) *The opinion of the Attorney and Solicitor, Ryder and Strange, on the erecting of a court of exchequer in the colonies.*

Quære 1. Whether the Crown has by the prerogative a power to erect a court of exchequer in South Carolina; and in what manner such court should be erected? We are of opinion, that the Crown has, by the prerogative, power to erect a court of exchequer in South Carolina, which may be done by letters patent under the seal of the province, by virtue of his Majesty's commission to the Governor for that purpose.

2. What powers a court so established will have? whether they will extend as far as the court of exchequer in England; and whether the proceedings therein should be the same as in England? We are of opinion that his Majesty may erect a court of exchequer in South Carolina, with the same powers as the court of exchequer here has: we think the proceedings in such new erected court should be agreeably, as near as may be, to the practice here.

3. Whether the Governor, by his commission or instructions, be sufficiently empowered to appoint a chief baron; and in what manner such chief baron should be appointed? We think the general power of erecting courts of justice, as given by the commission to Mr. Horsey, would be sufficient to authorize him to appoint

a chief baron; but as by the 39th instruction the Crown seems to reserve to itself the consideration, whether a standing court of exchequer should be erected or not, and as doubts have arose in the province touching the authority of the present chief baron, we conceive it is not advisable to rest the authority of erecting such court and appointing the chief baron on the present commission and instructions. but yet it would be more proper (if his Majesty shall be so pleased,) by a special commission to his governor, to authorize the establishment of such a court and the constitution of the chief baron and other officers of it.

12*th June*, 1738.

J. STRANGE.
D. RYDER.

(11.) *The Attorney General Northey's opinion, on an act of the Barbadoes Assembly to dock the entail of an estate.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships.

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the enclosed act, passed in Barbadoes, intitled "an act to dock the entail of Mount Lucie plantation, and other, the estate in this island of John Lucie Blackman Esq. and to vest the same in the said John Lucie Blackman, in fee simple," which act hath lain with me since the 16th of February last, because I could not procure a sight of the wills therein mentioned, but having now seen and perused the same, I have no objection against the said act, but am of opinion that the same is just and reasonable, and fit to be approved of by his Majesty, especially for that

by the laws of Barbadoes, a deed registered in that plantation (where common recoveries are not suffered) will be as effectual a bar as an act of assembly, but Mr. Blackman, living here, hath been advised that an act of assembly will give most satisfaction to a purchaser.

7th October, 1715. EWD. NORTHEY.

(12.) *The opinin of the Solicitor General Thomson, on the same subject.*

Sir:

In obedience to the commands of the Lords Commissioners of Trade and Plantations, signified by yours of the 4th instant, I have considered the act to dock the entail of certain lands in the parish of Chrish Church, in Barbadoes, and of several negroes thereon, and of land in the town of St. Michael, and to vest the land and negroes in Christchurch, in Alice Tickle, spinster, and the land in the town of St. Michael, in Francis Jemmott, his heirs and assigns for ever; and I am humbly of opinion that the act is very proper, and is only to supply the place of fines and recoveries, by which, according to the law of England, these parties in whom the fee simple of these estates are now vested, might, if the estates were in England, have effectually settled it, as by this act, and barred all remainders; so I cannot think there is any objection to the passing this act.

26th September, 1717. WM. THOMSON.

(13.) *The opinion of the Attorney General Northey, on the same subject.*

To the Right Honarable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of an act passed at Barbadoes, intitled "an act to dock the entail limited on a certain plantation situate in the parishes of St. Peters and St. Andrews, in this island, and to enable George Nicholas Esq., and Susannah his wife, to mortgage or sell the same, with the negroes thereto belonging;" and I do humbly certify your Lordships, that I have no objection against the said act being confirmed by his Majesty, the intent of the said act being only to bar an entail for the satisfaction of purchasers, which I am of opinion might have been done without the said act.

July 27th, 1717. EWD. NORTHEY.

(14.) *The opinion of the Solicitor General, J. F. Aland, on the same subject.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by letter from Mr. Popple, transmitting to me an act passed in Barbadoes the thirty-first of May, 1716, intitled "an act to dock the entail limited on a certain plantation situate in the parish of St. Michael, and to enable Thomas Somers Esq., to sell the same, with the negro slaves thereunto belonging," and requiring my opinion thereon, in point of law: I have considered of the said act, and am humbly of opinion, that the said Thomas Somers being seised of an estate tail, in the said plantation and negroes, with the reversion in fee expectant thereon, to himself, the passing of an act to dock

that entail, and to vest the estate in fee simple, to pay his debts, and to make provision for his family, is just and reasonable, and no more than what is done constantly in England, by fine and recovery; and acts of the like nature have been often passed in Barbadoes.

10*th October*, 1716. J. F. ALAND.

(15.) *The opinion of the Attorney and Solicitor General, Yorke and Talbot, that no fine levied, or recovery suffered, [in England], of lands lying in the plantations, can operate effectually, unless the same has been so authorized by acts of assembly in the colonies.*

We are of opinion, that no fine levied, or recovery suffered, here, of lands lying in any of the plantations, can bar the entail of such lands, unless the particular laws or acts of assembly of the plantation where the lands lie, have provided that fines or recoveries, levied or suffered in England, of lands there, shall have that effect; and in that case, the force of such fines or recoveries, depends upon such particular laws or acts of assemblies, and must be regulated by them.

15*th Dec.* 1730. P. YORKE.
C. TALBOT.

(16.) *The opinion of the Attorney General Northey, on the right of appeal from the colonial courts.*

Sir;

By order of the Lords Commissioners for Trade and Plantations, I send you the enclosed extract of a letter from Mr. Lowther, Governor of Barbadoes, upon consideration whereof, their Lordships desire your opinion, as soon as may be, upon this following *quære*, viz:

Quære. Whether an appeal can, or ought to be brought,

from the Court of Exchequer in Barbadoes, to the governor and council there, as a court of chancery.

July 15th, 1713. WM. POPPLE.

I am of opinion the Governor, by virtue of his instructions, is to admit appeals as well from the court of exchequer as from other courts in the island of Barbadoes to the governor and council there, and this plainly was the intent of the governor's instructions, no appeal being directed to be allowed from any court to her Majesty, but from the court of chancery, which would have been provided for, to have been from the court of exchequer to her Majesty, if an appeal had not been intended to be first in the chancery.

16th February, 1713. EDW. NORTHEY.

(17) *The opinion of the same lawyer, on the same topics.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience of your Lordships' commands, signified to me by Mr. Popple, I have considered of the petition of William Cockburn Esq., whereby he represents to your Lordships that he, being appointed by the the Lord Archibald Hamilton, late Governor of Jamaica, to exercise the office of secretary and clerk of the enrolment there (Mr. Page, who was the deputy of Mr. Congreve, who had those offices by patent, voluntarily absenting himself from that island) did execute the same from the 9th of March, till the 6th of Aug..., 1716, when he was removed by Mr. Haywood, the succeeding Governor of the said plantation. And thereupon a bill

was brought against the petitioner by Mr. Beckford, who was appointed by the said Mr. Congreve to be his deputy, upon the death or absence of the said Mr. Page, and a decree was given against him in Jamaica for more money, as the profits of the said office, than he received during the time that he executed the same, without making any allowance to him for the execution of the said offices; against which decree the Governor cannot, by his instructions, allow an appeal, the demand being under the value of five hundred pounds sterling· humbly praying that his Majesty would be pleased, for the relief of the petioner, to give directions for re-hearing of his cause, and the doing therein what to justice shall appertain.

And I do most humbly certify your Lordships, that the petition is unadvisedly framed, for that his Majesty cannot, by law, give a direction to any court to rehear any cause depending therein, but rehearings are granted, or denied, by courts of equity, on petition of the parties grieved, to such court as shall be judged proper.

And as to the instructions given to the Governor mentioned in the petition, whereby he is restrained from allowing an appeal in any case under the value of £500 sterling, that does restrain the Governer only from granting of appeals under that value, notwithstanding which, it is in his Majesty's power, upon a petition, to allow an appeal in cases of any value where he shall think fit, and such appeals have been often allowed by his Majesty; but I think the reference to your Lordships in that matter is improper, for petitions for appeal from decrees given in the plantations, have been always refered to a committee of the council for hearing the

causes of the plantations, and on their report that it is proper to allow the appeal prayed for, his Majesty in council has usually allowed the same, and not in any other manner. I have perused the decree, and think the petitioner has great hardship therein; and that upon a proper application he may obtain an appeal in that cause.

Dec. 19*th*, 1717. EDW. NORTHEY.

(18.) *The opinion of the Attorney and Solicitor, Ryder and Murray, on the commission granted to De Lancy, the Chief Justice of New York.*

We think the Governor should not have granted this commission different from the usage; but as the power given by the commission is general, we apprehend the grant is good in point of law, and cannot be revoked without misbehaviour.

25*th July*, 1753. D. RYDER.
W. MURRAY.

(19.) *The opinion of the Attorney General, Yorke, in* 1728, *on the King's right to order a* nolle prosequi *to be entered on prosecutions, in Jamaica, for the penalty of an act of Assembly.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by letter from Mr. Popple, dated the 6th of August instant, referring to me the inclosed papers, (the titles whereof are contained in a schedule hereunto annexed), relating to an information exhibited by his Majesty's

Attorney General of Jamaica against Mr. Donovan, agent for the contractors for victualling the squadron in the West Indies, for the duties of a quantity of rum, brought from Barbadoes, and delivered on board one of his Majesty's ships at Port Royal for the use of said squadron; and desiring my opinion, whether his Majesty may lawfully grant Mr. Donovan a *nolle prosequi*, as the law stands upon which the information against him was filed.

I have considered the said papers, and another paper laid before me by Mr. Sharpe, agent for the said Mr. Donovan, and affirmed by him to be a true copy of the said information, and also an act of assembly, passed in Jamaica on the 13th of November, 1724, intitled "an act for granting an additional revenue to his Majesty, his heirs, and successors, for the better support of the government of this island," which is the law whereupon the said information is founded; and several clauses of the said act, having reference to the revenue act, passed in the said island in the year 17[illegible]3, now expired. I have likewise considered that revenue act, and beg leave in the first place, to inform your Lordships that no proof has been laid before me of the facts contained in the said papers; and, therefore, the opinion I shall offer to your Lordships proceeds only from a supposition that those facts are represented in a true light.

Upon this foundation, I conceive, that the prosecution against Mr. Donovan, being for the duty charged by the act of assembly of 1724, upon rum, and not for any penalty thereby inflicted, none of the clauses, inserted in either of the said acts, for excluding the power of the crown to grant *nolle prosequis* in the cases of penalties, do extend to this case; and, although the said duty is

appropriated towards the support of the government of the said island, yet I apprehend his Majesty may properly judge, upon circumstances laid before him, how far it is reasonable to permit his officer to carry on a prosecution in his Majesty's name, for the recovery of the said duty in a particular instance: wherefore, I am of opinion, that as the circumstances of this case are represented in the inclosed papers, his Majesty may lawfully order his attorney-general for the island of Jamacia, to stay proceedings upon the said information, and to enter a *nolle prosequi* to the same, if such shall be his royal pleasure.

Aug. 30, 1728. P. YORKE.

(20.) *Mr. Fane's opinion on an act of the New York Assembly, for preventing prosecutions by information, as inconsistent with the Kings prerogative.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter of the first of May last, I have perused and considered an act passed at New York, in the year 1727, intitled "an act for preventing prosecution by informations." The act recites, that many of his Majesty's subjects have been lately prosecuted in the respective counties, and in the supreme court of this colony, upon information filed against them by the attorney-general and his deputies; though the matters charged against them have been generally trivial and inconsiderable: therefore, it is enacted that all informations filed by his Majesty's attorney-general of this col-

ony, now depending in the respective courts of this colony, shall be quashed; and the respective judges, and justices of the several courts in this colony, where such informations are filed, shall not allow or admit any process or proceedings whatsoever thereon, after the publication of this act; and all such process and proceedings, are then to cease, determine, and become void, and be dismissed the said court, or courts, accordingly: and it is enacted, that from and after the publication of this act, no person or persons whatsoever, shall be troubled, vexed, or disturbed in his, or their, liberty or estate, by the King's attorney-general for the time being, or by his deputy, or deputies, or any other person or persons whatsoever, upon pretence of any misdemeanour committed, otherwise than by presentment of a grand jury, or by information by an order from the Governor for the time being, signed in council, for such prosecution; and the party, or parties, so presented, shall be brought to trial the second court after such information filed, or be discharged the court without paying of any fees, any law, usage, or custom to the contrary notwithstanding, provided that, of the actions already commenced upon informations, as aforesaid, such of them may be brought on again, as the Governor for the time being, by an express order, signed in council within one month after the publication of this act, shall order and direct; provided also, that, as well the prosecutions to be made on such orders, as on any other such order or orders, to be signed in manner as aforesaid, shall be triable in the respective counties, only, where the matters of fact did arise, or was committed. And it is further enacted, that any person, or persons, prosecuted by information, and brought to trial, the second court, as aforesaid, and acquitted by the

verdict of twelve men, shall be discharged the court, without paying any fees, excepting to such person, or persons, as he, she, or they, shall employ in their necessary defence. It is further enacted, that, if the attorney-general for the time being, his deputy, or deputies, or any other person, shall prosecute any person, or persons, contrary to the true intent and meaning of this act, excepting on such penal statutes as include the plantations, or where it is otherwise provided for by acts of the general assembly of this colony, shall forfeit £100 current money of the same colony for every such offence, to be recovered by action of debt in any court of this province, the one half to the person, or persons, who shall prosecute the same to effect, and the other half to his Majesty, his heirs, and successors.

I think this act a very violent, and extraordinary, attack upon the prerogative of the Crown; for the right the attorney-general has to file informations, is delegated to him from the King; and has been ever thought a most essential and necessary power, with regard to the security of the public tranquility, as well as for the service and protection of his Majesty's revenue; and, I apprehend, the destroying that power in the manner it is attempted by this act, will be attended with very ill consequences; for if no delinquent is to be prosecuted without going through so solemn an inquiry whether it be expedient or not, I believe it will be an encouragement to wicked men to perpetrate the worst of villanies, in hopes, by justice being delayed, which it must necessarily be in this form of proceeding, they may escape that punishment they justly deserve; and which, in policy, ought to be as speedy as possible. Another reason against the passing this act, and which I beg

leave to submit to your Lordships' consideration, is, that all prosecutions now depending are by this act entirely quashed and discharged. What consequence this may have to the public peace in the colony, I cannot tell; but surely many inconveniences will arise by discharging these prosecutions, which I must suppose just, and not trivial and inconsiderable, since they have been carried on by the attorney-general, against whom there is no complaint; which, with submission, supposing there was any ground for the accusation, would be the most proper and decent way of proceeding, rather than to attempt the restraining the prerogative of the Crown, in so material a part of it.

The imposing a fine upon the attorney-general, if he does not pursue the directions of this act, is, I apprehend, an unprecedented step, and a high reflection upon the honour of the Crown; for can it be supposed his Majesty will appoint an attorney-general, who is so unwilling to do his duty, that he must, by the fear and dread of punishment, be forced to put those laws in execution, which he ought strictly by his employment to be supposed, not only to observe himself, but to see a due and strict observance of by others? For these reasons, I am humbly of opinion this act ought to be repealed.

June 5, 1728. FRAN. FANE.

(21.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the same subject.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships commands, signified

to us by Mr. Popple, referring to us an act passed at New York in 1727, entitled, "an act for preventing prosecutions by informations," and directing us to give our opinion in point of law thereupon; we have considered the said act, and also the memorial of his Majesty's attorney-general of New York, hereunto annexed; and are of opinion, that the said act is a high encroachment upon his Majesty's undoubted prerogative of proceeding by way of information, and of dangerous consequence, and therefore not fit to be approved.

August 13, 1728. P. YORKE.
C. TALBOT.

(22.) *The opinion of the Attorney-General Northey, concerning the proceedings in the courts of New York, on an escheat, and an appeal therefrom.*

As to these proceedings depending on the writ of escheat, on the death of Joseph Baker, which now stands on a demurrer, and not determined; I am of opinion that depends on his will, for if he hath sufficiently described the devisees, so as they may be known, they shall take thereby, and prevent the escheat of his houses to the Crown. The pleading of Howard to the *scire facias* is certainly ill, but that will not hurt the devisees, when they contend their title. If the judgment that shall be given be not liked, error on it will lie before the governor and council; and from him, before her Majesty in council.

July 30, 1713. EDW. NORTHEY.

(23.) *The opinion of the Attorney-General Northey, on the evidence of free negroes.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the enclosed act, passed at Jamaica the 10th day of November last, entitled "an act to prevent negroes being evidence, against Dorothy, the wife, and John, Thomas, and Francis, sons of John Williams, a free negro," whereby, reciting a former act of the like nature, made in favor of the said John Williams, the father, and that the said John Williams had educated his said sons in the protestant religion, and had given them suitable education, and that he had obtained by his labor and industry, a competency for his said wife and three sons; which, with their lives, might after be subject to the evidence of negroes, and other infidels, it was enacted that no negro, Indian, or mulatto, should thereafter be allowed, or received to give evidence against his said wife and children, in any suit or suits in any court whatsoever, or before any magistrate in that island, but that they should be tried by a jury of twelve men, as other subjects of Great Britain are tried there; and I do most humbly certify your Lordships, that by the annexed affidavit of Francis Oldfield, it does appear that the said John Williams, his wife and children, have all been baptised in the christian faith, and do all profess the protestant religion, and that by reason of the fidelity and integrity of the said John Williams the father, he obtained his freedom several years ago, and his said wife and children are also free from slavery, and that the reason of making this law is, for that by a law of Jamaica, entitled "an act for the better order and government of slaves," the evidence of one slave against another, that is or has been a slave, is admitted to be good and sufficient proof;

and such slaves, or persons that have been slaves, are to be tried by three freeholders, before two justices of the peace, and such slaves are not admitted to be evidence against any other: and I have no objection against this law, for that it is reasonable that a slave converted to the christian religion, being made free, should be admitted to the same privileges with other free men, and, that, therefore, this law is proper to be approved by his M esty.

April 16, 1717. EDW. NORTHEY.

Fifthly.—Of the Admiralty Jurisdiction.

(1.) *The opinion of the Attorney-General Northey in* 1702, *on the Admiralty Jurisdiction, in the Colonies.*

The board of trade, doubtful of the true jurisdiction of the admiralty, on the 14th of July, 1702, sent *quæries* to the attorney and advocate-general for their opinions; whether the courts of admiralty in the plantations, by virtue of the 7th and 8th of King William, or any other act, have there any further jurisdiction than is exercised in England? If the courts of admiralty in the plantations can take cognizance of questions which arise concerning the importation or exportation of any goods to or from them, or of frauds in ma ers of trade? And in case a vessel sail up any river w h prohibited goods, intended for the use of the inhab a whether the informer may choose in what court he will prosecute, in the courts of admiralty or of common law? *Prop. p.* 129.

Sir John Cooke, the advocate-general, pleaded for the jurisdiction of the admiralty, with that anxiety which the civilians have always shewn for the extension of their favorite jurisdiction.

As to the *quæries* relating to the admiralty courts in the plantations, sent to the advocate-general and myself by Mr. Popple, pursuant to your Lordships' commands, I have considered of the same; and as to the jurisdiction of the admiralty courts in England and the platantions, touching offences committed against the laws made relating to the plantations, which are enumerated in the beginning of the act made in the 7th and 8th of the late King William, mentioned in the *quæries*, I am of opinion, that for offences against the act of the 12th Car. II. ch. 18. for encouraging and increasing of shipping and navigation, by that act, the admiralty courts in the colonies have no jurisdiction; and the admiralty court in England, hath jurisdiction only where a ship is taken at sea for offending against that act, in which case the ship is to be condemned in the admiralty as a prize.

As for offences against the statute of the 15th Car. II. ch. 7. for the encouragement of trade, by that act no court of admiralty, either in England or the plantations, have any jurisdiction, the suits being to be in such courts, wherein no essoign, protection, or wager of law shall be allowed, which, by construction, are only the courts of law, where only essoigns, protection, or wager of law can be allowed.

The proceedings for offences against the statute 22-3 of Car. II. ch. 26. for regulating the plantation trade, by that act may be in the admiralty court in England, but not in the admiralty courts in the plantations.

The statute 7th William doth not give any jurisdiction to the admiralty court in England, for any offence in unlawful trading to or from the plantations, but suits on this act in England must be in the Queen's courts of record at Westminster; but proceedings may be in the ad-

miralty or other courts in the plantations, at the election of the informer, for importing or exporting to or from the plantations, in any ship but such as are described by that act, and manned as that act directs, which is, that the forfeiture may be sued for, in any court in the plantations generally, which includes the court of admiralty; and the rather, because the act expressly takes notice of the court of admiralty, as a fixed court in the plantations for other purposes; and I am of opinion as to the clause, fol. 502, that it doth not concern trading in unqualified ships, that being provided for by the former clause, but refer to the clause immediately preceding it, fol. 500, which enacts, that all ships coming into, or going out of, any of the plantations, and lading or unlading goods, and also their masters and ladings, shall be subject to the same entries, visitations, searches, penalties, and forfeitures, as to the entering, lading, or discharging their respective ships and ladings, as ships and their ladings, and the commanders of such ships, are subject and liable to, in this kingdom, by virtue of an act of parliament made in the 14th of Car. II.; and also subject to such other powers and authorities of the officers, for collecting and managing his Majesty's revenue, and inspecting the plantation trade, and liable to such pains and penalties, touching the importing and exporting goods into, and out of the plantations, as, by the same last recited act, are provided and inflicted, touching prohibited goods in this kingdom. By which clause I am of opinion, that that act gives the admiralty court in the plantations jurisdiction of all penalties and forfeitures for unlawful trading, either in defrauding the King in his customs, or importing into, or exporting out of, the plantations, prohibited goods, and of all frauds in

matters of trade, and offences against the acts of trade, committed in the plantations; and that in all the cases before-mentioned, except the trading in unqualified ships, not manned as directed by the act of the 7th William, suit can be only in the admiralty in the plantations; and for the excepted offences, suit may be in any court in the plantations, at the election of the informer.

Part of this *quære* will have a judicial determination in a case now depending in the Queen's bench, in an action of trover and conversion brought by——— against Colonel Quarry, the judge of the admiralty in Pennsylvania, who as such in that court, condemned an unregistered ship for trading there, which will acquit him in that action, if the prosecution may be in the admiralty court; but if that court hath not jurisdiction of the cause, the proceedings are *coram non judice*, and the plaintiff will recover against him as a wrong doer.

August 21, 1702. EDW. NORTHEY.

(2.) *The opinion of the same lawyer, on a similar subject, in* 1703.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered of the following acts, passed at the general assembly of Barbadoes, in August, September, October and November, 1702, viz: "an act to raise a levy for repairing the fortifications and breast-works," dated the 26th of August, 1702; "an act for fitting out of ships or vessels of war," dated the 27th of August, 1702; "an act that all persons,

both civil and military, in office, authority, and government, at the demise of the late King, shall continue until further order and settlement by a Governor, or her Majesty's pleasure be further known," dated the 27th of August, 1702; "an act for remittance of the duty of prize liquors," dated the 27th of August, 1702: "an act for purchasing a vessel of war, and fitting her out, and maintenance of prisoners," dated the 10th of September, 1702; "a supplemental act, to an act, entitled an act for purchasing a vessel of war, and fitting her out, and maintenance of prisoners;" as also, "a supplemental act, to an act, entitled an act for the fitting out of ships or vessels of war," dated the 14th of October, 1702; "an act for laying an imposition on wines, and other strong liquors, imported into this island," dated the 3d of November, 1702: which laws, I conceive, are agreeable to law, and do not contain any thing prejudicial to her Majesty's royal prerogative, except the act for fitting out ships or vessels of war, which gives the whole prize to privateers, as well such as should be set out by private persons there, as at the charge of the island, the perquisites of the admiralty not being saved; wherefore, I cannot think it fit to be approved, unless a law be first passed in that island to restrain the benefits thereby allowed to the captors to such privateers as shall be fitted out by the island, and for reserving the perquisites of the lord high admiral.

And as to the act, that all persons, both civil and military, in office, authority, and government, at the demise of the late King, shall continue, &c. it is unnecessary, provision being made for continuing of officers in the plantations on the demise of any King or Queen of this realm, by a statute made in the first year of her Majes-

ty's reign, entitled "an act for explaining a clause in an act made at the parliament begun and holden at Westminster, the 22d of November, in the 7th year of the reign of our sovereign lord King William III. entitled "an act for the better security of his Majesty's royal person and government."

And as to the act for remittance of the duty of prize liquors, if that encouragement be thought fit to be given to privateers in Barbadoes, which is not allowed them here in England, this law being perpetual, I am of opinio is fit to be continued only for a time, for her Majesty's further consideration.

October 22, 1703. EWD. NORTHEY.

(3.) *The opinion of the Advocate-General, Sir John Cooke, on the same jurisdiction.*

Ships trading contrary to the act of navigation (12 Car. II. c. 18.) are to be prosecuted, and the penalties arising thereon, to be recovered in any court of record: the words of the act are general, without a particular mention of England, or of the plantations, and include the admiralty courts of both places, they being the King's courts, and consequently courts of record.

Ships trading contrary to the act for encouragement of trade (15 Car. II. c. 7.) are to be prosecuted, and the penalties arising thereon, to be recovered in any of his Majesty's courts in the plantations, or in any court of record in England, and it is certain that the admiralty court is the King's court, and was so allowed to be by all the judges under their hands, anno 1632. In the eleventh paragraph of the statute, for preventing planting tobacco in England, and for regulating the plantation trade (22 and 23 Car. II. c. 26.) it is said, that upon un-

lawful importations to, or exportations from the plantations, one moiety of the several ships, and of their ladings, shall go to the King, the other to him who shall seize and sue for the same, in any of the said plantations, in the court of the high admiral of England, or of any of his vice admirals, or in any court of record in England, by which the jurisdiction of the high court of admiralty, in England, is plainly founded as is likewise that of the admiralty courts in the plantations, which, in respect to the admiralty of England, are vice-admiralty courts, and it is observable, that both the admiralty courts are mentioned before the common law courts, as being principally intended by the makers of that statute for such proceedings, and it is further evident by the same clause, and the two which follow in that statute, that the admiralty jurisdiction is not so confined, but that it may hold cognizance of, and determine the offences, though the goods are valued, and seised, on land.

The three statutes above-mentioned, viz: the 12th, 15th, 22d and 23d of King Charles II. are recited in the preamble of the last act, relating to the plantation trade (7th and 8th William III.), and that last act does sufficiently establish the admiralty jurisdiction, in offences against the acts of trade, in as ample a manner, and in the same words, as it doth the jurisdiction of the courts at Westminster-hall; and if it be objected that in those two places, it is only said that the proceedings for the penalties and forfeitures arising from the offences, and not for the offences themselves, shall be had in the courts of admiralty, it may be answered, that the courts of Westminster have no more or other jurisdictions, for they are mentioned in the same manner as the admiralty courts, and not otherwise: however, the offence and

the penalty is all one cause, and of the same cognizance, and are determined all at once; for to suppose otherwise, were to make one court put in execution the decree and sentence of another, which were absurd and impracticable.

Against the jurisdiction of the admiralty courts in the plantations, thus deduced and asserted, there is a seeming objection, from a clause of the aforesaid statute, 7th and 8th Gul. III. where it is declared, that upon all suits brought in the plantations, on offences against the several acts, relating to the plantation trade, by reason of any unlawful importations, or exportations, there shall not be any jury but of natives of England, Ireland, or the plantations, from whence it may be argued, because admiralty courts use no juries, they are not proper courts to try such matters in.

To which objection it may, amongst other things, be answered, that this clause does not in the least take away the jurisdiction, which not only the same act, but several former acts of trade, have given to the admiralty courts in the plantations, in cases of unlawful importations and exportations; for the directing the nature and manner of proceeding in one court, when two have the cognizance of the same matters, can, in no construction, take away the power of the other; but from that clause this conclusion, I conceive, may be truly and fairly drawn, viz: that none of the common law courts in the plantations should proceed in such cases, but where proper jurymen may be had, so that natives of any other places but England and Ireland and the plantations, or natives even of those places who are any way interested, or who are on any other account not legally qualified, cannot serve on juries, and consequently no such

trials can be had in those courts in the plantations where proper jurymen cannot be had; and in such cases the admiralty court, as it is always a proper court, will be then the only court to proceed in, and determine breaches of the acts of trade.

July 23, 1702. J. COOKE.

(4.) *Mr. Fane's opinion on the Admiralty Jurisdiction, in the Bahamas.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple's letter of the 6th of this instant, May, wherein your Lordships are pleased to desire my opinion, in point of law, whether the rights of admiralty in the Bahama Islands, are comprehended within the Lords Proprietors' surrender? I have considered of the same, and am humbly of opinion, upon perusal of the original charter of the Bahama Islands, granted by King Charles II. that there are no words in that charter which will carry a grant of admiralty jurisdiction, [illegible] the rights and perquisites thereunto belonging, to [illegible]s Proprietors; and, therefore, the Lords Proprietors, or any lessee under them, could never have any legal title or pretence thereto, under the charter.

May 16, 1729. FRAN. FANE.

(5.)] *The Attorney-General Northey's observations on some acts of the Barbadoes Assembly, as inconsistent with the Admiralty Jurisdiction.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' order of reference, signified to me by Mr. Popple, I have considered of the following acts, passed at an assembly of Barbadoes, from the 17th of November, 1701, to the 10th of March, 1701-2, viz: "an act for the payment of the sum of £2000 sterling to his excellency Ralph Lord Grey, baron of Warke, &c." dated 17th November, 1701; "an act to prevent freemen, white servants, negroes, and other slaves, running from this island in shallops, boats, and other vessels," dated 17th November, 1701; "an act for laying an imposition on wines and other strong liquors imported to this island," dated 17th November, 1701; "an act for the encouragement of white servants, and to ascertain their allowance of provisions and clothes," dated 17th November, 1701; "an act for the collecting of several sums of money and arrears due to the public of this island," dated 17th November, 1701; "an act to ratify, approve, and confirm letters patent, gifts, grants, bargains, sales, conveyances, and all other instruments of writing relating to the titles of the several owners and proprietors of the lands and tenements, slaves, and other hereditaments, within this island," dated the 18th November, 1701; "an act to encourage privateers, in case of a war," dated 18th November, 1701; "an act to revive and continue an act to secure the peaceable possession of negroes and other slaves to the inhabitants of this island, and to prevent and punish the clandestine and illegal detinue of them," dated 18th November, 1701; "an act to encourage the inhabitants of this island to become owners of vessels," dated 18th November, 1701; "an act to revive and continue an act, entitled, an act to prohibit and hinder the inhabitants of

this island to employ their negroes and other slaves in buying and selling," dated 23d December, 1701; "an act to raise and provide a further strength of laborers to clear the trenches and repair the breast-works and fortifications of this island," dated 23d January, 1701-2; "an act to raise and provide a further strength of laborers to clear the trenches and repair the breast-works and fortifications of this island," dated 10th May, 1701-2: which laws I conceive are agreeably to law, and do not contain any thing prejudicial to her Majesty's prerogative save that as to the act, entitled "an act to prevent freemen, white servants, negroes, and other slaves, running from this island, in shallops, boats, and other vessels," (which is expired also) I am of opinion it making stealing or taking away any boat felony, the disjunctive (*or*) should have been the copulative (*and*), for want of which, taking away a boat, without stealing, is made felony; and the power to kill run-aways is unreasonable, being included besides slaves.

And except the "act for ratifying, &c. letters patent, gifts, grants, &c." which I am of opinion is fit to be rejected, for instead of quieting possessions, as the act is drawn, it will probably disturb more than it will quiet, for it confirms all letters patent, grants, releases, &c. without restraining it to such where the possession hath been with the grant, for want of which it will revive defective grants, under which there never was any enjoyment: and although there is a proviso in the act against reviving any letters patent, &c. that have been made void by acts, judgments, or other legal ways, yet defective grants under which no enjoyment may have been, if not legally made void, of which sort there may be many, will be revived: besides, it is unreasonable to

make defective grants good, where for those defects subsequent grants have been, and such are made, good by this act, it making the defective grants good against all persons claiming under the Crown.

And except the "act to encourage privateers, in case of a war," as to which I am of opinion that its giving for ever hereafter to privateers the whole prizes to be taken by them, intrenches on her Majesty's prerogative, and her declaration in favor of captors, and gives away the perquisites belonging to the admiralty, and disables her Majesty's men of war to press, on the most urgent occasions, any seamen out of privateers, which is undoubtedly in the power of the lord high admiral to do, and is fit to be governed by his direction; and therefore I think it fit the same be repealed.

20th October, 1703. EWD. NORTHEY.

(6.) *Mr. West's opinion on the Admiralty Jurisdiction, in the plantations.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered two memorials from the lords of the admiralty, annexed to Mr. Secretary Popple's letter of the 5th of May last, and as your Lordships command me to be very explicit in my answer, I hope your Lordships will forgive the length of it.

By the fifty-fourth article of his Majesty's instructions to the governors of the American plantations, they are directed, "that in case any goods, money, or other estate of pirates, or piratically taken, shall be brought in or found, within the limits of their respective gover-

ments, or taken on board any ships, or vessels, they do cause the same to be seized and secured, until they shall have given his Majesty an account thereof and received his pleasure concerning the disposal thereof; but that in case such goods, or any part of them, are perishable, the same shall be publicly sold and disposed of, and the produce in like manner secured till his Majesty's further orders:" which instructions the lords of the admiralty desire may be annulled, and never inserted for the future in any instructions to be given to the governors of the plantations, upon a supposition that the governors are sufficiently authorized and instructed how to govern themselves in those cases which are the subject matter of this instruction, by the patents issuing out of the high court of admiralty, by which they are constituted admirals within their respective governments. This instruction, as your lordships will be pleased to observe, relates to two things, that is, first, to the goods of pirates; and, secondly, to goods piratically taken: as there seems to be a very material difference between them, I shall consider them singly.

The common law of England is the common law of the plantations, and all statutes, in affirmance of the common law, passed in England, antecedent to the settlement of any colony, are in force in that colony, unless there is some private act to the contrary; though no statutes made since those settlements are there in force, unless the colonies are particularly mentioned.

Piracy is felony (that is, a capital crime) only by the civil law, as that law is the rule of proceeding in our admiralty courts, nor was it all cognizable by the common law. But the admiralty jurisdiction was, by experience, found not to be a remedy adequate to the mis-

chief, since, by their law, no man can be condemned to death unless he either confesses his crime or be convicted by witnesses who saw him commit the fact, by which means many offenders escape punishment; and therefore, to remedy this mischief, it was enacted by the statute of the eight and twentieth of Henry the Eighth, chapter the fifteenth, "that all treasons, murders, robberies, &c. committed by pirates on the high seas, or in any other place where the admiral pretends jurisdiction, shall be inquired and tried in such counties within the realm, as shall be limited by the King's commission, in like manner as if such offences were done at land; and that such commissions shall be directed to the lord admiral, his lieutenant, or deputy, and to three or four such others as the lord chancellor shall name." And further, after several directions for juries, presentments, &c. it is enacted, "that such as shall be convict of such offences, shall suffer death, without benefit of clergy, and forfeit lands and goods, as in case of felonies and murders done at land."

Ever since this statute was made, no pirate has been ever condemned by a court of admiralty, *qua* such, but all trials for piracy have been by special commission for that purpose, grounded upon the statute. Now if this statute was of force in the West Indies, no person could be convicted there without a special commission; and if it was not, the proceedings must have been altogether at the civil law, as received in the admiralty courts, unaided by any statute, and consequently scarce any person would have been convicted at all, for doubtless the inconveniences would be as bad there, if not worse, than they were at home, before the making of that statute.

By the preamble to the statute of the eleventh and twelfth of William the Third, chapter the seventh, it not only appears that ever since the making the statute of Henry the Eighth, the trial of pirates, &c. before the admiral, &c. singly, by the civil law, had been altogether disused and laid aside; but also that the statute of Henry the Eighth did not extend to the West Indies: and therefore it is enacted, "that all piracies, felonies, and robberies, committed in or upon the sea, or in any haven, &c. where the admiral has jurisdiction, may be tried at sea, or upon the land, in any of his Majesty's islands, plantations, &c. by commission under the great seal of England, or admiralty seal, &c." which commissioners, though they are directed to proceed according to the course of the admiralty, do not yet derive any part of their authority from our high court of admiralty, but only from their special commissions issued for that purpose.

From what I have already laid before your Lordships, I think it evident that no trial of pirates can be in the West Indies had before the admiralty courts, *qua* such, unless their admiralty judges will venture to proceed by the civil law singly; for they cannot be aided by any statutes, since the statute of Henry the Eighth does not extend to the West Indies, and that of King William relates only to those special commissions, which special commissions, founded upon this last mentioned statute, are constantly granted to the governors of the respective provinces, who, consequently, together with such other persons as are joined with them in the commission, are the only court of judicature (not *qua* vice admirals, but *qua* special commissioners) in which any pirates can be condemned.

All goods, &c. whatsoever, which in consequence of any judgment are either forfeited, or upon any other account fall in *custodiam legis*, unless there is some particular provision for that purpose, are necessarily in the custody of that court where such judgment was pronounced; and the judges of that court, or the receiver by them appointed, are accountants to the king for such goods. Now, as for the goods of the pirates themselves, the custody of them can only accrue by reason of the forfeiture which is the consequence of the crime; from whence it follows, that the admiralty courts, *qua* such, cannot have any thing to do with those goods; for if they proceed upon the civil law, simply, by that law there is no forfeiture at all, but the forfeiture for piracy is created by the statute by which it is enacted that pirates shall forfeit for robberies, &c. done on the seas, in like manner as for felonies committed on land, and that statute is extended to the West Indies by the last mentioned act of William the Third, which act, by the express words of it, can be put in execution only by the above-mentioned special commissions.

But if all the goods be presumed to be not the goods of the pirates, but to be only piratically taken from other proprietors, it must be observed, that there can be no right to the custody of such goods till there is an adjudication of the piracy, which, in the West Indies, can be obtained only in a court commissioned according to the above-mentioned statutes.

And the persons (be they who they will) who have the custody of the goods, are only trustees, in the first place for the benefit of the right owners, and in case of non claim, for the crown; for by the act of piracy, the property is not changed, but still remains in the original

owner, and therefore it is provided by the statute of the seven and twentieth of Edward the Third, section second and seventeenth, in what manner, and by what officers, such goods shall be restored. "If a merchant lose his goods at sea by piracy (these are the words of the statute), and they afterwards come to land, if he can make proof that they are his goods, they shall be restored to him in places guildable by the *king's officers* and six men of the country, and in other places, by the lords there, or their officers, and six men of the country."

Since, therefore, there can be no right (properly speaking) in any person to have the custody of the goods, either of pirates, or piratically taken, until the piracy itself be adjudged, and no adjudication can be had, but in a court commissioned in the above-mentioned manner, and since the custody of goods must be in the court where the judgment is pronounced, unless there be some particular provision to the contrary, and since the governor in every province, by virtue of his special commission, presides in every such court, it follows that he must take care of (and perhaps answer for) the persons to whose custody the above-mentioned goods may be committed. For these reasons, my lords, I am humbly of opinion, that the instruction is very properly given, and that it is not fit it should be repealed.

My Lords;

The second memorial presented by the Lords of the admiralty to his Majesty in council, and by your Lordships referred to me, contains a complaint of the admiralty courts against the frequent encroachments which they affirm the provincial judges make upon his Majesty's authority and the admiralty jurisdiction, by discharging persons imprisoned by the admiralty for debts

and penalties due to his Majesty, and by granting prohibitions to the proceedings in their courts: they pray, therefore, in order to redress this grievance, that his Majesty would be pleased to command the governors of the several colonies, to give all countenance and assistance to the judges and officers of the admiralty, and also to restrain the provincial judges from interrupting the proceedings of their courts.

This memorial from the lords of the admiralty was undoubtedly occasioned by the letters of Mr. Smith, advocate for the court of admiralty in New England, and the representation of Mr. Menzies, judge of admiralty in the Massachusetts Bay; and upon perusal of them both, your Lordships will plainly see that the foundation of this dispute is nothing but the desire which the admiralty judges have of extending their jurisdiction in the West Indies: for the first article of which Mr. Menzies complains is, not that prohibitions have been directed to their admiralty courts, in cases in which by law they ought not to have been granted, but that any prohibitions were granted at all; and seems to insinuate very plainly, that in case their admiralty there should exceed its jurisdiction, the subject has no other remedy than by appeal to the high court of admiralty at home. I shall crave leave therefore of your Lordship to consider this question concerning prohibitions upon the foot of those instances which are alleged by the above mentioned gentlemen, of the oppressions they lie under from the common law courts; but I shall first trouble your Lordships with a few words concerning prohibitions in general. That the common law was always jealous of the encroachments of the civil law is certain, and wherever the common law prevails, this jealousy must necessarily

accompany it. Prohibitions have been the remedy constantly applied to prevent these encroachments, which have always issued out of the superior courts of the common law, by the laws of New England, confirmed by the Crown; (and I mentioned New England particularly, because the disputes which have happened between the judges of both laws in that province have given occasion to the present question) there are courts established in that colony, and invested with the same powers that are respectively executed by the courts of King's bench, common pleas, and exchequer, in Great Britain, and consequently a power of granting prohibitions may legally be executed by them. Nor is it a sufficient answer to insinuate that the statutes by which the admiralty jurisdiction in England is limited and confined have no relation to the plantations: for as the statutes of thirteenth of Richard the Second, chapter the fifth, the fifteenth of Richard the Second, chapter the third, the second of Henry the Fourth, chapter the eleventh, and twenty-seventh of Elizabeth, chapter the eleventh, are not introductive of new laws, but only declaratory of what the common law was before, I am of opinion that they are of force even in the plantations; for let an Englishman go whereever he will, he carries as much of law and liberty with him as the nature of things will bear; but to shew that it is impossible a power of granting prohibitions should not be, wherever the common law extended, your Lordships will need only to recollect not only the inconvenient but absurd consequences that would follow in case it were not so; for should the court of admiralty in New England take upon them to hold plea of freehold, or to take cognizance of actions of debt, &c. what remedy has the sub-

ject to vindicate that right to that inheritance which he has in being judged by the common law. In New England, if there is no power of granting prohibitions, remedy he has none, and consequently the benefit of the common law must, in the colonies, be enjoyed by none but those who have wealth sufficient to support frequent appeals to Great Britain. But even in such case, how is he relieved? to the King in council he cannot appeal, for that is irregular; from the sentence, therefore, of a court of vice admiralty abroad, he must apply to the court of high admiralty at home. I submit it to your Lordships, to determine how far it is absurd to suppose the law should afford the subject no other remedy against the exorbitances of one admiralty court, than by sending him to another.

On the other hand, my Lords, if it be granted that the common law courts in the plantations have a power of granting prohibitions, though it should be supposed that (as very likely they often do) they exceed their bounds, and issue prohibations in cases where by law they ought not, so that the subject may possibly be aggrieved by a cause being substracted from the admiralty jurisdiction, to which it was proper, and drawn to that of the common law, yet there is an adequate remedy always ready; for by an appeal to his Majesty, from whom both jurisdictions flow, he may obtain redress against any grievance he may lie under by reason of any judgment which any court of common law in the plantations can pronounce.

I shall not trouble your Lordships with any thing more concerning prohibitions in general, but shall beg leave to add a few words concerning that jurisdiction which I see is claimed by the vice admiralty judges in

America, by virtue of the acts of trade and navigation, and also concerning the instances, which are given by the above mentioned West Indian civilians, of the oppressions they lie under from the common law courts.

In respect to the acts of trade and navigation, I own myself at a loss so much as to guess upon which of them it is that the admiralty judges in the West Indies would found an increase of their jurisdiction, for there is not one single word in them which can be construed so as to give them, there, a greater power than is exercised by the high court of admiralty at home. But upon these acts, I would beg leave to observe two particulars, the first of which is, that though the term of his Majesty's courts in general does undoubtedly comprehend the courts of admiralty, yet whenever it is enacted (as happens, I think, to be the case in every one of those acts,) that any penalty shall be recovered in any of his Majesty's courts, by any person who will seize, inform, or sue for the same, *wherein no essoign, protection, or wager of law shall be allowed*, the admiralty is absolutely excluded, and cannot possibly have any jurisdiction, because those terms by which the courts are described are perfe y peculiar to the common law, and foreign to that law by which the courts of admiralty must proceed; secondly, that whenever any prosecution is directed to be had in any court of record, the admiralty jurisdiction is utterly excluded, since, by law, they are not a court of record.

I shall not need to trouble your Lordships with enumerating the several passages in the acts of trade and navigation, since the application of these two general rules (which I take to be law) will resolve almost any question which can arise upon the perusal of them;

and, therefore, all that now remains for me to do, in order to complete my obedience to your Lordships' commands, is briefly to consider the facts alleged by Mr. Smith and Menzies, and the method of remedying their supposed grievances, which the Lords of the admiralty pray of his Majesty.

The first fact which they mention amounts to no more than this: that two persons, named John Oultol and Cornelius Waldall, did, by public placards, &c. insult and defy the jurisdiction of the courts of admiralty, and upon a libel being exhibited against them in that court, they were fined. The judge of common law, upon consideration of this case, granted a prohibition, which the civilians there, it seems, think to be illegal; but I must own myself to be of another opinion, and that the judges could not refuse it upon motion. The most that a court of admiralty can do, is to fine and imprison for a contempt in the face of the court. But there can be no proceedings before them for any thing that is done out of court, and I make no doubt but our courts in Westminster Hall would have granted a prohibition in the same case.

2. A second complaint is, that an action of trover was brought for a ship after it had been sold, by decree of the admiralty court, which might possibly be very just, if the whole case had been stated.

3. A third complaint is, that a prohibition was granted upon a libel being exhibited in the admiralty court, for transporting of wool, contrary to the acts of navigation; which I conceive to have been regularly issued, since offences of that kind are directed to be tried in courts of record, and consequently the admiralty can have nothing to do with them.

In these particulars, I am of opinion that their complaints are not well grounded; but then, as to their being disturbed in the exercise of the admiralty jurisdiction of what is, or is not, prize, they certainly are in the right to complain, and I doubt not but your Lordships will think that it is the duty of the governors to support them in it by all means lawful, and if they are negligent in so doing, his Majesty's order for that purpose would undoubtedly make them careful for to do it for the time to come, which brings me to the end of this long report with which your Lordships have been troubled. The lords of the admiralty pray that his Majesty would be pleased to order the governors to restrain the provincial judges from interrupting the proceedings of the courts of admiralty; by which, if they mean that the judges should be hindered from granting prohibitions, I cannot conceive how they can be relieved in the manner they propose; for if the prohibitions are legally granted, no order can authorize him to hinder them, and if they are not, the proper remedy is by the appeal of the party concerned. But to conclude, if your Lordships, upon inquiry into the fact, should find, as in all probability the fact as to New England is, that the people there do under a pretence of law attempt to disturb and, perhaps, to banish from that province the due exercise of an admiralty jurisdiction, derived more immediately from the crown than that of their own courts, I am humbly of opinion that the properest remedy the admiralty can apply for, is, that a bill may be brought into parliament next session for that purpose, by which the manner of trying piracies, and the exercise of the admiralty jurisdiction for the future, may be established and reduced to certainty.

June 20, 1720. RICH. WEST.

(7.) *Mr. Strahan's opinion on the power of collecting admiralty dues, in Bermuda.*

I have perused the extract of a letter from Colonel Hope, Governor of Bermuda, together with his commission of vice-admiral, as also the copy of a commission from the receiver-general of the rights and perquisites of the admiralty and from the solicitor and comptroller of the same to Robert Dinwiddie Esq. constituting him their agent at Bermuda, bearing date the 1st of September, 1721; and having duly considered the subject matter of Colonel Hope's complaint, in his aforesaid letter, I am of opinion that the Colonel has no right to the dues and perquisites of the admiralty, which may accrue within the jurisdiction of his vice-admiralty, to retain them to his own use, although perhaps it may be true that his predecessors in that government may have enjoyed the same without ever having accounted for them.

Vice-admirals are indeed empowered by their commission to collect and receive all dues and perquisites of the admiralty within their respective jurisdictions; but they ought to account for the same to the lords commissioners, for executing the office of high admiral, or to such other person as they shall think fit to appoint for that purpose, for the use and behoof of the Crown. So that, as the lords commissioners of the admiralty have a right to call all vice-admirals to account for such dues and perquisites of the admiralty as they shall have received within their respective jurisdictions, they may appoint proper persons to take and receive those accounts from the vice-admirals.

But I conceive that the commission granted by the receiver-general, of the rights and perquisites of the admiralty, and the solicitor and comptroller of the same, to

Robert Dinwiddie Esq. of Bermuda, is not to be warrant in law, the same being an encroachment on the powers actually vested in Colonel Hope, by his patent of vice-admiral; for the power given to Mr. Dinwiddie by his commission, is not to take and receive an account of the Colonel as vice-admiral of that district, of what dues and perquisites of admiralty may have come to his hands or possession, which perhaps might have been justifiable; but he is thereby authorized to recover, seize, collect, and receive, all such dues and perquisites of the admiralty, of, and from, all and every person and persons whatsoever: whereas, the vice-admiral having that power vested in him by his patent, no other person can have a right to exercise it within his jurisdiction. And I take it, that the lords commissioners for executing the office of high admiral, are by their own patent restrained from granting this power of collecting and receiving the dues and profits of the admiralty to other persons besides the vice-admirals and other officers belonging to the admiralty, in such manner and sort as they formerly were collected and received when there was an high admiral. Wherefore, I humbly conceive that this commission to Mr. Dinwiddie, being an innovation and an encroachment on the vice admiral's power as vested in him by his patent, the same cannot in law be justified and ought to be revoked.

July 26, 1723. WILL. STRAHAN.

(8.) *The opinion of the Attorney and Solicitor-General, Yorke and Wearg, on the trial for a murder committed at sea.*

Extract of a letter from Mr. Worsley, Governor of Barbadoes, to the Lords Commissioners for Trade and Plantations, dated the 24th of January, 1724-5.

"I have the honor to present to your Lordships, an account of an accident that has lately happened here. The 4th of December last, the St. Christopher's galley, James Newth, commander, sailed out of this port, and the forts fired some random shot at her to bring her to, in that she had not put up the proper signal that was given her, or any other, which is to shew that she had cleared out of all the offices and had liberty to depart. The master, instead of bringing to, hoisted more sail, whence a matross of James's Fort, suspecting she had done something irregular, (as they often do in this part of the world, one about twelve months ago, attempting to carry away a custom-house officer,) fired a shot into her when she was about two miles off, which happened, unfortunately, to kill the mate, and wounded another man. The vessel immediately returned into port, and as soon as the master informed me of it, I inquired into the fact, upon which I found she had not put up her signal, the master complaining it was not a proper signal, being a tarpauling hoisted upon the flagstaff; and, though I found such signals had been sometimes given and had been put up, nevertheless as I thought it a very improper one, that there might be no such precedents for the future, I suspended the captain of the fort for some time: However, if the master of the vessel had not liked the signal, he ought not to have gone under sail till he had got another, and ought to have brought to upon the fort's firing. *The difficulty, at present, I lie under, is to know whether, and where, the matross that fired the shot from James's Fort is to be tried, or what court can take cognizance of it.* The person that was killed by a gun from the shore, was upon the high seas two miles off of the shore, where, I apprehend, my jurisdiction does not ex-

tend, and his Majesty's attorney-general here is of the same opinion."

We are of opinion, that the matross who fired the shot cannot be tried for the death of the mate in any court of common law, but that he ought to be tried for the same either in the court of admiralty at Barbadoes, or by special commission under statute of 11th and 12th W. 3. cap. 7 which is now the most known and usual method of proceeding in cases of felonies done upon the sea in those parts.

April 17, 1725.

P. YORKE.
C. WEARG.

(9.) *The opinion of the Advocate, Attorney, and Solicitor-General, in* 1761, *on the same point.*

Whitehall, Nov. 5, 1761.

Gentlemen;

I am directed by the Lords Commissioners for Trade and Plantations, to send you the inclosed copies of a letter, which their Lordships have received from the lieutenant-governor of New York, and of a report made to him by commissioners, appointed by a special commission for the trial of the master, mate, and several of the crew of a privateer, charged with the murder of some men belonging to his Majesty's ship Winchester, committed within a bay of that province.

I am further directed to acquaint you, that the law of New York upon which the commission for the trial of these persons was founded, was repealed by order in council of 5th of September, 1700, upon consideration of which, and of the statutes of Great Britain which have reference to admiralty jurisdiction, a doubt has occurred to their Lordships, whether there is in the colony of New York, or in any other of his Majesty's colo-

nies in America, (unless by laws which may have been passed in the said colonies), any sufficient authority for the trial and punishment of murder committed upon the seas within the admiralty jurisdiction in the said colonies; and, therefore, their Lordships desire the favor of your opinion upon the following questions, as soon as conveniently may be, to the end that if there should be a want of such authority, some remedy may be provided as soon as possible.

Question 1st.—Does the act of the 28th of Henry VIII. cap. 15. entitled for pirates, (being passed before the establishment of any of the British colonies,) extend to the said colonies; and if it does, how are the regulations therein set down to be executed?

We are of opinion, that the statute 28 Henry VIII. does extend to the case of murder committed any where on the high seas; and consequently that a commission might issue in the present case into any county within the realm of England, to try the offenders who might be brought over for that purpose, and the witnesses examined, and a jury sworn before such commissioners, unless that mode of inquiry and trial should be deemed inconvenient.

Question 2d.—Does the act of the 11th and 12th of William III. cap. 7th, entitled "an act for the effectual suppression of piracy," or the 7th section of the act of the 4th of George I. cap. 11th, entitled "an act for the further preventing robbery, burglary, &c." contain sufficient authority for the trial and punishment of persons guilty of murder upon the seas or waters within the admiralty jurisdiction in the plantations?

We are of opinion that neither of the acts of parliament mentioned in this *quære* were intended to affect

the case of murders. They relate merely to such felonies as are equal, or inferior, to the species particularly expressed.

Question 3d.—If the act of Henry VIII. cap. 15, does not extend to America, and neither the act of the 11th and 12th of William III. cap. 7th, nor the 7th section of the act of the 4th of George I. cap. 11th, do contain sufficient authority for the trial and punishment of persons guilty of murder upon the seas or waters within the admiralty jurisdictions in the plantations; by what other authority and jurisdiction are such persons to be tried and punished in the said plantations?

We have already said, in answer to the first *quære*, that the statute of Henry VIII. does extend to the present case; but, if that method of trial and proceeding should be found inconvenient, it will be proper to apply to the legislature for some new provision adapted to such case.

G. Hay.
C. Yorke.
F. Norton.

(10.) *The opinion of the Attorney and Solicitor-General of Barbadoes, Chilton, and Rawlin, on the trial of pirates there.*

May it please your Excellency;

We are very sensible that his late Majesty, King William, was pleased to send a commission to this island for trial of pirates, directed to the Lord Grey, then Governor, the members of the council, and several other persons. We are likewise well satisfied that her present Majesty, upon her accession to the throne, was graciously pleased by her royal proclamation, bearing date the 9th day of March, in the first year of her reign, to sig-

nify and declare that all commissions, both civil and military, granted by his said late Majesty should be continued, and remain in full force and virtue until her Majesty's pleasure should be further known, or that other provision be made pursuant to his late Majesty's commissions and instructions to his governors and officers; and so, such commissions continued until your Excellency's arrival in this island; but upon your coming here, it was the unanimous opinion of all persons in this island that all commissions granted to the Lord Grey, late Governor of this island, ceased, and, that if her Majesty had thought fit to have continued the commission for trial of pirates, a commission would then have been granted to you for that purpose, as well as one to be Governor, and another to be vice-admiral; and, therefore, we thought it was not prudent and safe for your Excellency to direct any prosecution on that commission directed to the Lord Grey, &c. for trial of pirates, where the lives of many persons might be concerned, considering also, that his late Majesty's commission aforesaid was directed to several members of the council, some whereof were dead before the granting of the said commission, and many more now dead and gone off this island; so that it would have been very difficult to have convened persons enough to make a sufficient *quorum*, according to the appointment of the said commission. The names of the said persons, that are either dead, or gone off, are as follows: the Lord Grey, now in England; Edward Craufeild Esq. dead; Richard Salter Esq. dead; George Andrews Esq. dead; John Bromley Esq. some years past settled in England; Patrick Mein Esq. now in England; Richard Scot now in England; Benjamin Cryer, a clergyman; Richard Walter Esq. dead; and George Larkin Esq. one of the commissioners gone off this island.

And we are humbly of opinion, that as long as the statute of 35th Henry VIII. cap. 2. continues in force, no person whatsoever can be tried in this island for a foreign treason, without a special commission from her Majesty for that purpose; the said statute positively directing that all foreign treasons shall be tried either in the kingdom of England, or by a special commission from her Majesty; and such always has been the exposition of that statute.

January 12, 1703-4.

E. CHILTON.
W. RAWLIN.

(11.) *The opinion of the Attorney and Solicitor-General, Northey and Thomson, on the pardon of pirates in the colonies.*

Quære. 1.—Whether the proclamation is a full and sufficient pardon to any persons who may have committed piracies and robberies upon the high seas in America within the time therein mentioned; or, if not, what steps must be taken to obtain it of the governors in America?

Quære 2.—Whether, by this proclamation, murders committed by such pirates are pardoned?

Quære 3.—Whether the persons who have committed any robberies, or piracies, or any others, by that title can hold the monies and effects they may be so possessed of, and not liable to be prosecuted for them?

Quære 4.—Whether, if any persons having notice of this proclamation, should, between such notice and the 5th of January next, commit any piracies or robberies, are entitled to the benefit of it?

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, we have considered of the annexed *quæries*, proposed, to us by your Lordships; and as to the first *quære*, "whether the proclamation is a full and sufficient pardon to any persons who may have committed piracies and robberies upon the high seas in America, within the time therein mentioned, or, if not, what steps must be taken to obtain it of the governors of America," we are of opinion, that the proclamation does not contain a pardon of piracy, but only his Majesty's gracious promise to grant pirates such pardon on the terms mentioned in the proclamation, on which every subject may safely rely; but, that it will be reasonable for his Majesty to give instructions to his governors in America, to grant the persons surrendering themselves according to the terms of such proclamation, his Majesty's most gracious pardon for piracies and robberies on the high seas.

As to the second *quære*, "whether, by this proclamation, murders committed by such pirates are pardoned," we are of opinion, that, where the murder is committed in the piracy, it was his Majesty's intention to pardon the murder so committed, and, that, therefore, it may be reasonable, in the instructions to his Majesty's governors, to direct them to insert in the pardons by them to be passed, of the piracies and robberies committed on the high seas, a pardon of all murders committed in the same.

As to the third *quære*, "whether the persons who have committed any robberies, or piracies, or any other by that title, can hold the monies and effects they may be so possessed of, and not be liable to be prosecuted for them," we are of opinion, that as to the proper goods of

the pirates, they being pardoned, the same will not be forfeited, but, as to the goods of other persons which they have taken unlawfully from them, the property thereof by such taking is not altered; but the owners, notwithstanding any pardon, may retake them, or they may recover the same by an action to be brought against the robber for the same.

And as to the fourth *quære*, "whether, if any persons having notice of this proclamation, should, between such notice and the 5th of January next, commit any piracies or robberies, are entitled to the benefit of it, we are of opinion, that there is no exception of any notice in the proclamation, and his Majesty has been pleased to give his royal promise, which he will never break, to pardon pirates surrendering themselves. All piracies committed, or to be committed, before the said 5th day of January, and for preventing the mischiefs hinted at in this *quære*, his Majesty's officers are to be diligent in apprehending all pirates, for his Majesty has not been pleased to promise pardon to any pirates but such as surrender voluntarily, according to the terms of the proclamation.

November 14, 1717. EDW. NORTHEY.
WM. THOMSON.

(12.) *The opinion of the Attorney-General Northey on appeals from the Admiralty courts, in the Colonies.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the annexed petition of Peter Van Bell, praying the liberty of appeal

to her Majesty in council, from a sentence pronounced in the admiralty court of Nevis. And am of opinion, if that court was held under the late King's commission for governing the Leeward Islands, as the petitioner takes it to be, alleging that the president and council had power only to appoint, but not to sit themselves as a court of admiralty; or, if the sentence was given by the president and council of Nevis, as the council there, in both cases, the appeal ought to be to her Majesty in council; but if the president and council held a court of admiralty, by authority derived from the admiralty of England, the appeal is to be to the court of admiralty in England; and so it was lately determined by her Majesty in council.

May 23, 1704. EDW. NORTHEY.

(13.) *The opinion of the Advocate-General, Sir Nathaniel Lloyd, on the same subject.*

My Lords;

In further obedience about the Eagle brigantine, condemned at New York, and appealed upon hither: I find that the appellants have thought fit to drop such appeal, and they proceed no further; so the condemnation stands. Not but that the appellants might have re-heard the cause here, had they thought fit.

For, by law, appeals do lie from the admiralty courts in the plantations, to the lord high-admiral of Great Britain, in the high court of admiralty of England, in common maritime causes.

As in causes of prize, properly, as taken *jure belli*, to the lords of the council, as commissioners for appeals, in causes of prize, by the American act.

March 13, 1715. NATH. LLOYD.

(14.) *The Advocate-General, Sir John Cooke's opinion on the seizure of a Spanish brigantine, on the high seas, by an uncommissioned vessel.*

My Lords;

In obedience to your Lordships' commands, in Mr. Popple's letter of the 25th of February, I have considered the proceedings and merits of the seizure of the Spanish brigantine therein mentioned, and am of opinion, that this matter ought to be communicated to the lord high-admiral, that directions may issue to the proper officers to proceed, in his lordship's name, in the court of admiralty here, in order to have the brigantine condemned, and declared a perquisite of the admiralty, being seized at sea, by a non-commissioned ship.

Doctors Commons, *March* 3, 1708. J. Cooke.

Sixthly.—On the national fisheries.

(1.) *The opinion of the Attorney-General, Raymond, on the heads of a patent for carrying on the fishery in* 1721.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships commands, signified to me by Mr. Popple, the 26th of July last, to send my opinion, in point of law, upon the draft of heads of a charter, for incorporating Sir Robert Sinclair and others, for the better carrying on the fishing trade in North Britain, herewith sent back to your Lordships, I have considered thereof, and as to Nos. 1, 2, and 3, I have no objection; as to No. 4, I should think it proper that the elections on avoidances, in case of death or disqualifica-

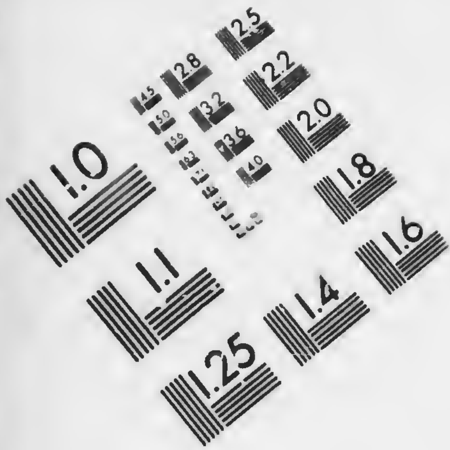
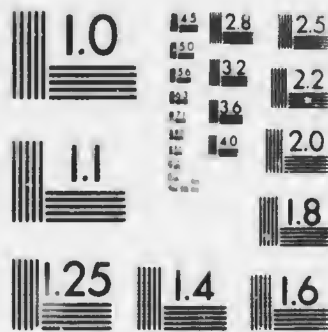
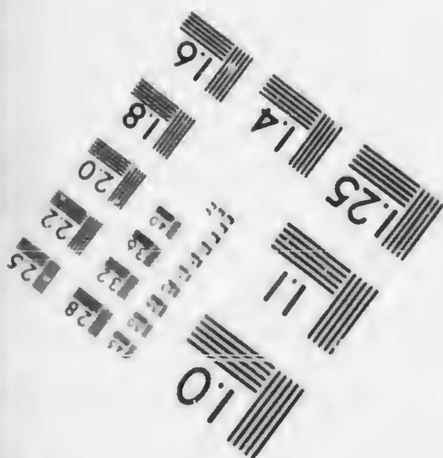
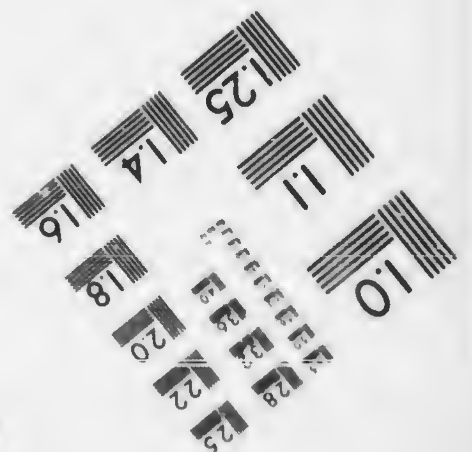


IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

tion, should be appointed to be made within a certain time, and not left entirely to the appointment of the directors, which may possibly hereafter introduce inconveniences. I should submit it likewise to your Lordships, whether it would not be proper to direct the notice therein appointed to be given, to be published in the paper printed by authority of the government, whether it is called the Edinburgh Gazette, or Courant, or whatever name it is called by, rather than to leave it so much at large, as to be inserted in one, or other, of the Edinburgh newspapers; and as to Nos. 5 and 6, I submit to your Lordships, whether the qualification for a voter, or of the governor, sub-governor, and deputy-governor, is not too small, if the capital stock is thought fit to be allowed to be so great as 600,000*l.*; as to Nos. 7, 8, 9, 10, 12, 13, 14, 15, I have no objection; as to No. 17, I submit to your Lordships, whether the charter should not specify what should be the consequence, if the corporation should borrow more on their bonds, than the value of the real estates they shall have purchased; as to Nos. 18, 19, 20, I have no objection; as to 21, his Majesty, by the laws of England, by his letters patent, cannot make bonds assignable, so as to transfer the property to the assignee, but possibly, by the laws of Scotland, the property of bonds may be transferred by assignment to to the assignee, of which the gentlemen of the law in Scotland are by much the properest judges; as to No. 22, I have no objection: as to No. 23, I doubt, by the laws of England, the King, by his letters patent, cannot alter the course of descent of things, and make things in their nature personal descend to the heir; but as to this also, the laws of Scotland may be different, which the gentlemen of the law in Scotland will take

care to settle as it ought to be by that law; No. 24 is the usual clause: these things I submit entirely to your Lordships. Upon the substance of the heads, as to the form, there is no doubt but the lord-advocate will settle them as they ought to be. I cannot omit mentioning to your Lordships, that when the lord-advocate and myself received his Majesty's commands to consider the petition of Sir Robert Sinclair, and the other gentlemen for this charter, we sent a copy thereof to the South Sea company (as had been done formerly in cases of like nature), to know if they had any objection to it, who returned us an answer, that they had no objection to the petition, but they desired to see the draft of the charter before it passed. I cannot but observe also, that by the act of parliament of last sessions, which established the companies for insurances, &c. page 369, it is enacted, "That no person should be entitled to any greater share in the capital or nominal stock of either of such respective corporations, than the money which he, or she, or they, shall have paid towards the same," which clause, as I take it, was added to prevent the turning them into bubbles, their aversion to which, as the petitioners have often declared, so I apprehend it is much for the service of his Majesty and the public to prevent; and for that purpose, I presume to put your Lordships in mind, whether it would not be proper to have a clause, that no transfer of any share of this corporation should be permitted, unless it is made within some short limited time, to be specified in the charter, after the contract for the same shall be made.

August 3, 1721. ROB. RAYMOND.

(2.) *Mr. Fane's opinion of the duties on whale fins.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me, by Mr. Popple's letter of the 18th instant, desiring my opinion, whether the indulgences granted by the act, passed the last sessions of parliament, entitled "an act for encouraging the Greenland fishery for whale fins, oil, or blubber of whales, seal oil, seal skins, and other such commodities, imported into Great Britain from the Greenland Seas, Davis's Straits, or any other parts of the seas adjoining or adjacent thereunto," do extend to all the like commodities imported from Newfoundland: I have considered the said act of parliament, the intention of which was to encourage the fishery carried on by the South Sea company to Greenland, and, in my humble opinion, the indulgences granted by the said act cannot be construed to extend further than to the commodities imported from the parts particularly described in the said act, into which description the like commodities imported from Newfoundland, I apprehend, cannot be taken; besides, I observe the legislature has so far restrained it to the parts described in the act, that an oath is directed to be taken by the master of every vessel, upon importation, that the commodities were the produce of whales, &c. actually caught in the seas particularly mentioned in the said act.

October 25, 1732. FRAN. FANE.

(3.) *The Attorney-General Yorke's opinion, on the power of the justices of the peace in Newfoundland.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' commands, signified to me by letter from Mr. Popple, transmitting the annexed copies of certain *quæries*. received from the Right Honorable the Lord Vere Beauclerk, Commodore for the Newfoundland convoy, and Captain Osborne, Governor of that island, together with a copy of Captain Osborne's commission, and of that granted by him to the justices of the peace there, and desiring my opinion thereupon: I have considered the said *quæries*, and upon the first thereof do conceive that the justices of the peace had not sufficient authority to raise money for building a prison, by laying a tax upon fish caught, or upon fishing-boats, the rather because the act of the 10th and 11th William III. for encouraging the trade to Newfoundland, directs that it shall be a free trade. The power of the justices of the peace in England for building of gaols, depends upon the statute of the 11th and 12th William III. cap. 19. by which they are enabled to make an assessment for that purpose upon the several divisions of their respective counties, after a presentment made by the grand jury at the assizes, great sessions, or general gaol delivery. As the justices of the peace in Newfoundland are, by their commissions, to act according to the laws of England, I apprehend they ought to have pursued this act of parliament as near as the circumstances of the case would admit, and to have laid the tax after a presentment by some grand jury, upon the inhabitants, and not upon fish, or fishing-boats. So far as the people have submitted to this tax, there may be no occasion to call it in question, but I cannot advise the taking of rigorous methods to compel a compliance with it.

As to the second *quære*, if any persons are guilty of

assaulting any of the justices of the peace or constables, or of actual resistance to their authority, they may be indicted for such offences at the quarter sessions, and punished by fine or imprisonment; but for contemptuous words spoken of the justices or their authority, they can only be bound to their good behavior. Offences by destroying the stocks, or whipping-posts, are indictable, and may be punished by imprisonment or fine, or partly by the one, and partly by the other; and his Majesty's may direct the fines to be applied to make good such stocks or whipping-posts.

As to the third *quære*, I am of opinion that the justices of the peace cannot decide differences relating to property, and that their power is restrained to the criminal matters mentioned in their commission.

As to the fourth *quære*, I am of opinion, that neither Captain Osborne, nor the justices of the peace, have power to raise any tax for repairing churches, or any other public works, except such works for which power is given to justices of the peace in England to levy money, by particular acts of parliament. As to any tax for building a prison, it is answered under the first *quære*.

Captain Osborne's instructions not having been laid before me, I cannot judge what powers are thereby given to him, but I presume that no power is comprised in those instructions, of imposing taxes in general, without the consent of some assembly of the people.

April 27, 1730. P. YORKE.

(4.) *The same lawyer's opinion on the powers of the several officers at Newfoundland.*

To the King's most excellent Majesty.

May it please your Majesty.

In humble obedience to your Majesty's commands, signified to me by his Grace the Duke of Newcastle, your Majesty's principal secretary of state, referring to me an extract of the commission to Captain Osborne, Governor of Newfoundland, so far as relates to the authority and direction thereby given to him, to appoint justices of the peace in the several districts of that colony, and an extract of a letter received from him, with copies of two papers therein referred to, (all which are hereunto annexed,) by which it might appear how he is obstructed in the execution of your Majesty's commands to him in this respect, and particularly, that it is pretended to be contrary to the act of parliament for encouraging the fishery of Newfoundland, and directing me particularly to take that act into consideration, and report to your Majesty how the law stands in this point, and whether there is any foundation for that objection, or any interfering between the powers given by the act to the fishing admirals, and the authorities which justices of peace, in the manner they are established here, are invested with by their commission: I have considered the said annexed papers, and also the act of parliament above mentioned, which was made in the 10th and 11th years of the reign of his late Majesty, King William III.; and I humbly certify to your Majesty, that by the said act, it is enacted "That the admirals of and in every port and harbor of Newfoundland, for the time being, be, and are, thereby authorized and required (in order to preserve peace and good government amongst the seamen and fishermen, as well in their respective harbors as on the shore,) to see the rules and orders in the said act contained, concerning the regulation of the fishery there duly put in execution; and

that in case any difference or controversy shall arise in Newfoundland, or the islands thereunto adjoining, between the masters of fishing-boats and the inhabitants there, or any by-boat-keeper, for, or concerning, the rights and property of fishing-rooms, stages, flakes, or any other building or conveniency for fishing or curing of fish in the several harbors or coves, the said differences, disputes, or controversies, shall be judged and determined by the fishing admirals in the several harbors and coves;" and in case any of the said masters of fishing-ships, by-boat-keepers, or inhabitants, shall think themselves aggrieved by such judgment or determination, and shall appeal to the commanders of any of your Majesty's ships of war, appointed as convoys for Newfoundland, the said commander is hereby authorized and empowered to determine the same, pursuant to the regulation in the said act.

These are all the clauses in the said act of parliament which relate to the present question, whereby it appears that the whole authority granted to the fishing admirals is restrained to the seeing the rules and orders, contained in that act concerning the regulation of the fishery there, duly put in execution, and to the determination of differences arising between the masters of fishing-boats and the inhabitants, or any by-boat-keeper, touching the right and property of fishing-rooms, stages, flakes, or any other building or conveniency for fishing or curing of fish, in the several harbors or coves of Newfoundland, which is a kind of civil jurisdiction in particular cases of property; whereas the authority of justices of the peace extends only to breaches of the peace, and other criminal matters, and therefore, I am humbly of opinion that the powers granted by your Maj-

esty to captain Osborne, to constitute justices of the peace in Newfoundland, is not contrary to, or inconsistent with, any of the provisions in the said act; and that there is no interfering between the powers given by that act to the fishing admirals, and the authorities which justices of the peace are invested with by their commission.

December 29, 1730. P. YORKE.

(5.) *The opinion of the Attorney-General, Ryder, on the King's power to erect courts of justice at Newfoundland.*

To his Grace the Duke of Bedford.

May it please your Grace.

In obedience to your Grace's commands, signified to me by your Grace's letter of the 23d instant, setting forth that your Grace had laid before the King a letter which you had received from Captain Rodney, late Governor of Newfoundland, wherein he desires at the request of the principal inhabitants of that island, that your Grace would move his Majesty in their behalf, that power may be granted to take cognizance of capital crimes there; his Majesty had thereupon been pleased to command your Grace to transmit to me an extract of the said letter, that I should consider of the request of the said inhabitants, and report to your Grace my opinion for his Majesty's information, in what manner I think his Majesty may comply with their request, consistent with the 13th article of the act of parliament of the 10th and 11th of the reign of the late King William, for the trial of persons guilty of capital crimes in the said island, in any shire or county in England, a copy of which article your Grace was pleased to inclose: I have

perused and considered the act of the 10th and 11th of King William III. and the inclosed extract from Captain Rodney's letter, and am of opinion that his Majesty has a prerogative and right to erect courts of justice in Newfoundland for the trial and punishment of all sorts of crimes committed there, and that the act of 10th and 11th of King William III. does not take away or affect that prerogative, so that his Majesty, notwithstanding that act, may erect and constitute such court there for the trial of capital and other crimes as his Majesty shall, in his royal wisdom, think proper.

I would only take the liberty of informing your Grace, that about the year 1738, this matter was taken into consideration by the board of trade, in pursuance, I believe, of some reference to them from his Majesty, or a committee of council, and the board did make a report concerning it, after having taken the opinion of myself, and his honor the present master of the rolls, the then attorney and solicitor-general, in which report they proposed inserting into the commission to the next governor of Newfoundland, a clause to empower the governor to erect a court of justice there, to the same effect as is inserted into the commission to other governors of his Majesty's American commission governments; but that clause coming afterwards to be considered in council, was rejected, as I have been informed.

January, 30, 1749. D. RYDER.

(6.) *The opinion of the Attorney-General, Ryder, that the King could not give power to establish a criminal court at Newfoundland, but under the great seal.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

I have perused and considered the several papers your Lordships were pleased to transmit to me, with Mr. Hill's letter of the 26th instant, desiring my opinion, whether a power to take cognizance of capital crimes in Newfoundland can be granted to the governor of that country by instruction only, signed by his Majesty in council, or whether it ought to be inserted in his commission under the great seal; and whether, if such power must be inserted in the commission, the words proposed for that purpose in the year 1738, and which were sent me, are proper: I am of opinion, such power cannot be granted by instruction, or any otherwise than under the great seal, and, therefore, if thought advisable to be granted at all, ought to be inserted in the governor's commission; but the manner of his exercising such power may be prescribed and limited by instructions, for any breach of which he will be answerable to his Majesty.

The form of words in the inclosed extract from the draft of a commission in 1738, is, I think, proper for the purpose, excepting that neither the power of trying, nor that of pardoning treasons, appear to me fit to be intrusted to the governor, or a court to be erected by him.

March 27, 1750. D. Ryder.

(7.) *The opinion of the same lawyer, in pursuance of the former, that the King may instruct his Governor of Newfoundland, to cause to be executed such persons as might be convicted of capital crimes, except treason.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' desire, signified to me by Mr. Hill's letter of the 8th instant, setting forth that frequent complaints having been heretofore made by the commanders of his Majesty's ships stationed at Newfoundland, of the great disorders committed on that island for want of courts of oyer and terminer, for the trial of capital offences committed there, it was the last year thought advisable (after my opinion had thereupon) to insert a clause in the commission prepared for Captain Drake, empowering him to appoint commissioners of oyer and terminer for the trial of such capital offences, which power was limited by an instruction, whereby the governor was directed not to suffer any criminal to be deprived of life or limb by any sentence of such court, until his Majesty's pleasure was known.

That Captain Drake, in a letter to your Lordships, dated the 26th of December last, takes notice that this power, given him by his commission, had had a very good effect in putting a stop to the disorders and murders which had been committed; but represents that unless power is granted to execute in cases of necessity, it will be impossible to bring the offenders to the punishment due to their crimes, for as there is no prison of sufficient strength to confine them in during the winter season, they will, undoubtedly, be rescued by their companions as it has been frequently the case; or should they remain in prison, they must be destroyed by hunger and the excess of cold.

Your Lordships, therefore, desire my opinion upon this affair, and whether I have any, and what objection, to giving the governor a power of executing criminals convicted of capital offences, when he sees just cause, as well as of trying such offences: I have considered the

matter, and have no objection, in point of law, to the giving the governor such power as is proposed with respect to capital offences; but it does not seem proper to extend it to treason, nor to the case of the officers of his own ship, or of any of the trading ships that shall be there.

May 16, 1751. D. RYDER.

(8.) *The opinion of the Advocate, Attorney, and Solicitor-General, Hay, Norton and De Grey, how far the King's power was limited at Newfoundland, by the statute of King William.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Pownall's letter, dated the 28th day of February last, inclosing a project of arrangements proposed by the ambassador of France, to be reciprocally agreed to by the crowns of Great Britain and France, for avoiding any disturbance or dispute between the English and the French who carry on a concurrent fishery on the coast of Newfoundland, and signifying to us your Lordships' pleasure, that we should give our opinions, as soon as possible, upon the following *quæries*:— 1st. Whether the articles of this project are consistent with the act of parliament of the tenth and eleventh of William the Third, cap. 25. to encourage the trade to Newfoundland? 2d. Whether the Crown can legally enter into, and has any power to enforce such regulations as are contained in the several articles of this project, so far as they relate to the subjects of Great Britain, either in the substance of the said articles, or in the

mode of carrying them into execution? We have taken Mr. Pownall's letter, and the two *quæries* therein stated, and the project sent therewith, and hereunto annexed, into our consideration, and are humbly of opinion, 1st. That the articles of this project are not consistent with the act of the tenth and eleventh of William the Third, cap. 25. for the encouragement of the trade to Newfoundland, the same containing regulations and restrictions, in several instances, contrary to the provisions of that act, as well in respect to the rights of his Majesty's subjects, as to the mode of determining controversies arising there. 2d. We humbly conceive that the Crown cannot legally enter into, nor has power to enforce such regulations, the same being contrary to the statute of King William, as far as they relate to the subjects of Great Britain, either in the substance of them, or in the mode of carrying them into execution.

G. HAY.
F. NORTON.
WM. DE GREY.

Lincoln's Inn, *March* 6, 1764.

(9.) *The opinion of the Attorney and Solicitor-General, Sawyer and Finch, on the Eastland and Greenland Companies.*

Whitehall, Nov. 23, 1681.

Sir:

I send here inclosed the scheme, which the Lords of the Committee of Trade and Plantations expect to have answered within a month, and so, from time to time, according to the promise you and the other officers of the customs have made their Lordships.

W. B.

Sir:

I have considered of the case in difference between the Greenland and Muscovy companies, and of the papers you sent from the lords of the committee for trade, amongst which I find my opinion given long since. In the case, I find no material difference in the cases, as stated by both companies to their counsel; and, upon review of my opinion, which I have there given at large, and to which I crave leave to refer, I see no cause to alter it in either point, but am rather confirmed in it, upon perusal of the opinion given by the counsel on behalf of the Greenland company, who seem not to have weighed the whole design of the act, which was to retrieve a decayed trade, not to overthrow a settled known trade, which if the act had in the least intended, it would have been done in more plain and express words; besides those opinions do, by way of supposition, presume, that ships or vessels are used in taking of the seals, which in fact is not so, which I humbly submit to their lordships' judgment.

Dec. 15, 1681. R. Sawyer.

Though I was once inclined to think, that the seal oil, imported by the Muscovia company, was liable to pay the 9*l.* per ton, and did give some opinion that way, yet upon better consideration of the act, and the circumstances of the case, I believe Mr. Attorney is in the right, and that they are not within the act.

H. Finch.

Seventhly.—On Commerce.

This head may be divided into the four following divisions; 1. Manufactures set up abroad; 2. The acts of navigation; 3. Miscellaneous matters of trade; 4. Coins.

I. (1.) *The opinion of the Solicitor-General Thomson, on the King's prerogative of prohibiting his subjects from going abroad.*

Sir;

In obedience to the commands of the Lords Commissioners of Trade and Plantations, signified by yours received this day, I have perused the letters therein inclosed. The King may prohibit his subject from going out of the realm without license, and the 5th of Richard II. cap. 2d. forbids all persons to depart the realm without license, except those sort of persons mentioned therein. As to the particular persons intending to go abroad, a writ will be granted from the chancery, upon a suggestion of such intention, to prohibit them from going abroad, and security may be required by virtue thereof, that they will not depart the realm without license, which if they refuse, they may be committed till sufficient security is found. As to those already abroad, if they are required by proclamation to return home, and do not obey, I do not know of any method of getting at them by any process abroad; but it is proper that the King's minister, residing in the country where they inhabit, do require that they may be made to depart that country, in order to their return.

November 12, 1718. Wm. Thomson.

(2.) *Mr. West's opinion upon establishing British manufactures in France.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have perused and considered the several letters relating to the establishing several manufactures, in foreign parts, by British artificers; but, as

the case is not particularly stated unto me, it will not be possible for me to give a direct answer to the question proposed. I shall therefore beg leave of your Lordships to consider it something at large, and to lay down some general positions, which I take to be agreeable to the law of England; a right application of which, I believe, will in a great measure amount to an answer to such inquiries as may be made.

1. That particular subjects should have an uncontrollable liberty of all manner of trading, is not only against the policy of our nation, but of all other governments whatsoever. I do, therefore, take it to be law, that the Crown may, upon special occasion, and for reasons of state, restrain the same; and that not only in cases of war, plague, or scarcity of any commodity, of more necessary use at home, for the provision of the subject, or the defence of the kingdom, &c. (in which cases the King's prerogative is allowed to be beyond dispute,) but even for the preservation of the balance of trade: as, suppose a foreign prince, though in other respects preserving a fair correspondence and in amity with us, yet will not punctually observe such treaties of commerce as may have been made between the two nations; or, in case there are no such treaties existing, refuses to enter into such a regulation of trade as may be for the mutual advantage and benefit of both dominions: on such occasion, I am of opinion that the King, by his prerogative, may prohibit and restrain all his subjects in general, from exporting particular commodities, &c.; or else, generally, from trading to such a particular country or place; since trade does not only depend upon the will or laws of the prince, whose subjects adventure abroad to carry it on, but also of that prince into whose country

the commodities are exported, and with whose subjects commerce is negotiated and contracted; without such a power, it is obvious that the government of England could not be upon equal terms with the rest of its neighbors, and since trade depends principally upon such treaties and alliances as are entered into by the Crown with foreign princes; and, since the power of entering into such treaties is vested absolutely in the Crown, it necessarily follows that the management and direction of trade, must, in a great measure, belong to the King.

2. Things of this nature are not to be considered strictly according to those municipal laws, and those ordinary rules, by which the private property of subjects resident within the kingdom is determined; but a regard must also be had to the laws of nations, to the policy and safety of the kingdom; the particular interest and advantages of private men must, in such cases, give way to the general good; and acting against that, though in a way of commerce, is an offence punishable at the common law.

3. Foreign trades carried on by particular subjects for their private advantage, which are really destructive unto, or else tending to the general disadvantage of the kingdom, are under the power of the Crown to be restrained or totally prohibited. There may be a prohibition of commerce without open enmity, as an actual declaration of war, and particular subjects, who, for private gain, carry on a trade abroad, which causes a general prejudice or loss to the kingdom, considered as an entire body, in doing so, manifestly act against the public good, and ought not only to be prohibited, but punished. Carrying on such trades, is, in truth, (what some acts of parliament have declared some trades to

be,) being guilty of common nuisances: and if the Crown, which in its administration of government is to regard the advantage of the whole realm, should not be invested with sufficient power to repress and restrain such common mischiefs, it has not a power to do right to all its subjects. If the public mischiefs, from such a way of trading, be plain and evident, there is the same reason for restraining particular persons from carrying on a trade that draws such consequences after it, (though it be a trade that of itself is not prohibited by any particular law) as there is, that a private subject shall not make such an use of his own house or land (in which he has an absolute propriety and a legal title to it), as will turn to the common annoyance and public detriment of the rest of the kingdom.

4. The general trade of the nation, and the maintaining of the customs and duties granted to the Crown for the support of it, are things of so public a concern, that whatsoever has a direct and evident tendency to the discouragement, and disadvantage of the one, or to the diminution of the other, is a crime against the public. As an instance of which, I shall mention it as a kind of precedent, that raising and spreading a story, that wool would not be suffered to be exported upon such a year, (probably by some stock-jobbers in those times), whereby the value of wool was beaten down, though it did not appear the defendants reaped any particular advantage by the deceit, was, upon the account of its being an injury to trade, punished by indictment, and a confederacy, without any further act done, to impoverish the farmers of the excise, and lessen the duty itself, has been held an offence, punishable by information. If, therefore, the consequence of this present undertaking should

prove what is apprehended from it, there can be no doubt but that the Crown has so much interest and concern for the trade of the nation and its own revenue, as to be able to put a stop to the carrying on a thing so mischievous to the one and the other, by the advice and assistance of his Majesty's own subjects.

5. As to the particular subjects so employed abroad, there is no doubt but that the King, by his prerogative, may restrain them; it is agreed on all hands, that the statute of fugitives is but an affirmance of the common law. That the Crown may, at its discretion, require the personal presence and attendance of the subject, lest the kingdom should be disfurnished of people for its defence as it is said in some books; and not only so, but upon a suspicion or jealousy that he is going abroad. *Ad quam plurima nobis et quam pluribis de populo nostro prejudicialia et damnosa ibm prosequenda*, (as the writ, framed upon that occasion, expressed it) The Crown is, by law, entrusted to judge what things those are, which shall be looked upon to be mischievous and prejudicial to the Crown and people, and what caution is to be taken against them; and by that writ it appears, it is equally criminal to do any thing of that kind by any other hand, as to do it personally himself: and, therefore, after the writ has commanded his not going abroad, it adds, *nec qui quicquam ibm prosequi attemptes, seu attemptari facias, quod in nostrum seu dictæ coronæ nostræ prejudicum cedere valeat quovis modo: nec aliquem ibm mittas exhac causa.*

6. Upon the very foot of trade itself, it is necessary that the Crown should have a power over the persons and dealings of their subjects in foreign parts. By the law of nations, a government, if they have no other re-

dress, take goods from any of the same nation, by way of reprisal for injustice done by one of the nations. So that Englishmen suffered to reside abroad, by their misbehavior may endanger more than their own persons and estates. But, as the stating to your Lordships, the power which the Crown has to prohibit the subject from going abroad, when there is reason to suspect that designs prejudicial to the kingdom are carrying on alone, is not sufficient to answer your Lordships' purpose, I shall beg leave to remind your Lordships of a case parallel to this, which has already had a determination at the board: *anno* one thousand seven hundred and five, several English merchants were concerned in a design to set up the manufacturing of tobacco in Russia, to which purpose they had carried over the necessary workmen and instruments; but, upon application to the board of trade, the then lords commissioners did represent it to the Queen in council, as their opinion, that the persons who had been already sent to Moscow, might be recalled by letters of privy seal, directed to her Majesty's envoy for that purpose; and, that the engines and materials of working should be broken and destroyed in the presence of the said envoy; and, that the persons at home, who were concerned in sending the said workmen over, should be enjoined not to send over any more workmen or materials, &c.

Upon inquiry, my Lords, I am informed that the said works and materials were actually destroyed in Russia, and the workmen sent back again by the direction of the envoy, who took the advantage of the Czar's absence from the place where they were established. What was then done, may certainly be repeated. It is not the business of a lawyer to consider how such a method of pro-

ceeding may be relished by a foreign court; but only to give it as his opinion, that it may be *justified*, as against particular subjects who are guilty of so high a crime against their country.

Dec. 5, 1718. RICH. WEST.

(3.) *The opinion of the Attorney-General Macdonald, how far the King may restrain his subjects from going abroad.*

A case of so much importance as the present, and not very frequently occurring, would require more investigation than the unavoidable shortness of the time permits me to make; nevertheless, certain established principles furnish conclusions which, in my judgment, forcibly apply to it.

The question must be, first, Whether the British seamen found on board of the Friendship, have committed any, and what offence, and how it is punishable? Secondly, Whether Brough, Taylor, and Rising, have committed any, and what offence, and how that is punishable? Thirdly, Whether, in case an action should be brought on account of the detention, there be a good defence to it? As to the first, disobedience to the King's lawful commands, is, by the common law, an high misprision and contempt, punishable, upon indictment or information, by fine and imprisonment, and that the King may lawfully command the return of his subject when out of the realm, under the penalty of seizing his lands till he return, or may command any particular subject to remain within the realm, by his writ of *ne exeat regnum*, or all, or any part of his subjects by proclamation, has been long and often recognized as a part of the common law. Fitzherbert, N. B. fol. 85, C. says, "that the King, by his proclamation, may inhibit

his subjects that they go not beyond the seas, or out of the realm without license; and that without sending any writ or commandment unto his subjects; for perhaps he cannot find his subject, or know where he is; and therefore the King's proclamation is sufficient in itself." And the judges held (12th and 13th Ed.) that departing the realm without license, was no contempt, though done with intent to live out of the Queen's allegiance; the departing having been before prohibition or restraint by proclamation, or writ of *ne exeat* awarded by the Queen; by which it is plainly implied that departing after proclamation would have been a contempt: and even so early as the reign of Edward I. several persons were impleaded for having acted contrary to a legal proclamation. Lord Hale, in his treatise *de portibus maris*, part 2. c. 8, sums up the law upon this subject, thus: First, At common law, any man might pass the seas without license, unless he was prohibited; Secondly, At common law, the King might, by his writ, prohibit a person particularly from going beyond sea without license, and this may be done at this day; Thirdly, At common law, in time of public danger, and *pro hac vice*, there might be a general inhibition by proclamation, restraining any from going beyond sea without license.— From another passage in a MS. of the same writer, he shows what kind of public danger he adverts to, for speaking of the general restraint, as distinguished from restraining an individual, he says, "this is clearly that restraint intended by the statute of magna charta, *nisi publici antea prohibit facient* (not as if it must be a prohibition by act of parlimament,) and this appears by the constant practice, especially in time of danger, when a free passage might either weaken the strength, or dis-

close the secrets of the realm." And after citing many instances, he adds, "and this prohibition the King may take off generally or particularly, as he pleaseth."

From these authorities, and the constant practice of prohibiting marines, by proclamation, from departing the realm for the purpose of entering into foreign service, at times when the state of Europe would render it dangerous to weaken the strength of the nation, I conceive that the British seamen on board the Friendship, who actually executed a contract for the 26th of March last, are guilty of a misdemeanor, for which, upon conviction, they may be fined and imprisoned: as the King, by his prerogative, may restrain all his subjects from departing the realm, he undoubtedly may such classes of them, on which its strength depends.

Secondly, With respect to Brough, Taylor, and Rising, if the entering into foreign service, in breach of the proclamation, be a crime in the British seamen, I am of opinion that a conspiracy to entice and carry them into foreign service, is also a misdemeanor, punishable by fine and imprisonment, if the evidence, upon examination, is sufficient.

Thirdly, With respect to the sufficiency of the defence to an action brought against the officers, I think they might justify the detention of the ship, so long as the British seamen were on board, and till they received directions upon the subject. The commander of a ship, actually disobeying the law, cannot, I apprehend, insist upon a clearance. By the 12th Ch. II. c. 4. s. 12, power is given to the King, to prohibit, by proclamation, the exportation of gunpowder, &c. but no specific mode of putting the act in force, by preventing the exportation, is pointed out; nor was any pointed out till the

29th George II. c. 16, forfeited the gunpowder and inflicted a penalty. During the period which elapsed between the passing of those two acts, I think the officers of the customs must have been justified in stopping a ship having gunpowder on board, after a proclamation, till such gunpowder was relanded; and this proclamation is equally warranted by the common law.

July 31*st*. 1788. AR. MACDONALD.

(4.) *The opinion of the Attorney-General Yorke relating to English subjects being engaged in the East India Company of Sweden.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

I received your Lordships' commands, by letter from Mr. Popple, signifying to me that your Lordships having some papers under your consideration, relating to an East India company lately erected in Sweden, wherein several Englishmen are thought to be engaged, not only as having shares in the said company, but as captains, supercargoes, and sailors, had desired I would let your Lordships know what laws are now in force to restrain his Majesty's subjects, either in or out of this realm, from being anyways engaged as aforementioned, and what penalties they are subject to; as also my opinion, whether his Majesty has any power to recall his subjects (other than artificers and manufacturers) from foreign parts, and if they are liable to any penalty upon their refusing to return.

As to the first question, what laws are now in force to restrain his Majesty's subjects, either in or out of the realm, from being engaged either as sharers in the said company, or as captains, supracargoes, or sailors under them; I humbly certify your Lordships, that the act

made in the fifth year of the reign of his late Majesty King George I. entitled, "an act for the better securing the lawful trade of his Majesty's subjects to and from the East Indies, and for the more effectual preventing all his Majesty's subjects trading thither under foreign commissions," expired at the end of the session of parliament.

But the act of the ninth year of his said late Majesty's reign, entitled, "an act to prevent his Majesty's subjects from subscribing, or being concerned in encouraging or promoting any subscription for an East India company in the Austrian Netherlands, and for the better securing the lawful trade of his Majesty's subjects to and from the East Indies, is still in force; whereby it was (*inter alia*) enacted, that if any subject of his Majesty, his heirs, or successors, should subscribe, contribute to encourage, or promote the raising, establishing, or carrying on any foreign company or companies, afterwards to be raised, formed, or erected for trading or dealing to the East Indies, or other parts within the limits of trade granted to the English East India company, or should become interested in, or entitled unto, any share in the stock or capital of such company or companies; every person so offending, shall forfeit all his and her interest, share, and concern in the capital stock or actions of such company, together with treble the value thereof, to be recovered and distributed as that act directs.

Penalties are also inflicted by the said act, upon any of his Majesty's subjects, who should know of any share or interest, which any other subject had in any such company, without discovering the same, or who should accept of any trust in any share or interest, in any such foreign company.

It is also enacted, that if any subject of his Majesty, his heirs, or successors, (other than such as are lawfully authorized thereunto,) should go, sail, or repair to, or be found in or at the East Indies, or any of the places aforesaid; every person so offending, should be guilty of a high crime and misdemeanor, and should be liable to such corporal punishment or imprisonment, or to such fine, as the court where such prosecution should be commenced, should think fit; and should and might be seized and brought to England, and upon their arrival here, be committed until they should find security to answer for such offence, as this act requires.

By an act made in the seventh year of the reign of his late Majesty King George I. cap. 21. all contracts entered into by any of his Majesty's subjects for loans, by way of bottomry, or any ships of foreigners bound for the East Indies, and for loading, or supplying such ships with a cargo or provisions, and all copartnerships or agreements relating to any such voyage, or the profits thereof, and all agreements for wages for serving on board any such ships, are declared void.

Besides the particular penalties and provisions of these acts, every subject of his Majesty, offending by trafficking or adventuring to the East Indies, or visiting or haunting the parts aforesaid, under color of being concerned in, or employed by any such new company, will incur the penalties inflicted by the act in the ninth and tenth years of King William III. cap. 44. viz. the forfeiture of all ships and vessels employed in such trade, with the guns, tackle, apparel, and furniture thereunto belonging, and all the goods and merchandizes laden thereupon, and all the proceeds and effects of the same, and also double the value thereof, to be seized, sued for,

and distributed; as by that, and several subsequent laws, is directed.

As to the second question, whether his Majesty hath any power to recall his subjects (other than artificers and manufacturers) from foreign parts; and whether they are liable to any penalty upon their refusing to return; I am of opinion that his Majesty may, by letters under his privy seal, require any of his subjects going into foreign parts without his royal license, (except merchants), to return home within a limited time, upon their allegiance; and also merchants, in case they are guilty of any practices contrary to the duty of their allegiance or the laws of the land; and if any person, after such letters of privy seal served upon him, shall not return into Great Britain within the time thereby prescribed, he will forfeit the rents and profits of all his lands and tenements during his life, and all his personal estate.

As to seamen, his Majesty may, by a general proclamation under his great seal, command all seamen, being his natural born subjects, who shall be in the service of any foreign prince or state, or employed on board the ships of foreigners, to return home, upon the duty of their allegiance, and under the peril of being guilty of a contempt of his royal authority; and also prohibit all seamen to go into any foreign service, or to serve on board the ships of foreigners, and such proclamations have been frequently published in former reigns.

Nov. 27, 1731. P. YORKE.

(5.) *Mr. Fane's opinion as to the seizing any machinery, which were designed to be exported, and which were used in the English manufactures.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, in Mr. Popple's letter of the 27th instant, wherein your Lordships are pleased to desire I should inform you, whether there is any law of this kingdom by which any machine or tools used in any of the manufactures of this kingdom, may be seized, at their being put on board ship for exportation to any foreign country; I beg leave to inform your Lordships, that I find by the statute of the ninth and tenth of William III. chap. 28th, sec. 2d. that boxes, cases, or dial-plates for clocks and watches, without the movements and maker's name, are prohibited from being exported out of the kingdom, and are liable to be seized on board ship. And by the seventh and eighth of William III. chap. 19th, sec. 2d, frames, for stockings, are also prohibited from being exported, and are also liable to be seized, which are all the machines or tools used in any of our manufactures, that I can find upon the nicest search to be prohibited from exportation to any foreign country.

October 28, 1730. FRAN. FANE.

II. (1.) *The report of the whole judges upon the memorial of the African Company, touching the assiento, in* 1689.

In pursuance of his Majesty's order in council, hereunto annexed, we do humbly certify our opinions to be, that *negroes are merchandize;* that it is against the statute for navigation, made for the general good and preservation of the shipping and trade of this kingdom, to give liberty to any alien, not made denizen, to trade in Jamaica, or other his Majesty's plantations, or for any shipping belonging to aliens to trade there, or export

thence, negroes, provisions for shipping, or aliens trading there; that for ships that shall happen by tempest, or in case of peril and distress, to come into the plantations for preservation, and to amend or take in necessary provisions, or repair there, in such case it is not against the act of navigation or any other law.

J. HOLT.	R. LECHMERE.
H. POLLEXFEN.	THO. ROKEBY.
ED. NEVILL.	GYLES EYRE.
J. POWELL.	PEYTON VENTRIS.
H. GREGORY.	JO. TURTON.

(2.) *The opinion of the Attorney and Solicitor-General, Treby and Somers, on the Spanish trade in the West Indies.*

Most of the privileges and permissions, proposed by the Spanish commissioner, cannot be granted without dispensing with the act of navigation, 12th Car. II. cap. 18. wherein, besides the matter of law, there is a great consideration of policy.

1st. The act requires that no goods or commodities whatsoever, shall be imported to, or exported from, any plantations, but in English vessels. But this must have a reasonable construction, and must be understood of such goods and commodities as are to be traded with, and not of provisions for present sustenance, or tackle for refitting a ship, or such like necessaries for accidental occasions.

2d. To disburden a ship merely for careening, may be lawful, so it be *bona fide*; but it is dangerous to make such an article, lest, under the umbrage of that, a secret trade be covered and carried on, contrary to the act.

3d. Negroes are merchandize, and can no more be ex-

ported, by the act, than other goods.—Bullion is allowed by the act to be imported.

4th. The act makes a forfeiture of the ship as well as of the goods, and does not distinguish whether the goods belonged to the owners or merchants, or to the officers or seamen, and it is difficult to render any such distinction practicable.

5th. The laws and customs of the place must be observed; but in the proceedings there, due regard will be had to the King of Spain's orders, and his subjects' contracts.

5th. The private exercise of religion will not be gainsaid.

Geo. Treby.
J. Somers.

(3.) *The opinion of the Attorney and Solicitor-General, Trevor and Hawles, on carrying logwood to Venice, whether legal.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

We have considered of the several laws for regulating the plantation, and other trades, in England, and as to the first part of the case, viz: the carrying logwood from Honduras, in the West Indies, (the same being no part of his Majesty's plantations) to Venice, we cannot find any law that restrains or forbids the same, unless the ship doth belong unto some of his Majesty's plantations; and as to the landing European goods at Venice, and carrying the same to Guinea, in case the coast of Guinea be reckoned an English colony or plantation (which we think it is not), the same is prohibited by the act made

the 15th Car. II., for the encouragement of trade, under the forfeiture of ship and goods, which may be seized any where, where his Majesty hath authority.

But in case this ship doth belong to any of his Majesty's plantations, she is forfeite[illegible] unlading logwood at Venice, by the act 22d and 23 [illegible] II. to prevent planting tobacco in England, and for encouragement of the plantation trade; whereby such ships are prohibited from unlading any dying wood in any port or place in Europe, other than England, Wales, or town of Berwick.

August 31, 1699.

THO. TREVOR.
JO. HAWLES.

(4.) *The report of the Attorney-General Northey on preserving the rights of British-built ships.*

Whitehall, March 6, 1717-18.

Sir:

Mr. Godolphin, attending the Lords Commissioners for Trade and Plantations the other day, upon the subject matter of a bill, by him proposed, for preserving the right of British-built ships, amongst other things he informed their Lordships, that many doubts had arisen upon a certain clause in an act, "for preventing frauds, and regulating abuses in his Majesty's customs," passed in the 13th and 14th years of King Charles II. the words of which clause are as follows: "That no foreign-built ship, that is to say, not built in any of his Majesty's dominions of Asia, Africa, or America, or other than such as shall (*bona fide*) be bought before the 1st of October, 1662, next ensuing, and expressly named in the said list, shall enjoy the privilege of a ship belonging to England or Ireland, although owned or manned by English, (except such ships only as shall be taken at sea by letters of

marque or reprisal, and condemnation made in the court of admiralty as lawful prize,) but all such ships shall be deemed as aliens' ships, and be liable to all duties that aliens' ships are liable unto, by virtue of the said act for increase of shipping and navigation."

Now their Lordships would desire to have your opinion how far this clause extends, and what alteration it has made in the case of foreign-built ships, that is to say, whether, by these words, "That all ships shall be deemed as aliens' ships, and be liable to all duties that aliens' ships shall be liable unto, by virtue of the said act for increase of shipping and navigation," be meant that such ships, being deemed as aliens' ships, shall be liable to the forfeitures, in some cases, as well as liable to all duties in other cases, that aliens's ships are liable to, by virtue of the aforesaid act of navigation? Or whether the forfeitures, appointed by the act of navigation, on ships unqualified, by the said act, to make some voyages, and to trade in certain species of goods therein enumerated, are so far altered by the foregoing clause, in respect of foreign-built ships, of English property, and manned by English, though purchased since the year 1662, that such ships may make the said voyages, and trade in the said enumerated goods, paying aliens' duties? A also whether you have ever known this point controverted in the court of exchequer, and what judgment has bee. given thereupon? WM. POPPLE.

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, I have considered of the *quaeries*,

stated by your Lordships in the annexed paper, upon the act for preventing frauds, and regulating abuses in his Majesty's customs, arising upon some discourse your Lordships had with Mr. Godolphin, and am humbly of opinion that foreign-built ships, of English property, and manned by English, though purchased since the year 1662, may make the voyages that any foreign ship, made free before that time, might have made, and may lawfully trade in the enumerated goods, paying alien duties; and that this has been always the opinion of the court of exchequer, and the practice has been accordingly, and there is now no pretence to fancy that, although such ships are now deemed as alien ships, they are liable to forfeitures as if they were in the hands of aliens, for that the only alteration made by the clause stated, is, that such foreign-built ships, owned by Britons, are to pay duty as alien ships, but they are qualified, as ships belonging to the people of Britain, to trade as such ships might have traded, by the act of navigation.

March 12, 1717. EDW. NORTHEY.

(5.) *The opinion of the Solicitor General Thomson, on Spanish ships trading to the British Islands.*

Sir;

In obedience to the commands of the Lords Commissioners for Trade and Plantations, signified by yours of the 2d instant, I think it plain, that by the first clause in the act of navigation, viz: the 12th of Car. II., that Spanish ships, coming from Spanish ports in America, laden with the product of those countries, are prohibited to be imported into our colonies or plantations, under the penalty of the loss of the goods and ship; and also

they are prohibited to export goods from thence in shipping, not English, &c.

February 4, 1719-20. WM. THOMSON.

(6.) *Mr. West's opinion on the same subject.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have considered the following *quære,* whether Spanish ships, coming from Spanish ports in America, and laden with the products of those countries, are prohibited by any acts of trade, and particularly those of the 12th and 15th of King Charles II. and that of the 7th and 8th of King William, to unload and sell their cargoes, in any of the British plantations in America, and to load again there? And I am of opinion that Spanish ships, coming from Spanish ports in America, &c. are within the intent of the above mentioned statutes, and are thereby prohibited from unlading and selling their cargoes in any of the British plantations again there.

January 29, 1719-20. RICH. WEST.

(7.) *The opinion of the Attorney-General, Northey, on the importation of naval stores from Holland.*

To the Queen's most excellent Majesty.

May it please your Majesty.

In humble obedience to your Majesty's command, signified to me by Mr. Secretary Hedges, I have considered of the annexed memorial of his Royal Highness, whereby it is proposed unto your Majesty, for the reasons therein mentioned, that leave may be given for importing

tar and pitch from Holland, Hamburgh, or such other foreign parts, from whence the same may be had on the best terms, for furnishing her Majesty's navy therewith, for the ensuing as well as the present year; and I do humbly certify your Majesty, that for explaining the act for increasing and encouraging of shipping and navigation, by a clause in the statute, made in the 14th year of the reign of the late King Charles the Second, for preventing frauds and regulating abuses in the customs, it is enacted and declared, "That no pitch or tar shall be imported into England, Wales, or Berwick, from the Netherlands or Germany, upon any pretence whatsoever, upon penalty of the loss of all the said goods, as also of the ships and furniture, one moiety whereof is to be to your Majesty, and the other moiety to the informer, who shall seize or sue for the same; by reason of which clause, I am humbly of opinion that such leave cannot be given to the merchants who are to sell to the commissioners of your Majesty's navy, to import those goods from Holland or Hamburgh, for that it will be licensing an importation expressly prohibited by that act; but notwithstanding that act, I do not see but that your Majesty may, for the service of your navy, in your own ships, import what pitch and tar your Majesty shall want for that service, from Holland or any other place, that act being intended to regulate trade, and not to restrain the Crown from importing from any place for the service of the navy, which appears from the forfeiture given by that act of the goods imported, and the ships in which they should be imported, one-half to the Crown the other half to the informer, which is not practicable in case of an importation made by your Majesty; however, there being a bill ordered to be brought in the

house of commons, for a temporary suspension of that part of the act of navigation that requires the merchant ships to be manned with three-fourths of the mariners English, I humbly submit it to your Majesty, if it will not be for your Majesty's service to have a clause in that bill, to enable a temporary importation of naval stores, as is proposed by his Royal Highness's memorial.

January 13, 1703. EDW. NORTHEY.

(8.) *The opinion of the Attorney, and Solicitor-General, Yorke and Wearg, on the same topics.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by a letter from Mr. Popple, of the 3rd instant. transmitting to us the annexed copy of a petition of the Muscovy company to his Majesty, and directing us to report to your Lordships our opinion, whether, as the law now stands, hemp, of the growth of Russia, may be imported in English bottoms from the Netherlands? We have considered the said petition, and do apprehend, that by the act of navigation no restraint is laid upon the importation of hemp, of the growth of Russia, from other places beside those of its growth, or such ports where it can only, or most usually is shipped for transportation; and it appears to be none of the commodities particularly enumerated in the act of frauds, 14th Car. II. which are prohibited to be imported from Germany or the Netherlands, and, therefore, we are of opinion, that, as the law now stands, such hemp may be imported in English shipping, duly navigated from the Netherlands; but this being a *quære* which concerns a matter of so great

consequence as the navigation of this kingdom, we thought it proper to transmit a copy of the said petition to the commissioners of his Majesty's customs, in order to be informed by them what has been the usage and practice in this instance: whereupon the commissioners of the customs having referred it to their patent officers to certify such practice, were pleased to lay before us the certificate of those officers, hereunto annexed, whereby it appears that hemp in general has been usually imported from Holland, and paid customs according to the book of rates, without inquiring into the place of its growth.

March 13, 1723.

P. YORKE.
C. WEARG.

(9.) *The opinion of the Solicitor-General, Mountague, on Irish ships carrying barley from Rochelle to Lisbon, in* 1708.

Sir:

I was very sorry to find, by yours of the 12th of this instant, November, that the Lords Commissioners of Trade had not received the opinion I had written to the *quære* sent me upon the extract of Lord Galloway's letter, which, you will perceive, has been wrote ever since the 26th of October, but was mislaid among my papers, and forgot to be sent; but I hope it will come time enough to answer the purposes they want it for: therefore, with my humble service, I desire you will lay it before their Lordships.

JAS. MOUNTAGUE.

Extract of a letter from the Earl of Galloway, her Majesty's ambassador extraordinary, in Portugal, to the Earl of Sunderland, dated at Lisbon, the 6th of August, 1708, N. S.

I must acquaint your Lordships, that there is lately come into this port, the Happy, Richard Knowles, master, from La Rochelle, laden with barley, consigned to a factor here, Monsieur l'Evesque: the master first said he came from Dublin, but the entry has been made from the former place, and he has the Queen's pass for Bilboa, and at La Rochelle they have published leave to embark corn for Portugal, which trade, I am apt to believe, they design to carry on by means of English vessels, with such passes for better security: as I suppose such passes are not to be obtained without the owners giving security in England, it will be very proper to make them answer for this trade, so much to our prejudice.

To the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

I have considered the extract of the Earl of Galloway's letter to the Earl of Sunderland, set forth on the other side, and am of the opinion that Richard Knowles, the master of the ship Happy, which voluntarily went to Rochelle for corn to carry to Lisbon, is, in strictness, guilty of high treason by the statute of the 3d and 4th of her present Majesty's reign, and so are all the persons concerned in that trade, if they are subjects to the Queen of Great Britain, and go voluntarily into France, without license from her Majesty; therefore, if this mischievous trade complained of cannot otherwise be prevented, the master and mariners, who are her Majesty's subjects, may be seized as traitors, and tried for the same, as persons guilty of foreign treasons are tried.

October 26, 170[illegible] JAS. MOUNTAGUE.

(10.) *Mr. Fane's opinion on the carriage of Canary wines directly to the British Plantations.*

The Case.—By the act of parliament, passed in the 15th year of King Charles II. entitled, "an act for the encouragement of trade," no commodity, of the growth, production, or manufacture of Europe, can be imported into any plantation belonging to his Majesty, in Asia, Africa, or America, but what shall be shipped in Great Britain, and in English-built shipping, and whereof the master and three-fourths of the mariners are English, and which shall be carried directly thence to the said plantations, and from no other place whatsoever, under forfeiture of ship and goods; that by the 7th section of the said act, there is a proviso that it shall be lawful to ship, in ships navigated as aforesaid, salt for the fisheries of New England and Newfoundland, in any part of Europe; and in the Madeiras, wines of the growth thereof; and in the Western Islands or Azores, wines of the growth of the said islands; and the same to transport into any of the said plantations.

Since the passing of this act, it has been a custom to export Canary wines directly from the Canaries to New England, and New York; but some doubts having arose, whether this exportation is consistent with the aforesaid act of parliament, and application having lately been made for liberty to export Canary wines directly from the said islands to the other plantations in America, *quære*, whether, consistent with the aforesaid law, Canary wines may legally be imported into any of the plantations directly from the Canary Islands?

I apprehend that the Canary Islands are not esteemed, by books of geography, to be a part of Europe, and, con-

sequently, the importation of the wines directly to New York and New England, will not be considered as a breach of the above mentioned act of parliament; besides, the long usage, in my humble opinion, will in some measure, if there should be any doubt as to the situation of these islands, be a circumstance which will have great weight in the determination of this matter.

February 3, 1736-7 FRAN. FANE.

(11.) *The opinion of the Solicitor-General, Eyre, on granting passes to ships, contrary to the act of navigation.*

Whitehall, Oct. 26, 1708.

Sir:

Her Majesty having referred to the Lords Commissioners of Trade and Plantations a petition from Mr. Thomas Pinder, praying her Majesty's passes for four Spanish ships to come from the Spanish West Indies to Barbadoes, to fetch negroes from thence, and their Lordships apprehending that such passports and trade are inconsistent with the acts of navigation, whereby no goods or commodities whatever may be imported into, or exported out of, any of her Majesty's plantations in Asia, Africa, or America, in any ships or vessels but such as do truly belong to the subjects of this kingdom, or of Ireland, &c. their Lordships have, therefore, commanded me to desire your opinion, whether the granting such passes may be lawfully granted?

WM. POPPLE, jun.

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordsh[illegible],

In obedience to your Lordships' commands, signified to me by the letter hereunto annexed, I have considered the matter which your Lordships have been pleased to require my opinion in; and I humbly conceive, and submit it to your Lordships' great wisdom, that the granting of the passes desired will be illegal, and directly contrary to the act of navigation.

October 29, 1708. R. EYRE.

(12.) *Mr. Fane's opinion of the King's ships seizing vessels, trading against law, in the British Islands.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Hill, I have considered an extract of a letter from Robert Byng, Esq. Governor of Barbadoes, to your Lordships, dated the 13th of May, 1740, and am humbly of opinion that no ships or vessels, offending against the several acts of trade, can be seized by his Majesty's ships of war, within the limits of any port within the territories of the respective Governors of his Majesty's plantations; and I think if any such power should be attempted by the commanders of his Majesty's ships, the officers of the customs will be very well justified in going on board such ship or vessel so seized, and bringing on shore any prohibited goods, or goods for which the duties have not been paid; and it is the duty of all persons, both civil and military, in his Majesty's service, to be aiding and assisting to the officers of the customs, if they are so required to be.

August 15, 1740. FRAN. FANE.

(13.) *The Advocate-General, Sir John Cooke's, opinion, on the carrying tobacco from Virginia, in neutral ships, to France.*

Sir:

I have been out of town, or you had sooner received an answer to the *quære* you proposed to me from the Lords Commissioners for Trade, which I take to be this, viz :—

By what law, order, or instruction, English merchants are disallowed to send goods (not contraband and expressly prohibited) in neutral ships from England, to any place in enmity with her Majesty?

I conceive that the laws of war and of nations do prohibit such trade; and such prohibition seems be be contained or implied in her Majesty's declaration of war, dated the 4th of May, 1702, in these words: "We henceforth strictly forbid all our subjects to hold any correspondence or communication with France or Spain, or their subjects;" nevertheless the Queen may, by contrary declarations and instructions, allow such trade, so as the same shall not be interrupted by any English ships of war, or privateers, as her Majesty was pleased to do in respect to Spain by her instructions bearing date the 29th of January, 1704-5, which, I think, was in time precedent to the passing of the bill to the same effect: however, I conceive that unless the States-General can be brought to consent to such trade, the goods so sent will be liable to their seizure and confiscation, according to the laws of nations, as the effects of their subjects were here, notwithstanding the permission they had from the States-General, till her Majesty was pleased to allow thereof.

J. Cooke.

Doctors' Commons, April 9, 1706.

(14.) *The opinion of the Attorney-General, Yorke, on the commencement of duties upon importation.*

Case.—An act passed the 12th of May, 1726, that liquors imported after the 10th of June should pay three shillings duty.—A ship arrived on the coast the 8th of June, and anchored in port the 10th of June. Is the rum liable to duty?

The general rule is that duties laid upon goods imported become due instantly upon the importation thereof; and such importation is always accounted from the time of the ship's coming within the limits of the port, with intent to lay the goods on land: therefore, I am of opinion that if the place in Rappahannock river, at which the ship in question was moored or at anchor the 10th of June, was within the limits of the port, then the rum is not liable to the duty; for the duty not commencing till from and after the 10th of June, there was no such duty in being at the time of this importation.

Nov. 2, 1726. P. YORKE.

(15.) *The opinion of the Attorney and Solicitor-General, Kemp and Smith, at New York, on the distribution of forfeitures, under the acts of trade.*

Romney, at Halifax, Dec. 8, 1763.

Sir:

As his Majesty has been graciously pleased to bestow on me a quarter of the moiety granted him by act of parliament, of all seizures made by sea officers, and condemned in your court of admiralty, I hereby apply to you for the same; and if I may be indulged in a further request, I pray the favor of you to cause the proper officer of your court to give me some account of your proceedings

with regard to such seizures, for we have strange accounts here of claims from governors, causes prejudged, and determined before trial, and of an attorney-general giving an opinion confessedly against the spirit and meaning of an act of parliament and the evidence of his own understanding; in short, of reason being lost in law or love of money; but I persuade myself that these are only mistaken reports, and that so far as the issue depends upon you, as judge, you will duly consider the act of a British parliament, the King's proclamation founded there upon, and your own appointment from the lords of admiralty, who are required by the King to cause his pleasure, signified in the proclamation, to be duly complied with.

COLVILLE.

The acts of trade, respecting the plantations, generally enact, "That the penalties and forfeitures sued for on those acts in the plantations, shall be divided between the King, the Governor, and the persons suing for the same, each a third."

A statute was passed in the third year of his Majesty's reign, entitled "An act for the further improvement of his Majesty's revenue of customs, and for the encouragement of officers making seizures, and for the prevention of the clandestine running of goods into any part of his Majesty's dominions."

Under this act, and his Majesty's order in council of the 1st day of June, 1763, the officers and crews of his Majesty's ships of war making seizures in America, claim the moiety of the net produce of those seizures, to be divided among them in the proportions mentioned in the said order of council.

Captain Hawker has made a seizure of a vessel and cargo, at New York, as forfeited on some of the acts of trade, which declare the forfeitures shall be divided in thirds, as aforesaid.

Can Captain Hawker, under the late act, and the King's order in council, demand the moiety for himself, officers, and crew? We have perused the late statute and the royal order, and do not observe any thing in that statute, vesting in the officers and crew the moiety of seizures made by ships of war in America, excepting the forfeitures by the last clause of that act; nor any virtual repeal of those laws, whereby the forfeitures were distributable between the Crown, the Governor, and the prosecutor.

The moiety which his Majesty is empowered to proportionate among the officers and crew, is the moiety mentioned in the precedent clauses in that statute, and is the share the officers of the customs in Great Britain are entitled to by that statute, on seizures made by them, on breaches of the acts of trade there.

The other part of all and every the seizures, &c. as the statute expresses it, which his Majesty is also empowered to proportionate as aforesaid, we think can be construed to extend no farther than to effect a division of whatever other share the officers and crew seizing may be entitled to, under the laws by which the seizure was made, which differ in England and the plantations, and may, perhaps, empower the Crown to proportionate among them any part of his Majesty's share: we conceive, that wherever seizures are made by his Majesty's ships of war, the officers and crew become entitled, upon prosecution, to the shares of the officers of the customs,

and upon the whole, therefore, are of opinion, that this late act cannot warrant a claim, in America, to more than one-third part of these forfeitures in such cases, where, by prior statutes, the Crown and Governor are each entitled to a third; and with respect to the royal order in council, we presume, with submission, it will be considered only as declarative of the distribution of those rights the officers and crews are entitled to by the acts of trade.

J. T. KEMPE.
November 7, 1763. WM. SMITH, jun.

(16.) *The opinion of the Attorney-General, Levinz, on the importation of painted stoneware.*

At the court at Whitehall, the 3d of March, 1679-80: present, the King's most excellent Majesty in council.

The aforewritten memorial, with regard to the importation of foreign painted stoneware, being this day presented to the board, with the papers annexed, it is ordered that the Lords of the Committee for Trade do examine the same, and report their opinions, what may be fit for his Majesty to do therein.

THOS. DOLMAN.

Reference therein, touching earthenware. Report of Mr. Attorney-General about earthenware.

May it please your Lordships;

By the statute of the 3d Edward IV. cap. 4 the bringing of any painted wares into this kingdom is prohibited; whether the earthenwares in question be painted or not is matter of fact, and, properly, by the laws of this kingdom, triable by a jury; therefore, whether your Lordships will think fit to have the matter determined

by a certificate of the officers of the place, whose intent it is to import them, or refer them to a trial by a jury of this kingdom, whose intent it is to obstruct the importation, I most humbly submit.

April 19, 1680. CRESWELL LEVINZ.

III. (1.) *The opinion of Sir William Jones, Sir F. Winnington, and Mr. J. King, in* 1676, *on the statute* 21*st James, of monopolies, how far an action would lie, in the Barbadoes courts, for seizing goods of the African Company.*

An action is brought against B. in the Barbadoes, upon the statute of the 21st Jac. cap. 3. of monopolies, for seizing certain goods imported thither from Guinea, contrary to the immunities and privileges granted by his Majesty to the royal African company.

Quære 1.—Whether, in this case, the action lies upon that statute for treble damages, considering the proviso that exempts all charters granted to any companies or societies, erected for the maintenance or ordering of any trade or merchandize out of that statute? I am of opinion, that this proviso doth exempt any charter, granted to any society of merchants, for the maintenance or ordering of trade, from being within the penalty of the statute; for that proviso, as it doth not confirm such charters, but leaves them to stand and fall by the common law, so it doth not inflict any new penalty upon them: wherefore, I think, an action will not lie upon this statute for treble damages, for doing any thing in execution of such charter.

Quære 2;—If any action lies upon the statute, can it be brought in any other courts but the king's bench, common pleas, or exchequer at Westminster, the statute

seeming to restrain the subject to those courts? It cannot be brought within any of the inferior courts within England; but if the law of the Barbadoes doth enact all statutes made in England to be of force there, (for a statute made in England doth not of itself extend to any of the foreign plantations, unless the statute doth particularly name them,) then an action will lie within their courts there upon a statute made here, though confined to the principal courts here; but, upon the answer given to the first *quære,* I think no action will lie upon this statute, for putting in execution this charter, but it will stand or fall by the common law.

November 13, 1676. WM. JONES.

The second *quære* is out of the case, by the resolution of the first; for if this statute, as to the recovery of treble damages, extends not to the royal African company, (as I conceive it doth not,) then no action can be brought in Barbadoes or any where else.

November 16, 1676. F. WINNINGTON.

I conceive no action lies upon this statute against the company, or any agent of theirs, for any matter done in pursuance of the charter.

November 16, 1676. J. KING.

(2.) *The opinion of the Attorney-General, Sawyer, in* 1681, *concerning interlopers.*

Report of the Attorney-General concerning interlopers.

In obedience to your Majesty's order in council, of the 10th of November, whereby I am commanded to consider of the petition of the East India company, and to report how the law stands, and whether such a proclamation may be granted as is desired: I humbly conceive,

that, by law, your Majesty's subjects ought not to trade or traffic with any infidel country, not in amity with your Majesty, without your license; and that your Majesty may signify your pleasure therein, and require your subjects' obedience thereunto, by your royal proclamation. I am likewise of opinion, that the license given to the company to trade into India, with a prohibition to others, is good in law, and the penalties of forfeitures of goods may therein run upon any goods which shall be seized within the limits of the company's charter, as for breach of a local law made by your Majesty, which, I conceive, *your Majesty may make in the foreign plantations and colonies* inhabited by your Majesty's subjects by your permission. I am of opinion, that your Majesty may issue such proclamation as is desired.

Nov. 16, 1681. R. SAWYER.

(3.) *The opinion of the Attorney and Solicitor-General, Harcourt and Montague, on the changes effected, by the union, in trade.*

To the Right Hon. Sidney, Earl of Godolphin, Lord High Treasurer of Great Britain.

May it please your Lordship;

In obedience to her Majesty's order in council, of the 28th of July last, upon the petition of divers merchants and others, her Majesty's subjects of Scotland, who had, since the 1st day of May last, imported or brought from that part of Great Britain into the port of London, as well divers prohibited and uncustomable goods, as divers customable goods, all which had been seized as forfeited, by which order we were commanded to call the parties concerned before us, and endeavor to settle such a method

of proceeding as might be most expeditious for bringing the matter aforesaid to an easy and proper determination: we humbly certify your Lordship, that we have several times, in the presence of Sir David Nairne, heard Colonel Graham, Mr. Coole, Mr. Larrington, and Mr. Stewart, (who took upon them to treat with us on the behalf of all persons concerned in the said petition,) as to the several matters contained in the said petition; and we have, with their consent, agreed upon and settled the following method of proceeding, as the most expeditious and easy for bringing the matter in question to a proper and judicial determination.

1st. That oath be made, in writing, that the goods and merchandize in question were imported into Scotland before the union, on the sole risk and account of her Majesty's subjects of Scotland; and that no Englishman, or alien, was any ways concerned or interested in such goods or merchandizes; and that such goods and merchandizes paid the duties in Scotland, due and payable there, at the time of the importation thereof, and were afterwards brought into the port of London, on the sole risk and account of such subjects of Scotland.

2d. That an exact account shall be taken by such persons as the commissioners of her Majesty's customs shall appoint, in the presence of the proprietors of such goods, or their factors, or agents, of the quality of all such goods and merchandize now under seizure, touching which any Scotch proprietor shall desire the seizure to be discharged; and that a reasonable and moderate estimate be taken of the value of such goods.

3d. That some merchant, or other person, of sufficient ability to answer the value in a *devenerunt*, inhabiting and settled within the city of London, shall take up the

said goods, and, by writing under his hand, admit the quantity of such goods and merchandizes to have come to his hands and possession, and shall likewise admit the value thereof according to the said estimate, to the end the party taking up such goods, and admitting the quantity and value thereof as aforesaid, may be charged for the same by an information, on a *devenerunt*, in the court of exchequer, if by virtue of the articles of union, such prohibited and uncustomable goods, imported into Scotland before the union, cannot be afterwards brought into any port of Great Britain without forfeiture; or if customable goods, so imported into Scotland as aforesaid, cannot be afterwards imported or brought into any part of Great Britain, without payment of the English duties.

4th. In such writing, the party signifying the same shall likewise agree to appear to any information of a *devenerunt*, which shall be brought in the name of the attorney-general, or any informer as the attorney shall direct, and plead to any such information the first week in next term, or as soon after as the attorney-general shall think fit, so as the merit of the case may be then, upon such trial, judicially determined; and that such agreements, as to the party's admission of the quantities and values, as aforesaid, and as to the party's consent to appear, plead, and take notice of trial as aforesaid, be made an order of the court of exchequer, the first day of next term; the attorney-general consenting by such order, to admit the importation into Scotland before the said 1st day of May, and also to admit the Scotch property.

5th. That such oath be made, and an account taken of the quantity of such goods, and an estimate made of

the value thereof, and such goods being taken up by some such responsible person as aforesaid, who shall sign such writing, as is hereinbefore contained, the seizures of the said goods may be instantly discharged, the officers who seized the same consenting thereunto, if your Lordship shall be pleased to approve thereof.

August 18, 1707. SIM. HARCOURT.
JAS. MOUNTAGUE.

(4.) *The opinion of the Solicitor-General, on the American act, establishing the case of prize, du ing the war of Queen Anne.*

By an act, the 6th Anna Regina, entitled, "an act for the encouragement of the trade to America," by the second clause, it is enacted that the flag officers, commanders, and other officers and seamen of every such ship or vessel of war, shall have the sole interest and property of, and in, all and every ship, vessel, goods, and merchandize, they shall take in any part of America, (being first adjudged lawful prize in any of her Majesty's courts af admiralty, and subject to the customs and duties payable to her Majesty, as if the same had been first imported to any part of Great Britain, and from thence exported for, and in respect of, all such goods and merchandize,) to be divided in such proportions, and after such manner, as her Majesty, her heirs, and successors, shall think fit to order and direct.

The next clause lays the same duties upon prizes taken by privateers.

The Case.—One of her Majesty's ships of war, or a privateer, takes a prize in America, and condemns her in one of her Majesty's courts of admiralty, and the said prize is carried into one of her Majesty's ports of America.

Quære 1.—What duties the captors are to pay in this case, whether duty payable, as if the goods in question were landed in England, or whether so much only as would be left in England, if the same were exported from hence into parts beyond the seas?

Note.—That the difference of the duties will plainly appear by the annexed paper.

Answer.—The goods that are thus taken in America, and carried into any of the ports there, I take to be chargeable with such duties as would be left in England, if the same had been exported hence after an importation hither.

Quære.—Another question doth arise upon this clause, whether the duty that is to be taken, is to be the prize duty, or the duty as if the goods were imported by way of merchandize?

Answer.—Goods thus taken in America must be looked upon as prize goods, and cannot be said to be imported by the captors by way of merchandize: therefore, I do think, the prize duty is to be taken.

May 25, 1708. J. MONTAGUE.

(5.) *The opinion of the Solicitor-General, Thomson, relating to a duty laid, in Carolina, upon British commodities.*

Sir:

In obedience to the commands of the Lords Commissioners for Trade and Plantations, signified by yours of the 26th of March last, I have considered Colonel Rhett's letter; and as the law mentioned by him, laying a duty of ten pounds *per cent.* upon British goods, seems very extravagant, and may be reasonably supposed to be attended with the consequences he mentions, I think it

may be truly said not to be consonant to reason, and as this duty is so heavy, it may prove to be such a burthen to trade, as to be in effect a prohibition of it to the British subjects, which is by no means agreeable to the laws of Britain: I therefore humbly apprehend that the power of making laws, by the charter to the proprietors, is, in this instance, exceeded. It would be too tedious and too expensive for every particular trader to contest the payment of the duty upon the supposed invalidity of the act, as being unreasonable, and if determined against them there, to appeal to the King in council; but if the merchants find themselves aggrieved, I presume they will complain, and then, upon a petition to the King, the proprietors will be heard, and if they do not consent to remedy the grievances, a prosecution may be ordered against them and their charter, nor will the complaint be improper in parliament.

April 5, 1718. WM. THOMPSON.

(6.) *The same lawyer's opinion on choosing a treasurer of the factory at Lisbon.*

Sir;

In obedience to the commands of the Lords Commissioners of Trade and Plantations, signified by yours of the 26th of this instant, March, I have considered the patent to the consul, and the powers to choose a treasurer; and I humbly conceive that, if any of the merchants there refuse such an office, or any other put upon him by the consul and factory there, the consul may refuse to be assisting to that merchant, or to protect his effects, or to let him have any of the privileges which he allows to other merchants there; but there is no method prescribed in his patent, to inflict penalties, or

to levy them, for such refusal of offices, though they are necessary to support the society; and, therefore, I think the consul's power defective in this particular.

March 30, 1718. WM. THOMSON.

(7.) *The opinion of the Attorney-General, Ryder, on the case of distressed English seamen at Cadiz.*

To his Grace the Duke of Bedford.

May it please your Grace.

In obedience to your Grace's commands, signified to me by Mr. Aldworth's letter of the 6th instant, representing that the number of ships cast away in the neighborhood of Cadiz, having occasioned so many sailors to apply to Mr. Consul Colebrook for relief, that the disbursements he has found it his duty to make, to prevent their perishing, or being obliged to enter into the service of Spain, has so far exceeded what he has been able to collect of the contribution settled, by the act of parliament, in 1736, that he has thought himself obliged to draw a very irregular bill on your Grace for 1500 dollars, to put him in a condition to go on with this necessary expense; also inclosing the letters from the consul upon this occasion, and desiring my opinion upon the methods he may most legally and properly pursue, in order to obtain the payment of the duty settled by parliament for the relief of the distressed seamen, and to see the money appropriated to that use for which it was intended: I have considered the said inclosed letters (which are herewith returned), and likewise reviewed a report I made upon a former reference relating to the same matter, in your Grace's letter in October, 1749, in which I have stated, that I had considered the matters

contained in the said letter, and find two things complained of: one, the unequal distribution of the money, collected pursuant to the act of the 9th of his present Majesty, chap. 25: the other, the evasion of it, by getting clearances of ships without payment of the duty.

As this is a law to be carried into execution in a foreign country, not within his Majesty's dominions, I do not see any method that can be taken here by proceedings in law, to remedy either of the grievances.

As to the first, it seeming to be the effect of partiality in the deputies, who have the power of distribution, can be regulated only by influencing them to act in a more upright impartial manner, or engaging the merchants to choose other deputies, who will be more just in the execution of the trust.

As to the latter, the clearances from the port being in the power of the Spanish officers, it does not appear to me what method can be used to prevent the captains of ships from having them before they pay the dues directed by the act, but by interposition of the court of Spain, in directing and obliging their officers to deliver them to the English consul, in order to be detained by him till the act is complied with.

As to what is proposed of directing the captains of ships to deliver their Mediterranean passes to the consul, as a security for paying the dues, I do not know how such an order can be enforced, unless by making it a condition on which the validity of those passes shall depend, that they shall be so delivered, and not re-delivered, without conforming to the act, of which the consul, or some deputy for him, to make endorsements; but what may be the consequence or inconvenience of making the force of the passes to depend on this, I am not

able to judge; and, perhaps, it may be proper to take the opinion of the board of trade upon the whole, what may be fittest to be done, to remedy the inconveniences in a matter in which the trade is so much concerned.

February, 8, 1750. D. RYDER.

(8.) *Mr. Fane's opinion on the privileges of the Russia company, carrying on a trade to Armenia.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, signified to me by Mr. Popple, inclosing extract from the charter of the Russia company, and desiring my opinion, whether the privileges therein granted to the said company, particularly those of importing through Russia the produce and manufactures of Armenia major or minor, Media, Hyrcania, Persia, or the countries bordering on the Caspian Sea, do still subsist, notwithstanding the acts of navigation and the charter of the East India company, confirmed by acts of parliament subsequent to the Russia charter: I have considered the several charters, and the act of navigation; and I am humbly of opinion, that the privileges granted to the Russia company, of importing through Russia the produce and manufactures of Armenia, major or minor, Media, Hyrcania, Persia, or the countries bordering on the Caspian sea, ceased by the act of navigation, by which all goods of foreign growth and manufacture are prohibited under severe penalties and forfeitures, from being brought into England, Ireland, &c. from any place or places, country or countries, but only from those of their said growth or manufacture, or from those ports where the said goods

can only, or are, or usually have been first shipped for transportation, and from none other places or countries; this subsequent act of parliament, I think, therefore, very fully determines these privileges; but if there could be any doubt upon it, I apprehend the subsequent exclusive charter of the East India company, confirmed by act of parliament, whereby the sole trade to those countries is granted to that company, entirely takes away all pretences to those prior privileges.

June 17, 1734. FRAN. FANE.

(9.) *The opinion of the Attorney and Solicitor-General, Ryder and Strange, on the act of Georgia, about trade with the Indians.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

We have considered the *quæries* sent to us by your Lordships, in Mr. Popple's letter of the 21st of June last, the first of which is, "whether the act of the trustees of Georgia, or of any assembly, passed in the colonies abroad, and confirmed by the Crown, can grant to any of the said provinces an exclusive trade with the Indians dwelling within the respective provinces."

And, as to that, we are of opinion that as an absolute exclusive trade with the Indians would be destructive of that general right of trading which all his Majesty's subjects are entitled to; and, therefore, repugnant to the laws of Great Britain, no act of the trustees of Georgia, or of any assembly passed in the colonies abroad, confirmed by the Crown, can grant to any of the said provinces, an exclusive trade with the Indians dwelling within the respective provinces, though the method of

trading within each respective province may be regulated by the laws thereof.

And as to the second *quære*, which is, whether the act above mentioned excludes all persons whatsoever, whether inhabitants of Georgia or not, from trading with the Indians settled within the bounds of the province of Georgia, as described by the charter, except such as shall take out licenses according to the direction of the said act; we are of opinion, that the act therein referred to does exclude a' persons whatsoever, whether inhabitants of Georgia or not, from trading with the Indians settled within the bounds of the province of Georgia, as described by the charter, except such as shall take out licenses according to the direction of the said act; that act and the reason of it, extending *to all persons whatsoever*, and such taking out of licenses being no more than a proper regulation of the trade within the said province.

July 28, 1737.

D. RYDER.
J. STRANGE.

(10.) *Mr. West's opinion on some acts of South Carolina for regulating the trade with the Indians.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered the several following acts passed in South Carolina, in August and September, 1721.—As to the act, entitled "an act for the better regulation of the Indian trade, by appointing commissioners for that purpose, and to survey and supervise the garrisons, and to settle the bounds of the Indians," the chief pur-

view of which act is to regulate the Indian trade, and for that purpose does direct that no person whatsoever shall trade with the Indians in amity with that government, without first repairing to Charleston in Carolina and taking out a license for his trading from three commissioners appointed by this act; which trader is also directed to give bond for his carrying on his trade according to such rules and regulations as shall be made from time to time by the said commissioners.

It is also enacted that these licenses are to be renewed annually, and that the sum of twenty pounds shall be paid for each license; and powers are thereby also given to the said commissioners to determine all controversies that shall happen between any traders and the Indians, in such manner as they in their discretion shall think fit, upon the evidence of any single Indian, without any jury, or any form of law whatsoever.

If this act related to, and affected only the inhabitants and proper subjects of the colony of Carolina, I should be of opinion that it should be not proper to be passed into law, since the hardships thereby imposed upon the traders are, in my opinion, very grievous, and the powers granted to the commissioners seem to be very arbitrary.

But, besides these particulars, I must beg leave to acquaint your Lordships, that, upon the occasion of this act, I have been attended by John Carter Esq. (agent for the province of Virginia,) who has represented to me that the inhabitants of that province have long carried on a considerable trade with the same Indians, the trade with whom is intended to be regulated by this act, and that in carrying on their said trade, they are obliged to carry their goods and merchandizes through the utter-

most parts of the province of Carolina, which are, at least, four or five hundred miles distant from Charleston; and that the people of that province do apprehend that their trade will be considerably affected and prejudiced by the general words of this act.

And, in relation to this representation of Mr. Carter, (in case that fact is true, that the inhabitants of Virginia are obliged in their carrying on their trade, to transport their goods through any part of the province of Carolina,) I am humbly of opinion, that those Virginia traders will be (by virtue of the general words of this act,) obliged to take out licenses from the commissioners of Charleston, and to conform themselves to all such regulations as are prescribed in it.

I submit to your Lordships, whether the difficulties and hardships hereby imposed upon the inhabitants of Virginia will not amount to a total prohibition of their trade with those Indians who are the subject matter of this Carolina law; since every Virginia trader will be obliged to travel near five hundred miles out of his way, in order to obtain a Carolina license, for he must be personally present in Charleston to enter into bond, ere he can purchase that favor: he must come there precisely during the two days' quarterly sessions of their commissioners; and if by sickness, the frequent overflowings of rivers, or any other accident in his journey, he happens to miss that opportunity, he must then wait three months before he has another; and all that while, himself, his servants, and horses, laying idle on expense, and his goods liable to perish; he must find one to be security with him in a bond of three hundred pounds penalty at a place where he is an entire stranger; he must pay an annual tax of twenty-three pounds for ob-

taining his license and, which is still worse, he is to forfeit his bond on the least transgression of laws not promulgated at the time his bond is given, but to be made occasionally, according to the sovereign will and pleasure of three persons called commissioners, vested with an unlimited power of declaring whatever they think fit to be law, and judging definitively upon what they please to call a breach of it; exposed to be condemned in as many sums of ten pounds, as complaints shall be made against him, and convicted upon the evidence of an Indian, and that, without the benefit of a trial by jury.

Besides what I have now mentioned, I must beg leave to observe to your Lordships, that attempts of the like nature with this bill have been long the occasion of disputes between the two provinces, for as I am informed, in the year 1708 there was a complaint made by the province of Virginia against the government of Carolina, for seizing the merchandize of several of the Virginia traders, and compelling them, in an arbitrary manner, to pay a duty for their said goods: upon which complaint, the then Lords Commissioners of trade and plantations, were, upon the 6th of September, 1709, pleased to make a report to her late Majesty in council, and were therein of opinion, that the government of Carolina had no rightful power to lay any duty upon goods carried to those western Indians by the inhabitants of Virginia; which report of their Lordships was afterwards confirmed by her Majesty in council; notwithstanding which, the government of Carolina did, within about a year after, think fit to pass an act, entitled "an act to oblige those traders, that come from Virginia to other neighbouring colonies to trade with the Indians or white per-

sons living within this province and government, to come first to Charleston, and take out licenses to trade, and to be subject to the like regulations, and to pay the same duties of import with the inhabitants of this province and government, who trade with the Indians living within the bounds of the same. By which act, they did enact the substance of what is passed in that which is now under consideration; against which act, the said then Lords Commissioners of trade and plantations did likewise make a representation that it was not proper to be passed into law; upon which, by order in council, dated the 8th day of January, 1712, the Lords proprietors of the province of Carolina were commanded to take care that the last-mentioned act should be immediately repealed.

My Lords:

The greatest difference that I can observe, between this act of 1721 and that of 1711, is, that in that of 1711, the Virginia traders are expressly named and the duty openly and avowedly laid upon them; whereas, in this act of 1721, the Virginians are only comprehended under general words, and not particularly mentioned, for it is enacted, that if any person or persons whatsoever, other than such as duly obtain licenses in the manner as in the act particularly mentioned, shall directly, or indirectly visit, frequent, trade, traffic, or barter, with any Indian or Indians in amity with the government of Carolina, all and every such offender and offenders shall forfeit the sum of two hundred pounds, to be sued for and recovered in such manner as in the act is directed; and the inhabitants of Virginia, not being able to carry on their trade without passing through some of the remotest parts of the province of Carolina, I am of opin-

ion, that they will be comprehended in the general words of this law, and will be disabled from, or, at least, very much disturbed in, carrying on their trade, unless they shall first (under the difficulties I have above mentioned) take out licenses from the commissioners of Charleston, according to the directions of this act: and if I may in any manner depend upon such information as I have received from the agent of the province of Virginia, it seems probable that one of the chief ends proposed by the framers of this act was to comprehend the Virginia traders, hoping that they might, by the means of general words, compass what they had formerly, to no purpose, attempted in express terms.

I must own, that what I have now laid before your Lordships, is chiefly founded upon such informations as I have received from the Virginia agent, but I was induced to give credit to his accounts, because what relates to the former reports made by your Lordships' predecessors will appear by books in the office; to all which I would beg leave to add, that before I thought it proper to make a report upon the Virginia informations, I sent word to Mr. Francis Young, (who is agent for the province of Carolina) to let him know that the agent of Virginia had lodged with me objections against this act being passed, in order that he might have an opportunity to lay before me such reasons as he should think proper to urge on behalf of the province of Carolina, and in defence of this law. But he never thought fit to lay before me, either in writing or otherwise, any considerations or reasons whatsoever for the passing of the said law.

For these reasons, therefore, I am humbly of opinion that this act is not proper to be passed into law.

I have also perused and considered the several other following acts, entitled "an act for a most joyful and just recognition of the immediate, lawful, and undoubted succession of his most sacred Majesty King George to the Crown of Great Britain, France and Ireland, of the province of South Carolina, and all other his Majesty's dominions;" "an act for establishing the tranquillity of this, his Majesty's, province of South Carolina;" "an act for confirming and continuing the several acts therein mentioned, and for collecting the arrears of taxes, and confirming judicial proceedings in the courts of law;" "an act for preventing the spreading contagious distempers;" "an act for the speedy recovery of small debts;" "an act for the better settling and regulating the militia;" "an act for establishing a court of chancery in South Carolina;" "an act for maintaining a watch and keeping good order in Charleston;" "an act to alter the bounds of St. George's parish;" "an act against excessive usury;" "an act to empower the commissioners of the high roads, &c. to alter the same for the better conveniency of the inhabitants;" "an act for appointing agents to solicit affairs in England;" "an act to ascertain the manner of electing members of assembly, and to appoint who shall be deemed capable of choosing, or being chosen, members;" "an act for establishing precinct and county courts;" "an act for ascertaining public offices, fees, &c.;" "an act for erecting the settlement of Wineau, in Craven county, into a distinct parish from Saint James's Santee, in the said county;" and "an act for repairing the causeway, leading to Ashley river, ferry, &c. and for vesting the ferry in Captain Edmund Bellinger:" to all which, I have no objection to their being passed into law.

Oct. 25, 1722. RICH. WEST.

(11.) *Mr. West's opinion, relating to Custom House officers being concerned in trade and shipping.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have considered of the statute of the 20th of Henry VI. chap, 5, by which it is enacted "that no customer, &c. shall have a ship of his own, use merchandize, keep a wharf, or inn, or be a factor;" and I am of opinion, that the said statute is still in force.

This statute was doubtless intended (as is manifest from the nature of the mischief mentioned in the preamble, and which was to be remedied by it) to extend to all custom-house officers in general; but as great alterations have been made in the manner of collecting and managing the customs since the time of this statute's being enacted; and as no penal statute can by law be extended, by an equitable construction, beyond the express words, I apprehend, that in case your Lordships should have any thoughts of making it applicable to all the custom officers, as they stand at this time, it will be necessary to have a bill brought into parliament for that purpose.

Nov. 26, 1720. RICH. WEST.

(12.) *The report to the King, of the Attorney and Solicitor-General, Northey and Thompson, on a proposed charter to a corporate body, for insuring ships.*

To the King's most excellent Majesty.

May it please your Majesty.

In humble obedience to your Majesty's commands to

us, by your order in council, dated the second day of February last; we have considered of the annexed petition of Sir Justus Beck, and two hundred and eighty-six others, in behalf of themselves, and of several others, merchants and traders of Great Britain and Ireland, whereby they represent, that the merchants and traders of your Majesty's dominions do frequently sustain very great losses, for want of an incorporated company of insurers, with a joint stock, to make good all such losses and damages of ships and merchandizes at sea as should be insured by them; that the establishment of such a company, by your Majesty's royal authority, will be a very great security and encouragement to trade and navigation, enable the merchants to make quicker returns, employ more hands, increase the number of seamen, greatly augment your Majesty's customs, and preserve many of your good subjects and their families from that ruin to which they are now exposed by being assurers in a private capacity; that they have entered into a voluntary subscription to raise a fund for erecting such a company of assurers as may effectually make good all the losses assured by them, (which will in nowise interfere with any other corporation), and having a sufficient sum subscribed for that purpose, they most humbly pray that your Majesty will be graciously pleased to grant your royal letters patent, for incorporating them, with such others as shall subscribe thereunto, and their successors, to enable them, by a joint stock, to manage and carry on the said undertaking, under such rules and regulations, by such name, and with such powers and privileges for their better government, as your Majesty in your great wisdom shall be pleased to direct, not to exclude particular assurers from assuring ships and merchandize as they now do.

As we have also considered of the annexed petition of Sir Gilbert Heathcote, and three hundred and seventy-five others, merchants and traders of the city of London, on behalf of themselves and others, merchants and traders of this kingdom; whereby they represent, that for the promoting and encouraging the trade of this nation, it hath been found absolutely necessary to make insurance on ships and goods at sea, and that at as low and moderate rates as possible, which is a very great ease and benefit to trade; that a number of office-keepers at the exchange at London, who act as brokers, have, for a great many years past, made it their constant business to procure persons of good substance to insure and underwrite policies, by whose means the merchants have been regularly served; that by these means, at this time, the premiums given in London for insuring ships and goods are much lower than in any other part of Europe; and, therefore, many orders for insuring in London are sent from foreign parts; whereas, formerly, great part of our adventures were forced to be insured abroad; that to establish a corporation for insuring ships and merchandizes will be a great discouragement to the present [illegible] method of insurance, without their giving greater security to the insured than they now have; and it may be so managed as entirely to fall into the corporation, to the great disappointment of the bold trader, by undue preferences, and delaying and refusing to insure on exigencies, when ships are missing, which frequently happens, and in stormy weather: humbly, therefore, praying that your Majesty would be graciously pleased to hear them by their counsel, to offer reasons against the passing a charter for incorporating a number of persons for insuring ships and merchandizes at sea. And

by a third petition, hereunto also annexed, the merchants of Bristol have desired to be heard by their counsel against the passing the said charter; and we have heard the petitioners for the charter, and also the petitioners of London against the charter, by their counsel, none appearing for the petitioners of the city of Bristol.

And for inducing your Majesty to incorporate the subscribers, it has been insisted on that the insuring of ships is for the benefit of trade; and that insurances will be best made by a corporation, and they will do it at the easiest rates; and, that in a corporation, the transaction for an insurance will be quicker, there being only one subscriber, which will be done at once; whereas, by the method now used, as is stated in the petition against the incorporation, the office-keepers are to pick up the insurers here and there, as they can, which takes up much time and is inconvenient; and that the corporation, it is probable, will be more diligent than single persons, the credit of the corporation depending on it; that there will be fewer suits upon policies than at present, for as the present insurance is made, every underwriter may try his particular insurance, and in the case of a corporation there can be but one suit, and this cannot be a monopoly, the merchants being at liberty to insure with the corporation, or with private persons, as they shall think fit; and, therefore, it will always be the interest of the corporation to insure on moderate terms; and the incorporating insurers will be an ease to those who insure with them, for that the corporation is one against whom the suit may be brought; whereas, if twenty or thirty were to join in a partnership to insure, every one must be named in any suit to be brought against them; that the insured will have better securi-

ty from a corporation than they can have from particular persons; for that a million of money is subscribed by the subscribers to be the fund of the said corporation, whereby there will always be a fund to answer their policies, so that there is no probability of the corporation failing; whereas, as the present use is, many of the insurers continually fail, and there is no deposit whatsoever to secure their insurances. To avoid which, this corporation with a fund is proposed; besides, the present insurers, over and above the ten *per cent.* mentioned in the common policies to be abated, will not pay without suit, unless a further abatement of six pounds *per cent.* be made; whereas, if there were a corporation, they durst not trifle or delay as private persons do, but must immediately pay their losses, for the credit of the said company: and as to the difficulty of making a corporation to appear to suits to be brought against them, they propose that their incorporation shall be subject to be determined by your majesty, if they do not appear as readily as private persons are obliged to do.

And, by the affidavits annexed to the petition for the charter, John Emmet deposes, that he has for several years traded to Holland and Hamburgh, and has not made one insurance in Great Britain, being of opinion that the insurers would be safer and cheaper at Amsterdam, and that the same, or the greatest part thereof, have been constantly made there; and Robert Jackson, of Amsterdam, merchant, and John Gascoign, of Rotterdam, merchant, severally depose, that it is frequent and customary for merchants and others residing in England to give orders to merchants in Holland to cause insurance to be made for them there, and that they have frequently received such orders and done the same accord-

ingly, and they know it to be almost a daily practice; and Robert Fletcher, of London, merchant, deposes, that being lately in Holland, and frequently in conversation with several merchants there, and often discoursing of a subscription then going on at London towards a fund for insuring ships and merchandize, they very much approve of the project, believing, if completed, it would be a better security for the insured than any method now in practice.

The counsel for the petitioners against the incorporation insisted that the subscription is made only for the sake of stock-jobbing, and if a corporation should be erected, there will be another stock to transact, and upon the view of the subscribers, very much the greatest part thereof being of different trades from the trade of merchandizing, it is evident that that is the design, and that there is no reason to incorporate the said subscribers unless the utility and conveniency of the proposal be self-evident; that insurance of ships is necessary for foreign trade; and if the present method be not found inconvenient, there is no reason to set up a corporation for insuring; besides, that by the present method many families are supported, and there will be no reason to destroy them without absolute necessity. All, or the greatest part of the petitioners against the said charter, are merchants, who are to have the benefit of insurances; and therefore, they insist, it is reasonable to believe, if such corporation would be a public benefit they would not oppose the same, and they also insist that the method of insurance is now on as good a foot as it can be put; that the insurance is now lower here than in any country in Europe, and for that reason very many foreign merchants make their insurances here; that your

Majesty cannot make a monopoly by granting to a corporation the sole power of insuring, exclusive of others, notwithstanding which, the granting such corporation will, in consequence, end in a monopoly; for, if such company as desired should be erected, having so large a stock, they will in all probability insure very low at the beginning, to bring people to them, and thereby discourage the present method of insuring, and oblige the people who are now concerned therein to leave off all thoughts of insuring, and then the company would put such terms on the insured as they should think fit; and from the nature of insurances, the more places the better, for if one will not insure, another may; but if the present insurers should be suppressed, and the corporation be the only place, they will insure only on their own terms, and there will be no other place to apply to; and as to the objection that the credit of the corporation will be concerned, it was answered, that a corporation has no sense of shame as private persons have, and will stand out suits longer than private persons, because richer. Besides, the dispatch of a corporation will not be like that of private persons, they may act but at certain hours, may keep holydays, and in disputable cases, may make references, and expect reports, which may occasion great delays, which is not practicable in insurances as now managed. And, besides, after they have discouraged other insurers, if they should then insure only at their own rates, it will be of great inconvenience to merchants; and as to the objection that private insurers often fail, it was said, it cannot be made appear but the company may stop payments in case of a war, and it would be of infinite inconvenience to trade if the method of insurance should prove impracticable; besides, in ca-

ses of insurances as now used, the body, land, and goods of the insurers are liable; and, in case even of an execution against a company, it will be very difficult to find where to execute the same; and further, that the company cannot be prevented from diverting their money to other uses.

They also produced several merchants; and Mr. John Bernard declared, that at present the best men upon the exchange insure, and very few Englishmen insure abroad, and many foreigners make their insurances here.

Mr. Shephard affirmed, the insurances here are made very easy and on better terms than abroad, and, for that reason, many foreigners insure here and few Englishmen abroad.

Mr. Heysham declared, that there is no complaint at present of the insurances here, and the setting up a corporation will make the present insurers leave off their inquiries into the nature of ships and their voyages, whereby they may the better know how to insure, whereby the whole business will fall into the corporation. Mr. Morris, Mr. Godfrey, Mr. Chester, Mr. Harris, Mr. Ratcliffe, Mr. Perry, and Mr. Hinkle, all agree, there is no occasion for a corporation, but that the same will be prejudicial.

By the affidavits of Robert Aston, James Mendez, and G. T. Guigier, annexed to the petition against the incorporation, it appears that great insurances have been from time to time made here on account of foreigners, on ships at sea, for very great sums of money; which insurances, Mr. Aston deposes, were made at low and easy rates, and cheaper than at any other place. And, he further says, that for the most part he has been al-

lowed by his correspondents after the rate of one *per cent.* and half *per cent.* for standing bound for the insurers, over and above the usual allowance of half *per cent.* for causing the insurance to be made; and, that he never lost one penny for standing bound for the insurers: and the said James Mendez deposes, that the reason of his orders from foreigners to insure has been from the lowness of the premiums given, and for the vast sums that are easily insured here, and the greater facility of recovering losses and averages with less proof than is required in other places; and, that great advantages accrue to the kingdom by foreigners causing their insurances to be made here; and, that the business of insuring is at present so well done in London, and in such great reputation both at home and abroad that it cannot be better, as he apprehends; and he verily believes, that if a new office of insurance should be erected in the manner proposed, that he shall not be able to do great part of his business of insurance, several orders being very intricate, and with so many conditions, although very fair and just, that he judges a new office would not accept them on any terms; and that the insurers being of value, he hath frequently undertaken, at the request of his correspondents, to whom their worth was not so well known, to make good the said policies, in case of loss, for so low a consideration as ten shillings *per cent.* and Guigier deposes the same.

To which it was replied on behalf of the petitioners for the corporation, that it appears the merchants are divided in their opinions on this matter, some being for and others against the corporation; and, that it is plain a company would be useful to the public and to trade; for that the policies would be sooner done by a corpora-

tion than by the several persons who now underwrite policies; and that the security would be better; and it is plain that the present offices may go on as well as the corporation; and where insurances are cheapest, there will be the most custom; and if the company should insist on unreasonable deductions or delays, no person will insure with them; and that it is plain, if the grant will not make a monopoly, the consequence will not make it so; and if a corporation be erected, it will be the interest of foreigners to insure with them, whereby they will save the premium for insuring the insurers: and they produced Sir Justus Beck, who declared his opinion that all foreign insurances would be made with the company; and that about three years since, many English insured at Hambro, as judging it more secure; and Sir John Williams declared, he thought the corporation would be of advantage to trade; and Mr. Clarke declared, he thought the corporation would be for the benefit of trade, for that thereby there would be one place more to insure at than now there is; and there would be great security from such a company, whereas, there are frequently great losses by private insurers.

On the whole matter, it is agreed on all sides, that the insuring of ships is of absolute necessity for the carrying on of foreign trade: and that the same has been always managed in the method the same is now in; and it has not been made out that there is any corporation in Europe for insuring ships; that the want of a good method of insuring will be very fatal to trade; and we are humbly of opinion, that the making an experiment in a thing of this nature, if it should prove amiss, would be of the utmost consequence to the trade of this nation, and that it so highly concerns trade and commerce that it will be

proper for the consideration of the parliament; and, therefore, we cannot advise the erecting a corporation for the insuring ships and goods at sea, against which there are so many great objections, especially the method now used being approved of both at home and abroad; and we are not able to determine of what consequence the erecting of another corporation in London, with a stock of a million of money, may be to the public.

The petitioners for the corporation have laid before us several heads for a charter, if your Majesty shall be graciously pleased to grant the same; but the same not having been referred to us, and the opponents opposing a charter in general, they did decline entering into the consideration thereof, and, therefore, we have not presumed to lay the same before your Majesty.

March 12, 1717. EDW. NORTHEY.
WM. THOMPSON.

(13.) *The opinion of the Attorney-General, Levinz, on the King's power to grant a patent for making black pepper white.*

To the King's most excellent Majesty.

The humble petition of William Crouch, of London, merchant, and James Whiston, of London, broker, sheweth,

That your petitioners have lately, with great industry and charge, found out and discovered a new invention of making black pepper white, and merchantable, which may prove of extraordinary benefit and advantage to your Majesty's trading subjects.

Forasmuch, therefore, and for that it was never known or done by any before within these your Majesty's kingdoms, your petitioners humbly pray your Majesty would

be graciously pleased to grant them a patent for the sole use of the said invention during the space of fourteen years, according to the statute in that case provided: and they shall pray, &c.

At the court at Newmarket, September 28, 1680. His Majesty is graciously pleased to refer the consideration of this petition to Mr. Attorney or Mr. Solicitor-general, to report what his Majesty may fitly do in it for the petitioner's gratification; whereupon, his Majesty will declare his future pleasure.

SUNDERLAND.

May it please your Majesty;

I humbly conceive your Majesty may (if so graciously pleased) grant such patent as is desired, if the same be a new invention; but before it be done, I humbly think it advisable that the merchants might be heard as to what inconvenience may thence arise to the pepper trade which is very considerable.

October 12, 1680. CRESWELL LEVINZ.

IV. (1.) *The Attorney-General, Northey's opinion on foreign coins.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Popple, Jun. your secretary, I have considered of the inclosed papers mentioned in the annexed letter, and do humbly certify your Lordships that the value of the foreign coins is well established by her Majesty's proclamation; and the tender of the same, according to those values, is a legal tender, and every

body is bound to take them at those values; but if any person (as the persons complained of do) will accept them at greater values, I do not know that it is any offence, being to the prejudice of the receiver, none being obliged to take them in payment from him at more than they are settled at by the proclamation. This mischief we labored under here in England, till by the act of the 6th and 7th William it was made an offence to take broad money at more than it was current for, and I am apprehensive this mischief will not be remedied without an act of parliament made here, to lay a penalty on all persons in the plantations, who shall there receive the coin at other values than they are directed to be current at by the proclamation. If the proprietary governments make laws to give those coins a currency beyond the proclamation, I am of opinion they are guilty of a high misdemeanor, and their charters, or at the least the power of making laws, may be seized into her Majesty's hands by *quo warranto*, to be brought against them; but the acts of particular persons, as I take this practice complained of to be, will not prejudice the charters or corporations.

Oct. 19, 1705. EDW. NORTHEY.

Eighthly.—*Of the law of nations, which, multifarious as it is, may for the present purpose, be considered under two heads:* 1. *Of treaties with powers, and the breaches thereof;* 2. *Of the effects arising from the independence of the United States.*

(1.) *The opinion of Sir Leoline Jenkins, on Captain Cook's case.*

May it please your Majesty;

Upon the view that I have had of Captain Cook's

proceedings in the court of Spain, and particularly of the two commissions, or sentences given by the Queen regent, it is my humble opinion that Captain Cook must prosecute the effects of those two sentences at the Havanna, and must affect the ministers of justice there with a denial to execute the Queen's commissions, or else with such delays as amount to a flat denial, before that his cause be ripe for the granting of reprisals.

It is true his case is sad, and it may be as true that these sentences were given not with any intention to remedy him, but as an amusement only, and with a design to put him off. This seems to be the judgment of Sir William Godolphin, your Majesty's ambassador upon the place, which as it is a matter of state, and an account how the ministry there governs itself towards your Majesty in this juncture, I shall not presume to offer any thing to your Majesty as to the state part of it; but as to the matter of law in this case, I do humbly lay it as a ground, that reprisals will not lie, where there is neither denial of justice nor a delay of it amounting to a denial.

In this case it cannot be said there is a denial, in regard that there is an entire satisfaction awarded in the Queen's commissions, with circumstances of seeming favor, all appeals being absolutely forbid, and all necessary power for the due execution of them being given to the proper officer; nor yet do the delays suffered in Spain amount to a denial of justice, for though the attendance there was for nine whole months, yet a judgment being sued for, and at last given, that delay cannot be said to amount to a denial of justice.

It is true, and a great mischief, that the parties wronged are sent to the Havannah to have reparation

done them; yet, I must confess, I cannot understand how it could have been otherwise ordered in this case; and if a spoil were committed upon Spaniards, by your Majesty's subjects of Scotland, or Ireland, upon either of those coasts, and that the wrong doers were there, I know not how such Spaniards complaining here could refuse to go (when your Majesty should direct it) to seek and receive their remedy and the execution of your Majesty's award and pleasure, from the justice of the place where the injury was done.

It is said, indeed, in Captain Cook's memorial, that Francisco Lopez de Andrade, one of the spoilers, and others of them, were in Spain while the Captain was there; though this be true, yet it will be very obvious to the Spaniards to reply, that Captain Cook did not sue out any process against him, and if he had, that the said Lopez should not have been sheltered from the public justice. Thus it may be thrown on Captain Cook to shew that he hath begun any prosecution, civil or criminal, against Lopez, and that justice was denied him, else his complaint that he is not like to meet with Lopez at the Havannah, will signify little, to make that circumstance a denial of justice.

That which may seem hardest in Captain Cook's case is, that he is sent to Havannah, to those who have already flatly denied him justice, and that, though they should be prevailed with to proceed to execute the Queen's commissions, yet that they will require a new liquidation, and fresh proofs of the losses and damages.

To this they will answer in Spain, first, that those of the Havannah are now no judges on the merits of the cause, but ministers only, to procure the reparation that the Queen hath awarded. As to the new liquidation,

they will say that they must be allowed to govern themselves according to their own laws and forms in the manner of proceeding.

They will further confess that the proofs made in the admiralty here would have been sufficient to have grounded reprisals upon, had these sentences for satisfaction been denied him, because the whole matter must then have been taken *pro confesso*, and the sum in proof must have been the sum for the levying of which the letters of reprisals must have been granted and limited; for all reprisals must be limited to a certain sum. But the Queen having not condemned the wrong doers in the sum demanded and deposed to in the admiralty here, the law there (if I mistake it not) allows the defendant being seized and executed upon, to bring the plaintiff to a new liquidation.

One mischief more there is in this case, the wrong doer may prove insolvent, or be dead by this time, or else get out of the reach of the justice of the Havannah; but these are accidents for which it can hardly be made out that the crown of Spain is accountable in case the courts of justice are otherwise always open; for these casualties are such as do frequently intervene in all the governments in the world, and where men become insolvent, or cannot be met with, there is no remedy, though the government itself be never so nearly concerned either in its own revenue, or in the execution of public justice.

All these mischiefs put together give but little prospect or hopes to Captain Cook of real reparation, yet they are not (as I humbly conceive) of that nature as to excuse or dispense with him, if he pretends to reprisals, from using all means and diligence possible to demand and prosecute the execution of his sentences at the Ha-

vannah; for till he hath used all the instances and diligence that any subject of Spain would be obliged to, in his case, he will not (as I humbly conceive) be sufficiently founded to obtain your Majesty's letters of reprisals.

This run will be extremely tedious, chargeable and uncertain in the success, yet I can think but of one way to prevent it, it is, may it please your Majesty, by calling on the government of Spain to nominate certain commissioners on each side, that shall hear and determine this and all other differences arising from depredations at sea.

The third article of the treaty of Madrid doth expressly mention, and, in a manner, suppose a constitution of, and recourse to such commissioners, in order to prevent the harsh remedy of reprisals. This would be much the shorter way, but it would bring on such reckonings of the same kind, that they at Madrid do threaten to charge upon your Majesty's subjects; however, I humbly take leave to mention it, because the Queen regent having given two sentences or commissions that have the countenance of an entire satisfaction (for so they are worded), it will be a very hard matter for a stranger, as Captain Cook is, not to make one false step, but to bring it about in his prosecution so to affect the justice of Spain with these wilful delays as may be fit for your Majesty to grant reprisals upon; and I mention this the rather, in that this way of treating by commissioners for depredations, I find to have been the usual course between Queen Elizabeth and her neighbors.

One word more. I humbly crave leave to intimate that the treaty of America does require a further elucidation and adjustment by consent between your Majesty

and that Crown; for it appears by the judgments of the Queen, in the matter of the Campeche wood, and other matters therein touched, that they in Spain are beforehand with your Majesty, and do, by their *scedulas reales*, affix a new interpretation upon the treaty, in declaring what shall be private, or not private, prize, or not prize, without communicating, it seems, with your Majesty, and without any publication that may reach your Majesty's subjects.

Oct. 8, 1675. L. JENKINS.

I. (1.) *The opinion of Doctors Exton and Lloyd, how breakers of treaties are to be punished in England.*

We have in obedience to your Lordships' commands, considered the *quære* referred to us, viz: whether the King of England, having made alliance by treaty and league with any foreign potentate, and therein agreeing to punish with extreme rigor such as, by color of commissions from enemies to the said allies, shall take arms against the King's peace and treaties proclaimed, and spoil the King's allies, be not a levying of war against the King, and punishable by death; or what crime it is, and how punishable? It is our humble opinion, that this is not a levying war against the King, nor by the law of the land punishable with death; it is a crime against his Majesty's treaties of peace, and the strict proclamations he hath been pleased to set forth, to enjoin the due observance of them; it is also an offence against the law of nations, and by the civil law it is *crimen læsæ majestatis;* but, by the law of England, we conceive it to be no more than a confederacy against his Majesty's crown and dignity, and by the statute for the trial of piracy, the 28th Henry VIII. c. 15. punishable only by

fine and imprisonment, and there is an offender in the like kind now in the Marshalsea, who hath accordingly been so punished.

Nov. 29, 1677. THOS. EXTON.
RICH. LLOYD.

(2.) *The opinion of the same civilians, on the offence of accepting commissions to cruise against the King's allies.*

At the committee of trade and plantations, in the council chamber at Whitehall, Tuesday, the 13th of November, 1677, present,

Lord Privy Seal.	Lord Faulconbridge.
Marquis of Worcester.	Mr. Sec. Coventry.
Earl of Craven.	Mr. Sec. Williamson.

Mr. Chancellor of the Exchequer.

It is our humble opinion that this is not levying a war against the King, (namely, taking a commission from a foreign power, to cruise as a privateer against the King's allies,) nor by the law of the land punishable by death: it is a crime against his Majesty's treaties of peace, and the strict proclamations he has been pleased to set forth to enjoin the due observance of them. It is also an offence against the law of nations, and by the civil law it is *crimen læsæ majestatis;* but by the law of England, we conceive it to be no more than a confederacy against his Majesty's crown and dignity, and by the statute for the trial of piracy, the 28th Henry VIII. cap. 15, punishable only by fine and imprisonment; and there is an offender in the Marshalsea, who hath accordingly been so punished.

Nov. 21, 1677. THOS. EXTON.
RICH. LLOYD.

(3.) *The opinion of the Advocate-General, Cooke, on making reprisals upon Portugal, in* 1709.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

My Lords;

In obedience to your Lordships' commands, I have perused and considered the enclosed papers relating to the petition of Sir William Hedges, and am humbly of opinion, that the confiscation of his effects by the King of Portugal, as therein stated, is a manifest violation of the law of nations.

Her Majesty having already been graciously pleased to interpose on the behalf of the petitioner, I would humbly propose this further method to be pursued, when for state reasons it may be thought the most proper juncture.

1st. That her Majesty be pleased to refer to the court of admiralty the liquidation of the damages sustained by the petitioner, and to certify the same to her Majesty, and that intimation thereof be given to the King of Portugal's minister, that he may, if he shall think fit, intervene, whilst that report is under consideration.

2d. That her Majesty should be graciously pleased, by her royal letter to the King of Portugal, peremptorily to demand restitution of the liquid damages, within a competent time, to be therein prefixed.

3d. That if, within the time limited, such restitution be not made, her Majesty be then graciously pleased to empower the petitioner to seize any merchandize or other effects of the King or of his subjects, wheresoever the same may be found, until he shall be justly satisfied not only for the liquid damages he has sustained, but

also for all necessary expenses made in the recovery thereof, with proviso, that the petitioner be obliged to give an account of his proceedings, by virtue of such power.

J. COOKE.

Doctors' Commons, Sept. 22, 1709.

(4.) *The opinion of the Attorney and Solicitor-General, Northey and Raymond, upon the petition of several merchants, whose ships had been taken by the Danes.*

May it please your most excellent Majesty;

In humble obedience to your Majesty's commands, signified to us and Sir Nathaniel Lloyd, your Majesty's advocate-general, by Mr. Secretary St. John, we have, in the absence of Sir Nathaniel Lloyd, who is now at Cambridge, considered of the several petitions of George Wegg, of Colchester, merchant, and of Jonas Alberg, of London, merchant, and Charles Keen and Robert Awborne, merchants, of King's Lynn, setting forth that the Danes have taken several ships, bound from Sweden to Great Britain on the petitioner's accounts, praying your Majesty to afford them your royal protection and countenance in recovering the same, by directing your Majesty's envoy in Denmark to reclaim the same, or by assisting them in their claim; and we do most humbly certify your Majesty, that the said ships and goods being taken by the Danes, as, and insisted on to be, lawful prize, the petitioners must make their claims and prove their respective titles to the same in the court of admiralty in Denmark, in order to prevent a condemnation, and to obtain a restitution thereof; and we are humbly of opinion, that it will be reasonable and just for your Majesty's minister at Copenhagen to assist the petition-

ers in their just claims, and if, after their titles to the ships and goods shall be duly proved to be belonging to your Majesty's subjects, and not to be lawful prizes, and justice shall be denied them in the courts of admiralty and the courts of appeal there, if any such be, your Majesty may then demand satisfaction for your said subjects from the crown of Denmark; and if justice be not then done them, the petitioners may properly apply to your Majesty for letters of marque and reprisal, to be granted them against the subjects of Denmark, it being made appear to your Majesty that your subjects have been denied justice in Denmark.

Sept. 7, 1711.

EDW. NORTHEY.
ROB. RAYMOND.

(5.) *The report of several civilians on the seizure of British vessels, by the Spaniards, in the West Indies.*

Sir;

Having perused Mr. Pullein's letter from Bermuda, January 9, 1703-4, with the affidavits of Samuel Sherlock and Samuel Smith, as also of Francis Jones and John Williams, we humbly are of opinion, that in case the Lords Commissioners for trade and plantations think those informations to be true, that then the only and proper way for relief will be, upon a representation of this matter to the minister for Spain residing here, and likewise by her Majesty's minister at the court of Madrid, to demand reparation and redress of those practices complained of, which seem very prejudicial to, and destructive of, the trade of her Majesty's subjects in those parts; and that herein no time should be lost: which we nevertheless submit to their Lordships' judgment.

C. HEDGES. R. WOOD.
NATH. LLOYD. HUM. HENCHMAN.
HEN. NEWTON. Doctors' Commons, March, 4, 1703-4.

(6.) *The Advocate-General, Doctor Simpson's opinion, on the project of a treaty of commerce with Prussia.*

Sir:

In obedience to the commands of the Lords Commissioners of Trade and Plantations, signified to me by your letter dated the 3rd of this month, I submit to their judgment the following observations, which have occurred to me on the perusal of the project of a treaty of commerce proposed on the part of the King of Prussia.

If this project should be carried into execution upon the footing it now stands, it would be very beneficial to the King of Prussia, but in my opinion disadvantageous to Great Britain, especially at this time when we are engaged in a war with France.

By this project nothing is to be declared contraband but what relates to the land service, and the King of Prussia is to be empowered, by treaty, to carry naval stores and all equipage for the sea service to our enemies, which, by the law of nations, he is not at present authorized to do; and though this nation will have a reciprocal right to do the same, yet, as the King of Prussia is not a maritime power, that privilege will be of no advantage to us.

The project is the same in substance as the treaty between Sweden and Great Britain, made in the year 1661, and if it should be thought necessary to enter into any commercial one with Prussia, the plan of that treaty seems to be as little prejudicial to us as any extant; but I think it desirable that some alterations should be made, and particularly with respect to contraband and the passport, as to which the convention with Denmark, in 1691, seems to be a better plan. The contraband speci-

fied in that convention extends not only to naval stores, in express terms, but to all instruments of war, either by sea or land; and more strictness is there required with respect to the oaths of the masters and owners of the ship and cargo, with tho nature of it, and destination of the voyage, as well as in regard to the obtaining of the passport, and the form thereof.

I do not recollect an instance in the late war of a Swedish ship being taken, furnished with a passport agreeable to the treaty of 1661, but most of those which were taken were, upon inquiry, found to carry contraband, or conceal enemy's property, though they had passes on board importing the contrary; and I am persuaded that unless some such provision be made as is in that convention with Denmark, relating to naturalization, and making freemen and burgesses, great frauds will be committed under colorable passports, which may be introductive of disputes and much trouble.

The Swedes, by the treaty in 1661, are prohibited carrying provisions to the enemies; but by this project the King of Prussia is to be authorized to do it. But if it should be thought reasonable to lay him under a restraint, in order to prevent disputes about the meaning of the word *commeatus* or provisions, it should be declared what species of provisions should be deemed contraband.

It can be of no service to us to extend by treaty the King of Prussia's liberty of navigation and commerce to all the seas over the world, and particularly to those of Asia and Africa; but possibly the King of Prussia has a view of making some settlement, or establishing an India company, for he would not, I conceive, under the 15th article of the project, be enabled to trade to our

settlements, or traffic otherwise than has been there practised by him; and it it observable, that though by the 5th article of the treaty, in 1661, the confederates are not to furnish any aid or supply to the enemies of the other, yet, by the 9th article of the project, the contracting parties are to stipulate not to succor the enemies of the other by sea only, and if any of our allies whom we are engaged to supply with our natural sea force, should be at war with him, the complying with that objection may perhaps be deemed a contravention of this treaty.

The 11th and 13th articles of the project ought to be altered, for though they be similar to the 12th and 14th articles of the treaty in 1661, yet that part of them relating to the punishment therein stipulated to be inflicted on transgressors ought not to stand; as, I conceive, his Majesty cannot, by any treaty, make his subjects liable to other punishments than what the laws of this kingdom do, and that is costs and damages for the offence, to be recovered in the admiralty court.

With these observations, I have taken the liberty to send their Lordships a copy of the instructions which were given to privateers in 1702, drawn pursuant to the treaty with Sweden in 1661, and the convention with Denmark in 1691; to which is annexed the forms of the oaths and passports, as they may probably be useful in the consideration of the project for the treaty proposed.

ED. SIMPSON.

Doctors' Commons, June 14, 1756.

(7.) *The Advocate-General, Dr. Paul, on the merchants of Minorca trading with Algiers.*

To the Right Hon. the Lords Commissioners of Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Thomas Hall Esq., referring to me a report of several merchants of Port Mahon, relating to the trade to the kingdom or government of Algiers, which has been submitted to Lieutenant General Blakeney, the Lieutenant-Governor of Minorca, containing the sentiments of those merchants, with regard to the trade between the state of Algiers and that island, and to what might be most advantageous to his Majesty's subjects in general, trading to the Mediterranean; which having been laid before their Excellencies the Lords Justices, and by them referred to your Lordships, for your consideration and report how far the request of those merchants may be complied with agreeable to the maritime law; and it being your Lordships' direction to me, that I should report my humble opinion immediately (the affair admitting no delay) how far the matters contained in the said report are consistent with the maritime law: I humbly certify your Lordships, that I conceive the several propositions and regulations recited and clearly set forth in the merchants' report, are reasonable, and highly beneficial to trade and navigation, and no ways contrary to the maritime law, the principal view, purpose, and intention of that law being to encourage and protect commerce at sea.

There are at present articles of peace and commerce between Great Britain and Algiers, ratified, confirmed, and renewed, the 29th of October, 1716. The present rules, under your Lordships' consideration, are as bene-

ficial to trade as those already established, and more explicit and plain; and, consequently, as I humbly apprehend, merit your Lordships' approbation.

G. PAUL.

Doctors' Commons, July 18, 1750.

(8.) *The opinion of the Advocate, Attorney, and Solicitor-General, Paul, Ryder, and Murray, how far salvage was due on a Spanish ship and cargo, that had been stranded in North Carolina.*

Some Spanish vessels having been wrecked on the coast of North Carolina, it was held by Dr. G. Paul, Attorney-General Ryder, and Solicitor Murray, that nothing was due as salvage, though, for mere labor in saving the cargoes, a reasonable compensation only was due; that the governor ought not to have asked any duty or gratification: they think the cargo is in the nature of a pledge for the freight.

June 4, 1751.

(9.) *The opinion of the Attorney and Solicitor-General, Yorke and Talbot, on the duration of the treaty of neutrality, in* 1686.

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Popple, desiring our opinion upon the legality of the following article in his Majesty's general instructions to his several governors in America, relating to the treaty of peace and neutrality in America, made between England and France, in 1686, we have considered the said article, which is in these words, viz:

"Whereas, by the 5th and 6th articles of the treaty of peace and neutrality in America, concluded between England and France, the 16th day of November, 1686, the subjects, inhabitants, &c. of each kingdom are prohibited to trade and fish in all places possessed, or which shall be possessed, by them, or either of them, in America; and that if any ships shall be found trading contrary to the said treaty, upon due proof the said ships shall be confiscated; but in case the subjects of either king shall be forced by stress of weather, enemies, or other necessity, into the ports of the other, in America, they shall be treated with humanity and kindness, and may provide themselves with victuals and other things necessary for their sustenance and reparation of their ships, at reasonable rates, provided they do not break bulk, nor carry any goods out of their ships, exposing them to sale, nor receive any merchandize on board, under penalty of confiscation of ship and goods;" notwithstanding which treaty, we are given to understand that an illegal trade has been carried on between our plantations and the French settlements in America, on pretence that there is no law in force against such trade. It is therefore our will and pleasure, that you signify to our subjects under your government, the purport and intent of the abovesaid two articles, and that you take particular care that the same be punctually observed and put in execution, and that no illegal trade be carried on between our subjects in our said

under your government, and the French settlements in America, by any of our ships of war attending

, or by any other British ships; as likewise that none of the French subjects be allowed to trade from their said settlements to

We have also considered the annexed extract of the 5th and 6th articles of the said treaty of peace and neutrality, referred to by the said instructions, and conceive that it was the intent of those articles to give power to the King of Great Britain, and the Most Christian King, reciprocally to seize and confiscate the ships and cargoes belonging to the subjects of each other, which should carry on a trade contrary to the said articles, and, consequently, that ships belonging to the subjects of France, with their ladings, that shall be found trading in any of the British plantations in breach of those articles, will be liable to be seized and condemned in some of his Majesty's courts within such plantation for that cause; and that, on the other hand, ships and their cargoes belonging to British subjects, who shall be found trading in any of the French plantations in breach of the said articles, will, in like manner, be subject to seizure and confiscation, within such French plantation; but we apprehend, that it was not the intent of this treaty to provide that either of the contracting powers should seize and confiscate the ships or goods of their own subjects, for contravening the said articles; and if such intention had appeared, we are humbly of opinion, that it could not have had its effect with respect to his Majesty's subjects, unless the said articles had been confirmed, either by the act of Parliament of Great Britain, or by acts of assembly within the respective plantations.

As to the above mentioned instruction, there appears to us nothing illegal in the terms of it; but considering the distinction arising upon the said two articles of the treaty, which we have already stated, we submit it to your Lordships' consideration, whether it may not be expressed more explicitly and particularly, in order to

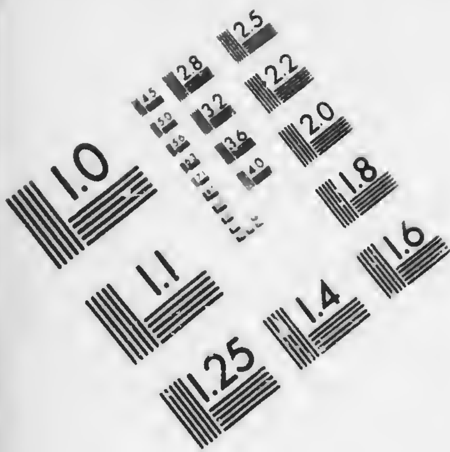
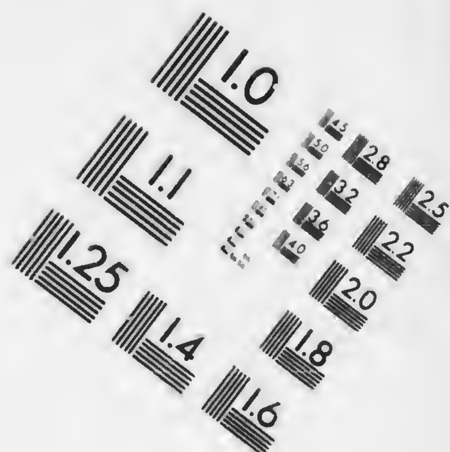
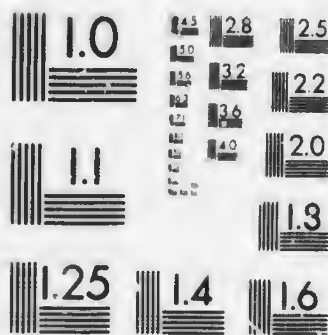
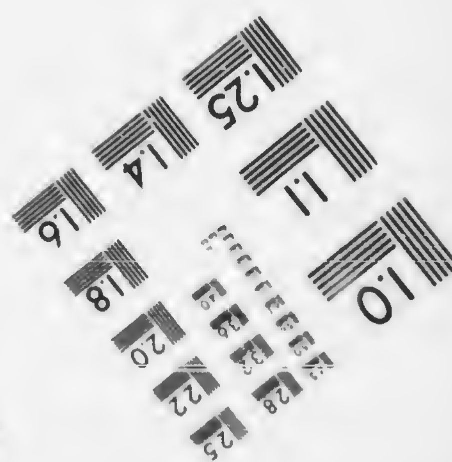



IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

prevent mistakes in carrying the same into execution in the several cases that may happen.

June 3, 1728.

P. YORKE.
C. TALBOT.

(10.) *The opinion of the Attorney and Solicitor-General, Ryder, and Murray, on the same subject.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In pursuance of your Lordships' desire, signified to us by Mr. Pownall, in his letter of the 30th day of March last, inclosing a copy of an instruction given to the governors of his Majesty's colonies and plantations in America, relative to the 5th and 6th articles of the treaty of peace and neutrality in America, concluded between England and France, the 16th day of November, 1686, desiring our opinion whether the said treaty is now of any force or validity: we have taken the said articles of that treaty into our consideration, and are of opinion that the said treaty is now in force.

April 7, 1753.

D. RYDER.
W. MURRAY.

(11.) *The opinion of the Attorney and Solicitor, Norton and De Grey, on the same subj ct.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to us by Mr. Pownall's letter of the 28th of January last, intimating that your Lordships had under your consideration some papers relative to a negociation with the

court of France, respecting the freedom of navigation in the American seas, in which some doubts have occurred as to the existence or non-existence of the treaty concluded between the two crowns on the 16th of November, 1686, commonly called the treaty of neutrality, and that it is your Lordships' pleasure we should take the said treaty into our consideration, and report our opinion whether the same is or is not now in force: we have taken the said treaty and Mr. Pownall's letter into our consideration, and are humbly of opinion that the same is not now in force.

FLR. NORTON.
WM. DE GREY.

Lincoln's Inn, Feb. 12, 1765.

(12.) *The opinion of the Advocate-General, Sir James Marriot, on the same subject.*

Sir;

In pursuance of your letter, by order of the Lords Commissioners of trade and plantations, I have taken into consideration the question with which I am honored, whether the treaty of 1686, commonly called the treaty of neutrality, is a subsisting treaty? I have considered the same with great attention, and it does not appear to me that the treaty of 1686 is not a subsisting treaty, but that *it may be insisted upon* to be so, upon the ground of implication of words, and the equitable interpretation of the subsequent treaties which have been formally renewed, by the treaties of Aix la Chapelle, and the last definitive treaty of Versailles; and as the treaty of 1686 is supported by the general nature of such conventions, and by acts of acknowledgment of the contracting parties in the intermediate periods, and,

farther. that the treaty of 1686 having not been specially abrogated, what is not abrogated *may be understood* to subsist.

I observe, that the treaty of 1686 is a subsisting treaty, not otherwise than it can be maintained upon some one or other of these reasons, because, on the other hand, it appears that none of the subsequent treaties have *nominally* revived it.

These are the general outlines of the *probable* arguments for the validity of the treaty in question, and the objection against it, all which I shall submit in the *fullest manner* I am able, for their Lordships' consideration; because the admitting that the state of commerce with France, in America, remains unsettled by the last general treaty, leads, as I humbly apprehend, to large consequences.

On the general view of the question, I conceive, that treaties being in their nature *compacts superseding the common usage, which is, strictly speaking, the law of nations,* by particular stipulations, are to be argued upon the footing of all obligations which arise from contract, expressed or tacit, whether *quasi ex contractu*, or necessarily implied by general words of comprehension; and the principles of the civil law, *de obligationibus*, which is the law admitted by all nations in Europe, by most in their domestic, and by all in national questions, must be allowed to arbitrate in deciding the validity and existence of a public treaty, by the same rules and reasonings as when applied to any other contract of private life. I imagine, therefore, that the civilians of France will admit the following principles to be just: "that the ground on which the force of every contract relies, is a mutual, apparent consent. and an equitable object in con-

tracting." Words or characters are merely used to convey, by marks or sounds, the ideas of consent, and to preserve the memory of compacts; now the end thus being principally to be considered, and the means being regarded only as declarative of the end, if by any other means than by strict words a contract is implied, it is undoubtedly valid whenever there appears, from any acts or reasonable interpretation of signs, an acknowledged consent and equitable foundation of contracting, these circumstances making the very substance of a contract; the instances in the Roman law are many and obvious, that obligations may be entered into by implication. The consequence I mean to draw is, that if obligations can be entered into by implication, and so commenced, they may be revived by implication, which is a stronger case: they may be revived by implication, *a fortiori*, with more facility than they can be commenced; because, in the case of first contracting, the contract is *stricti juris*, and *res integra*; but in the case of a revival, there is a basis and better ground of implication; for the general sense of the contract once being declared by facts corresponding to it, is perfectly understood, so that it wants fewer words to revive a convention, than first to contract it. A contract, also, revives from the very nature of the cause ceasing to operate which had suspended the force of the convention, and more especially if the revival is confirmed by any effectual acts of a sufficient continuance in time to mark publicity and consent of the contracting parties; and, above all, if the objects of good faith are concerned in the revival. *Quid refert*, said the great Roman lawyers, *an verbis populus voluntatem suam declaret, an rebus et factis?* And when they distinguished between obligations and stipulations,

they strongly laid down the doctrine of obligatory implications. *Neque scriptura omnimodo opus est, ut substantiam capiat obligatio, sed sufficit consentire. Alter altere obligatur in eo quod alterum alteri ex bono et æquo præstare oportet.* This reasoning, applied to the validity of the treaty of 1686, acquires fresh force, by considering the nature of a war under the circumstances of the several powers of Europe, and the comprehensive stipulations of the definitive treaties subsequent to it, and bearing relation to those circumstances.

A stress is laid upon this point; for in debating any question upon treaties arising between nation and nation in the age we live in, it is necessary to keep in view the general state and condition of the contracting powers, from whence the arguments of public law can only be drawn with any just decision.

Without our revolving, therefore, for examples, the ancient history of nations in a less civilized state of mankind, we may determine upon points of public law in a different way than that in which Grotius, Puffendorf, and other elaborate writers of Holland and Germany have done it, amassing their proofs from the Greek and Roman historians, orators, and poets, from tragedians, comic authors, and fathers of the church, as equal authorities; but the decisions of public law are, and must be different, in different ages of mankind. The system of nations concerning their reciprocal rights, whether by usage or treaty, depends upon their manners. When I speak of the present age, I mean an interval of time from the treaty of Westphalia down to the last definitive treaty of Versailles, which may be called truly the age of negociation, of which kind of intercourse and connections the Greeks and Romans, con-

tending always with barbarous nations, had very partial notions; drawn however, from, and adapted to, the condition of their rivals, and the rest of mankind, in those ages. In the present age, as war is commenced on different principles from the wars of antiquity, so it ends with different principles; in both, more to the honor of humanity.

The public law of Europe abhors the sanguinary object of ancient wars, universal slavery or extirpation.— Every war, in these times, is considered but as an appeal to the rest of the powers of Europe, and is but a temporary exertion of force to decide a point of interest which no human tribunal can determine: thus it is, in its nature, but a *suspense* of the other rights, not in contest, which existed between the belligerent powers reciprocally before the war: when we reason, therefore, that a war being ended, the public reciprocal rights and obligations, not specially abrogated, but suspended, emerge, and acquire their former vigor and activity, the reasoning of it is just; is so, because it is consistent with the relations, and arises out of the nature of things. We need not urge the necessity of particular stipulations to revive such obligations: it is the very essence and necessary idea of reconciliation, implied of course, if not declared, in every definitive treaty of pacification, that the commercial and friendly intercourse of the contracting powers is replaced in its former state; but it is usual in all definitive treaties, that all the acts of hostility which have been committed on either side to suspend the intercourse of the contracting parties, should be declared to be forgot, and to be considered *comme non avenus*, which, when expressed in terms, can mean nothing, or it must mean this, that no consequence shall

be drawn hereafter from the past contest to the prejudice of any reciprocal rights existing, before not expressedly deviated from by some new stipulation.

On this general ground it is, I mean a restitution of reciprocal rights *in integrum* after a war, implied as well as expressed, that the *jus postliminii*, which never has been called in question in any period, reverts to creditors relative to the debts due to them from the subjects of the belligerent state, contracted before the war, during which, although the right of the creditor to recover the same is suspended, yet it is not annihilated by any confiscation, but he may pursue and obtain his demand after the war. Now the same restitution *in integrum* of national rights and obligations is as reasonable and just between the respective governments, as it is universally allowed to exist between their subjects, one with another; for the revival of all obligations, public as well as private, stands undoubtedly upon the same *analogy* of justice.

But there is still a more striking instance of all obligations not entirely sinking in a war, when the creditors of one belligerent party are the subjects of the other hostile government, and yet preserve the right to their property, by the law of nations, *flagrante bello*, without danger of confiscation. Such is the force of those exalted principles of public law, which, in these happier ages of human society, restore their proper empire over the minds of men to good sense and good faith, with a force superior to the passions or prejudices of nations long accustomed to be rivals; and such I conceive to be the law of Europe in its present state, which, whenever these doctrines, founded in reason and humanity, shall cease to prevail, will fall back into all the gloom of a barbarous condition of ignorance and despotism.

The war between England and France which followed the revolution, suspended the commercial treaty of 1686, called the treaty of neutrality. The treaty of peace concluded at Ryswic, 1697, takes no notice of it nominally, but revives it, not only by the general quality of a treaty, putting an end to the war, but by the strongest terms of a general comprehension, restoring the commerce of the two nations, reciprocally, to the state in which it existed before the war.

The 5th article is, *liber sit usus navigationis et commercii inter subditos utriusque dominationis, regum prout jam olim erat tempore pacis et ante nuperrimi belli denunciationem.*

The commerce of the two nations was declared free, just in the same degree as it was free before the war, and of course prohibited in the same degree; so long as, in our reasoning, every affirmation carries with it the necessary negation of its opposite.

Thus was the treaty of 1686 revived, by implication, in the terms of the treaty of Ryswic; but it was as strongly revived by reciprocal acts of acknowledgment; and both nations adhered to the treaty of 1686 till the war of Queen Anne. By that war the vigor of the treaty of 1686 was again suspended till the general peace of Utrecht, and revived again in the same manner as before.

The 7th article is, *la navigation et le commerce seront libres, entre les sujets de leurs majestes, de meme qu'ils l'ont toujours ete en tems de paix, et avant la declaration de la guerre.*

The separate treaty of commerce between Great Britain and France at the peace of Utrecht was confined to Europe, which shows that both parties considered the treaty of 1686 as reciprocally subsisting in Ameri-

ca, for otherwise they certainly would have provided for it in a treaty the most comprehensive in history, and the most definitive in developing and fixing all the interests of the belligerent parties, except the last, since the treaty of Westphalia.

It must be judged that both France and England then considered the treaty of 1686 as a subsisting treaty, not only for the reason I have already given, but for others. The 6th article of the general treaty of Utrecht refers the case of mutual confiscation of ships, in America, which had been made in time of peace (most probably on the ground of the treaty of 1686) to commissaries: it must mean, or it could mean nothing, that the decision of these commissaries should be made on the basis of some treaty, and no other treaty could possibly be, in the contemplation of the contracting parties, but the treaty of commerce and neutrality of 1686, subsisting at the time of the capture, and the 6th article of it relative to confiscation of ships and cargoes in America. Farther, the validity of the treaty in question appears plainly acknowledged, in fact, by no step being taken in contravention to it by France and England for so long a period as from 1713 to 1727. It was again acknowledged more particularly in about 1738, when the French court repealed the edict which had been made in contravention to the treaty in question, on the warm remonstrances of the British government.

The treaty of 1686 remained thus considered, by both nations, and by all Europe, as a subsisting treaty till the war of 1744. The treaty of Aix la Chapelle took no notice of this treaty, nominally, but renewed all subsisting treaties. The treaty of 1686 was acknowledged, in fact, by both nations acting in consequence of it till the war of 1756.

The last definitive treaty of peace, like that of Aix la Chapelle, does not nominally revive the particular treaty of 1686; but having first, nominally, revived the great general treaties, in which the interests of the other powers of Europe have been settled at different periods, it goes on to renew all other treaties which subsisted between the contracting parties before the war: thus a distinction clearly appears, that some treaty is understood to subsist, which is not named, and which is of a different nature from the treaties specified; and that the treaty understood is relative only to the interests of the two contracting parties, separate from the rest of their allies and confederates, who were parties to the treaties which were revived by name; so that there is a very reasonable ground of implication, from the terms of the reviving stipulations, that the treaty of 1686 was meant to be revived as a subsisting treaty by the last definitive treaty. But upon the general analogy, it is a much stronger case that a commercial treaty should subsist by implication, than that a subsidiary treaty of alliance, which I take to be out of doubt, should subsist by implication, though made for a limited time, as completely as by signing, sealing, and formal ratification, provided the parties do any act declarative of their consent to the renewal, which as I observed before, is the ground on which all contracts are supported. If one party advances the subsidy for another year or more, and the other accepts it, it is, undoubtedly, a subsisting treaty, notwithstanding that the term limited is expired. Now, in the case of the validity of a general treaty of commerce, the implication of validity is stronger, because there being no limitation of time, nothing expires; but there is only a suspense of the obligation, during the interval of a war.

The general stipulations of revival in the definitive treaties deserve particular attention, because under the terms, "renewing all subsisting treaties," it is plain, that they do not subsist, because they are renewed; but they are renewed in words, but subsist because the war is at an end. This usual stipulation would be nugatory, if it revived nothing by implication of this expression; and it would be redundant, if it did not attempt to show that it did not mean to abrogate specially, or by any implication, but on the contrary to give the utmost force to that which was already understoood to subsist generally.

Upon the whole matter, for some one or all of these reasons, or for better, which may occur to the contemplation of their Lordships, and the wisdom of his Majesty's administration, under the present circumstances of the British and French colonies in America, I have the honor to submit that the treaty of 1686 may be insisted upon, as a subsisting treaty, not only because it is revived by a strong implication of words and facts, but for that it may be understood to subsist because it never was abrogated.

JAMES MARRIOTT, Advocate-General.

Feb. 15, 1765.

If the King's advocate's last report on the treaty of 1686 is not circulated, he begs the favor of Mr. Pownall to alter the passage, page 8, beginning at the words, "But there is still a more striking instance," &c. &c.

Instead of it, read as follows, "But there is still a more striking instance of all obligations not entirely sinking in a war, when the subjects of one government are the public creditors of the other, and yet these alien enemies preserve the right to their property in the pub-

lic funds of the hostile government, by the law of nations, in the midst of the war, without confiscation."

Doctors' Commons, Feb. 21, 1765.

(13.) *The opinion of the Attorney-General, Pratt, on the question whether Guadaloupe became, in* 1759, *a British island.*

By the book of rates, annexed to the act of tonnage and poundage, 12 Car. 2, C. 4, and several subsequent acts of parliament, the duties payable in Great Britain by British subjects upon the importation of goods, being the produce of the French plantations, are considerably higher than for the like goods if produced in the British plantations.

Case.—The articles of capitulation entered into on behalf of his Majesty with the inhabitants of Guadaloupe are inclosed: the seventh article, by the tenor of it, seems intended only to operate upon such duties as are payable upon the island, besides which the sixteenth and twenty-first seem to be the only articles relative to trade.

N. B.—In the year 1626, the French and English, by consent, took a joint possession of the island of St. Christopher's in America; about the time of the revolution the French drove out the English. In the year 1690, or thereabouts, the English recovered the island and had entire possession, which they continued until it was ceded to them by the peace of Utrecht in 1712.

It appears by the book of rates at the custom-house, that sugar imported into Great Britain from St. Christopher's, after the year 1690, and before the year 1712, paid the same duty as sugar imported from the British plantations.

Quære.—Is the island of Guadrloupe to be considered as a plantation or territory, to his Majesty belonging, or in his possession, within the meaning of the act of navigation, and the other laws before recited; and is, or is not, the produce thereof, when imported from thence into Great Britain, to be charged with the same duty as if it was imported from his Majesty's British plantations?

I am of opinion, from the best consideration I can give this case, that Guadaloupe must be considered as one of the British plantations; for notwithstanding the advantageous terms that are granted to the inhabitants, the island is clearly in his Majesty's possession. The inhabitants are disarmed and in a state of subjection to his Majesty and his troops; all new commissions are to be taken under his Majesty, and all acts of justice are to run in his name; he is in actual possession of all the public revenues, and all the trade of the island has changed its course, passing now in English bottoms only to Great Britain; all which particulars being considered, I must conclude that this island is now a plantation belonging to his Majesty, and in his possession, in right of the Crown of England; that it is an English and a British plantation, within the meaning and intent of the act as referred to: the great objection to this opinion arises from the condition of the present inhabitants, who enjoy privileges, under the articles, hardly compatible with the state of subjects; but that has no great weight, if it be considered that these are personal privileges confined only to the present inhabitants, who are restrained from alienating to any but the King's subjects, and the capitulation is made not with the French king, but only with the inhabitants. The right of sovereignty, therefore, is

wholly changed, and the whole island is the King's acquisition by conquest. If any inhabitants should die without heirs, his lands would escheat to the King. If any of them should levy wars, or plot the King's death, they would be guilty of high treason, and to illustrate this further, if the inhabitants should agree to sell all their possessions to Englishmen, the island would immediately, without any further treaty or capitulation, become wholly English. The inhabitants plainly understood themselves transferred to his Majesty's dominions, and therefore have stipulated for the like privileges in trade as are allowed to the rest of his Majesty's subjects; and this is granted, with a proviso that they comply with the acts of trade. In a word, the condition of subjects may be better or worse in different parts; but here the question is about sovereignty, and has nothing to do with the privileges his Majesty has been pleased to grant the natives. I have had no opportunity to confer with Mr. Solicitor-General upon this point; and therefore, if we differ, I should wish to have a meeting with him, because this is a question of great consequence and concerns a multitude of people.

August 7, 1759. C. PRATT.

(14.) *The opinion of the Solicitor-General, Yorke, on the same legal topics.*

I am of opinion, that Guadaloupe is to be considered as a plantation or territory belonging to the King by conquest; and I am also of opinion, that, provided the requisites of the act of navigation, and the subsequent laws relative to the same subject matter are complied with, the produce ought to be charged with the same duties as if imported from plantations originally British.

The act of navigation refers not only to the plantations and territories belonging to, or in the possession of, the crown at that time, but to future acquisitions; and the later acts, which relax or vary in some respects the provisions of it, are equally extensive. The instance of the rule observed at the custom-house as to sugars imported from St. Christopher's between 1690 and 1712 (without distinguishing between the ancient French and English divisions of the island) is in point. As to the articles of capitulation with the inhabitants, I think that question is not affected by them: the King has a right by conquest, though it is accompanied with terms. The seventh article plainly respects duties payable in Guadaloupe itself, either as a beneficial revenue to be transmitted to Europe on the King's account, or to be employed in carrying on the expenses of government in the place. And the sixteenth and twenty-first articles (as allowed by General Barrington and Commodore Moore) only stipulate for the inhabitants those privileges in trade, according to the laws of England, in which his Majesty, without any such particular stipulation, might lawfully indulge them from the moment that they owed an allegiance as his subjects, residents in a plantation belonging to his crown.

If there are any objections against putting this conquest on the same foot, as to the duties in question, with other plantations belonging to the King, or in his Majesty's possession, they must arise from some other articles and expressions in the capitulation, tending to qualify and render incomplete the right of conquest.

But, first, it seems to me immaterial, that no actual oath of fealty or allegiance to the King is stipulated, because the conquest binds the inhabitants to such alle-

giance by the law of nations. Second, Where the inhabitants stipulate a neutrality, in the fourth article, it is merely for the single purpose of not being compelled to bear arms. Third, Expressions in the fifth, seventh, and eleventh articles, where both the English officers, and French inhabitants, seem to refer to some act of *cession* (by way of perfecting the King's right) which may possibly be made by France to his Majesty at a future treaty of peace, are mere inaccuracies, and import no more in the view of the parties than saying, in case the island shall be retained by his Britannic Majesty, and not restored to the French King, then, &c. &c. What puts this matter out of all doubt, is, that article twelve, as penned by the inhabitants themselves, supposed that Guadaloupe may be the object of an exchange between Great Britain and France, which it could not be if it were not an absolute conquest made by the crown of Great Britain, capable of being exchanged for some other conquest made by the crown of France. And in the sixth article of the capitulation with the garrison, as prepared by the French officers, the future possible cession of the island, referred to at the making of a peace, is a cession to be made by Great Britain to France; which, in the very terms, supposes an absolute conquest. Upon the whole, I am of opinion that the island of Guadaloupe is to be considered as a plantation belonging to the King, and in his possession, within the meaning of the laws stated; and that the duties ought to be paid in England as on commodities imported from British plantations.

August 13, 1759. C. YORKE.

(15.) *The opinion of the Attorney and Solicitor-General,*

Trevor and Hawles, how far Scotchmen were aliens, and how a Lieutenant-Governor could be tried for misdemeanor.

To the Right Honorable the Lords Commissioners for Trade and Plantations.

In answer to your Lordships' *queries*, signified to us by Mr. Popple, the 30th of April last, relating to offences committed by Captain Norton, and against the act for regulating abuses in the plantation trade;

First, We are of opinion, that for such offence or wilful neglect, the Lieutenant-Governor, Captain Norton, may be indicted and tried in the court of king's bench, by virtue of the act for punishing governors of plantations for offences committed by them in the plantations. But we doubt whether he will incur the penalty of £.1000 by the act made the seventh and eighth of the King, for regulating abuses in the plantation trade; for the words of the act extend only to governors and commanders in chief, and is given only for the offence of not taking the oaths or putting the acts in execution; but he will be finable at the discretion of the court;

Secondly, We think a foreigner endenized is qualified to be master of a ship trading to the plantations, unless there be a provision in the letters patents of denization, that such denization shall not enable him to be master of a ship, which is usually inserted for that purpose; but hath been omitted in some denizations of French protestants since the reign of his present Majesty, by order of council;

Thirdly, We are of opinion, that a Scotchman is to be accounted as an Englishman within the act, every Scotchman being a natural born subject.

June 4, 1701.

THO. TREVOR.
JO. HAWLES.

(16.) *The opinion of the Attorney-General, Northey, on the question of alienage, and trading with her Majesty's enemies.*

To the Right Hon. the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

On consideration of the case of Manasses Gillingham, who (being a natural born subject of her Majesty, but a settled inhabitant in the island of St. Thomas, belonging to the King of Denmark, and naturalized there) traded from thence to and with the Spaniards, in war with her Majesty; I am of opinion, his being naturalized without the license of her Majesty will not discharge him from the natural allegiance he owes to her Majesty; however, he being a settled inhabitant in the island of St. Thomas, under the King of Denmark, and not having been commanded to return into her Majesty's dominions, as he might have been, though naturalized there, his trading with the Spaniards from that island, in amity with the Danes, will not be a capital, if any offence at all; and therefore I cannot advise the proceeding against him criminally for such trading. If any inconvenience happens from such trading, as is suggested by the governor of Barbadoes' letter, the Queen's subjects may be recalled to return to her Majesty's dominions, and if they refuse, and after trade with her Majesty's enemies, they may be proceeded against criminally for such trading, as any of her Majesty's subjects residing in her plantations may be proceeded against for trading with her Majesty's enemies, that is, for a misdemeanor; for I do not take simple trading with an enemy to be high treason, unless it be in such trade as furnishes the enemy with stores of war.

March 22, 1703-4. EDW NORTHEY.

(17.) *The opinion of the Attorney-General, Norton, whether the French and Spaniards who remained in the ceded countries after the peace of 1763, were aliens or subjects.*

To the Right Honorable the Lords Commissioners for Trade and Plantations.

May it please your Lordships;

In obedience to your Lordships' commands, signified to me by Mr. Pownall's letters of the 21st of December, and the first of March last, stating that great difficulties had frequently occurred from the question whether the subjects of the crowns of France and Spain, who remain in the ceded countries in America, are to be considered as aliens; and intimating more particularly, that a variety of doubts and difficulties had occurred as to the ability of aliens to acquire property in America, either by purchase, grant or lease from the crown; and also as to the situation in respect to the laws of this kingdom, of such subjects of the crowns of France and Spain, as being inhabitants of Canada, Florida, and the ceded islands in the West Indies, remain there under the stipulations of the last definitive treaty; and therefore desiring my opinion, whether such of the French or Spanish inhabitants of Canada, Florida, and the islands of Grenada, Dominica, St. Vincent's, and Tobago, as being born out of the allegiance of his Majesty, and also remain in the said countries under the stipulations of the definitive treaty, are, or are not, under the legal incapacities and disabilities put upon aliens and strangers by the laws of this kingdom in general, and particularly by the act of navigation, and the other laws made for regulating the plantation trade; and if it should be my opinion that

they are under such disabilities and incapacities, your Lordships, in that case, desire my sentiments in what manner such disabilities may be removed. I have taken Mr. Pownall's letters into my consideration, and am humbly of opinion that those subjects of the crowns of France and Spain, who were inhabitants of Canada, Florida, and the ceded islands in the West Indies, and continued there under the stipulations of the definitive treaty, having entitled themselves to the benefits thereof, by taking the oaths of allegiance, &c. are not to be considered in the light of aliens, as incapable of enjoying or acquiring real property there, or transmitting it to others for their own benefit; for I conceive that the definitive treaty, which has had the saction, and been approved and confirmed by both houses of parliament, meant to give, and that it has, in fact and in law, given to the then inhabitants of those ceded countries, a permanent transmissible interest in their land there; and that to put a different construction upon the treaty would dishonor the crown and the national faith, as it would be saying, that, by the treaty they were promised the quiet enjoyment of their property, but, by the laws were to be immediately stripped of their estates; but I think that no aliens, except such as can claim the benefit of the definitive treaty, or bring themselves within the seventh of his late Majesty, are by law entitled to purchase lands for their own benefit and transmit them to others, either from the crown or from private persons, in any of his Majesty's dominions in North America or the West Indies.

But I submit to your Lordships, whether, as it is a matter of the highest importance that those countries should be settled, and perhaps not less so that such set-

tlements should be made without draining this country of its inhabitants; whether it would not be proper to apply to parliament for a naturalization bill for those places, under proper regulations, as well to encourage foreigners to go thither, as to quiet such aliens as may have already settled there under the common received opinion that they were capable of holding lands there for their own benefit, and disposing of them in any manner they might think proper, in common with the rest of his Majesty's liege subjects.

FLETCH. NORTON.

Lincoln's Inn, July 27, 1764.

II.—Of the legal effects, resulting from the acknowledged independence of the United States.

A re-statement of Mr. Chalmers's opinion on that important subject.

The question is, whether the inhabitants of the United States, who had been born within the King's allegiance, and remained within the United States after they were acknowledged by the King to be independent and sovereign, continued subjects, having the rights of subjects; or became aliens, having the rights of aliens, from that acknowledgment.

During the year 1783, which forms the epoch of that event, I took the liberty of publishing my opinion of those effects. Whatsoever I may have seen or heard since that epoch, I have not in the least changed my opinion. And as abler men than I pretend to be have avowed and published very different sentiments from mine, it may, perhaps, be permitted me to restate and reinforce my original opinion, which first broke the ice

that had been collecting and consolidating for so many years.

The act* which enabled his Majesty to conclude a peace or truce with certain colonies in North America, declared it "to be essential to the interests and the welfare and prosperity of Great Britain and the thirteen specified colonies, that peace, intercourse, and commerce, should be restored between them.

The treaty, it must be allowed, is explicit enough as to the political associations that formed the states, which are expressly acknowledged "to be free, sovereign, and independent states; and the King, for himself and his heirs and successors, relinquished all claims to the government, propriety, and territorial rights of the same, and every part thereof." The statute of the 22d of the King does not take notice of what the world knew sufficiently, that thirteen of the British colonies had revolted; neither does it notice, that the persons forming those colonies which had declared themselves in 1776 to be independent, were, and had always been the King's subjects; but it merely enables the King to make a peace or truce with any commissioners who might be sent by the said colonies, or any of them, or any bodies politic, or descriptions of men within those colonies: and the treaty is altogether silent as to the individuals who formed those well known confederations: it admits the thirteen societies, in their associated capacity, to be free, sovereign, and independent, by relinquishing all claim of government over them: yet it does not explicitly renounce the allegiance of those colonists, who, at the epoch of the war, were still British subjects, in con-

*22 Geo. III. chap. 46.

templation of British law: for it does not declare that the citizens of the United States shall be deemed aliens in future; and it neither excepts nor disowns those faithful subjects who had retained their allegiance and adhered to their King and country.

The faithful colonists of Great Britain, as they had been born within the King's dominions, were, owing to this circumstance alone, constituted subjects of the King and freemen of the realm. By their birth within the allegiance of the crown they acquired a variety of rights, which are called emphatically by lawyers their birthrights, and which can never be forfeited except by their own misconduct, and can never be taken away but by the law of the land. "No freeman," says the great charter, "shall be seized or imprisoned or outlawed or any way destroyed, except by the legal judgment of his peers, or by the law of the land."

It is, nevertheless, a very different consideration with respect to those colonists who, having achieved the late American revolution by their efforts, now form by their residence the United States. Rights may be undoubtedly forfeited, though privileges cannot be arbitrarily taken away; a man's crimes, or even misconduct, may deprive him of those immunities which he might have claimed from birth or derived from some act of the legislature: he may be outlawed by the sentence of a court of justice, or he may be banished by the united suffrages of his countrymen in parliament; the American citizens, who voluntarily abjured their sovereign, avowed their design to relinquish their character of subjects, however contrary to law their relinquishment undoubtedly was. The American subjects who swore fidelity to the government of their own choice, thereby declared

their election to be no longer connected with a state which had mortified their prejudices rather than bereaved them of rights: and by that conduct, and by those offences, the devoted colonists forfeited to the law all which the law had conferred on them. The American treaty virtually pardoned their misconduct in forming those associations which were admitted to be free: the parliament, by its recognition, virtually legalized the election which the revolted citizens of those states had made.

But whether that treaty, or that act of the British legislature, ought to be construed a relinquishment of their allegiance, with the obedience that is inherent in it, or as a pardon of their faults, whatever were committed by forming those associations and taking oaths which were inconsistent with their allegiance, is a point which needs not be now very pertinaciously argued.

The term nation always supposes something collective, or a body politic. A colony is also a body politic, though inferior to a nation. Each of the revolted colonies, when it departed from its former character of a colony, became a state, or body politic, and the association of those thirteen states which had departed thus from their character of colonies, formed a nation, or body politic, under the name of the United States. The King, by the definitive treaty, acknowledged those states to be free, sovereign, and independent; he treated with them as such, and he relinquished for ever all claims to the government, propriety, and territorial right of the same countries: the extent of those territorial rights or boundaries of the United States were distinctly ascertained and avowedly declared by a particular clause of the defini-

tive treaty. On the same day that the King ratified by a formal act that definitive treaty, the whole acts of trade, navigation, and revenue, attached upon those United States, as a nation free, independent, and sovereign. It did not now require to be a great lawyer, to tell that the soil of such a nation was alien; that the products of such a soil were alien; that the ships of such a nation were alien; and that the navigators of such ships were, *ex prima facie*, aliens.

As the king had now, by the treaty, relinquished for ever all claims to the government of the United States, so did he, incidentally, relinquish the obedience of the various people forming those United States: as the American citizens, who formed those bodies politic, now owed no subjection to the crown of Great Britain, they were no longer British subjects, the terms subjection and subjects being correlatives, such as husband and wife, father and son, sovereign and subject, which must always have a reciprocal relation to each other: it is one thing, says SOUTH, for a father to cease to be a father, by casting off his son; and another, for him to cease to be so, by the death of his son: in this, the relation is at an end for the want of a correlative, and in the same manner, when the sovereign relinquished, by the treaty, in the due performance of a legal trust, all claim to the government of the United States, the relation of the American citizens ceased for the want of a correlative.

The first law opinion which has fallen into my hands on those topics was that of Mr. Kenyon, dated at Chester, on the 11th of October, 1783*, and without any

* The definitivo treaty was signed on the 3d of September, 1783. The case only stated to Mr. Kenyon the statute 12 Charles II. chap. 18. sec. 3. 8. 9. with this N. B. "These questions are put merely to know how

hesitation he gave it as his opinion, that "the fair construction of the act, as circumstances now stand, is, that goods, the produce of the United States, may be imported into this country from the place of their growth, upon payment of the duties payable by foreigners, and upon no other terms †." The next opinion which has fallen in my way is that of Sir William Wynne, which was asked by the board of customs, whether ships of the United States were entitled to registers, as ships of the British colonies, which is such an opinion as was to be expected from such a jurist, against considering such ships as British, but as alien ‡. The next opinion which has occurred to me is that of the atttorney-general, Arden, in Oct. 1788, wherein he gives it as his judgment, that there can be no trade between the United States and the British West Indies, except such as was allowed by the King's proclamation ‖. All those opinions go to prove, what is sufficiently obvious in itself, that the United States became free, sovereign, and independent, under the definitive treaty; and so, must be deemed foreign and alien to the British nation; taking it for granted, that the people forming those United States must be necessarily aliens.

Yet are there books which propagate different doc-

the law stands upon those clauses, without any regard to any orders of council that may be made relative to the trade of America, under the act of last session of parliament."

† See this opinion, under this head, No. 2.

‡ It was dated on the 19th of October, 1785. The late Mr. Thomas Boone, the chairman of the board of customs, assured me that the attorney and solicitor-general concurred in Sir William Wynne's opinion. See it under this head, No. 3.

‖ See this opinion, under this head, No. 4.

trines, and persons of ingenuity who avow notions that lead them to consider those citizens, who were born under the allegiance of the King, to be still entitled to their birth-rights, as subjects, under the well known declaration of the great charter, that has been already quoted.

But every nation and every state, under whatever name, must consist of individuals, men, women, and children, of whatever number; and it is those individuals who form the body politic of every such nation and state. By the definitive treaty, the King, first, acknowledged the associations of individuals, forming the United States, to be free, sovereign, and independent; and, secondly, relinquished all claims to the government and territorial rights of the same. According to those notions, then, the country of the United States is relinquished, as sovereign, and the inhabitants thereof are admitted to be free and independent; yet are they said to be subjects, claiming from the laws of England their birth-rights as British subjects, notwithstanding their own election to be free and independent, and the recognition of their election by their former sovereign. Such a contradiction of character never existed in any code of law in any country; on the contrary, the Lord chancellor Egerton laid it down as a principle, in delivering his judgment in the case of the POST-NATI, "in a true and lawful subject, there must be *subjectio, fides, et obedientia*, and those cannot be severed, no more than true faith and charity in a true christian *." Now, the notions be-

* See Lord Egerton's speech, which he published in 1609, p. 64. I presume it is not necessary to say, that when the lord chancellor gives his judgment on the case before him, for his decision, that it becomes a part of the law of the land, if it be not appealed from, and reversed.

fore mentioned would separate from the character of a true subject, the subjection, the fealty, and the obedience, which is so essential to the genuine character; and after those very citizens of the United States had relinquished their faith, allegiance, and obedience, and were acknowledged by the King to be free and independent, what subjection, what faith, what obedience could remain in such citizens? We may now infer from the foregoing premises, that it is absurd in argument, and unfounded in law, for any person to claim the rights and privileges of a subject, without showing his subjection, professing his faith, and owning his obedience. Yes, the American citizens are free, and without subjection; yet how? Not to do as they list; for they must so use their freedom and independence as not to prejudice the public *; so says the law of reason and policy, *res-publica preferenda est privatis;* and so affirm many statutes †.

The learned and elegant Craig traces back the doctrine of foreign birth, alienage, to the feudal law, of which this is the chiefest rule: *unus et idem duorum dominorum homo ligius esse non potest*, that is, one and the same person cannot be liegeman, or vassal, of two superior lords. He who is born under another prince, whose liege subject he is, because he cannot perform what he owes to his true lord, is put away from the fief in another country; for he cannot keep his fealty un-

* Commentary upon Fortescue, 20·1.

† 27 Edward III. 12. 16; 28. Edw. III. ch. 5; 23 Henry VIII. ch. 16; 25 Hen. VIII ch. 13; 32 Hen VIII. ch. 18, 19; 33 Hen. VIII. ch. 7; 35 Hen. VIII ch. 1; 1 Edw. VI. ch. 3. 5; 2 and 3 Edw VI. ch. 37; 1 and 2 P. and M. ch. 5; 18 Eliz. ch. 9. 15. 17.; 8 Eliz. ch. 3; 23 Eliz. ch. 5; 27 Eliz. ch. 19, &c.

tainted and inviolate to two lords, to him under whom he is born, and to his new sovereign; neither is it possible for him, in case of war between them, to succor them both, to assist both as a soldier, to conceal the secrets of both princes, which is chiefly required by the feudal law. This able writer considers this doctrine as universal in the several codes of the European nations; it is even so by the law of nature: no man, said our Savior, can serve two masters, for he will hate the one and love the other*. If the feudal law were a branch of the common law, then must the notion which attributes rights to the former subjects, after their subjection was relinquished by their sovereign, be abhorrent to the common law.

The American citizens can, therefore, by no mode of speech, nor by any principal of law; of the law of nature, of the law of nations, of the feudal law, of the common law, be deemed British subjects, unless those associations of mankind are subjects, who owe no allegiance to the British crown, or any obedience to the British government; that allegiance, which is said to include all the engagements owing from subject to sovereign; that obedience, which is styled, emphatically, the very essence of law. In the report of Calvin's case, it is said to be a maxim that ligeance is a reciprocal tie, *quia sicut subditus tenetur ad obedientiam, ita rex tenetur ad protectionem* †. But what reciprocity can there be, or what protection claimed, when subjects have renounced their allegiance, refused their obedience, and the King thereupon renounces their allegiance, and releases their sub-

* Craig on the succession of King James, 253.

† 7 Co. 5.

jection, by acknowledging their freedom and independence? The King gives protection to his subjects by his laws. An American citizen, claiming his birth-rights, must apply to the King's laws; and to entitle himself to legal protection, he must show that he is a subject, owning, and yielding obedience. If he cannot do that, he must fail in his claims of rights, like the Frenchwoman in the time of Edward I. whose case is reported in HENGHAM: she brought a writ of *ayell* against Cobledicke, and declared of the seisin of Roger, her grandfather, and conveyed the descent to Gilbert, her father, and the same descent from her father to herself; and the tenant pleaded, that the demandant was not of the legiance of England, or of the fidelity of the King; and demanded judgment. This was held to be good and sufficient, for to the King fidelity and allegiance are due; and therefore since she failed in that, she was not to be answered, and thereupon she prayed license to depart from her writ, and so she left her suit *.

It may be here worth inquiry, if something to this useful purpose may not appear on the face of the treaties with the United States? By article 4 of the definitive treaty, it was stipulated that creditors on either side should meet with no lawful impediment to the recovery of their debts. After the re-establishment of peace by that treaty, the subjects and citizens of the contracting parties were not at war, and being at peace, there could not be any legal impediment to legal remedies for just debts; but in contemplation of the treaty, the subjects of the one power and the citizens of the other had become thereby aliens to each other. The

* The lord chancellor Egerton's speech, 91-3.

same observations may be made upon the 5th article, which provides that persons having any interest in confiscated lands, either by debts, marriage settlements, or otherwise, should meet with no lawful impediment in the prosecution of their just rights. It may be moreover remarked that Adams and Jay, two of the American negociators, were lawyers, the first being chief justice of Massachusetts, and the last chief justice of the United States, and both Adams and Jay knew the meaning of their own terms, whatever the British negociator may have done. This reasoning is confirmed by an article in the commercial treaty between Great Britain and the United States, which was negociated in November, 1794, by Lord Grenville and the same John Jay: it was agreed by article 9, "that British subjects who now hold lands in the United States, and the American citizens who now hold lands in his Majesty's dominions, shall continue to hold them, according to the nature and tenure of their respective states and titles therein, and may grant, sell, or devise the same, as if they were natives, and that neither they, nor their heirs, or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as ALIENS *." Is

* The 37 Geo. III. ch. 97. was made for carrying into execution that treaty of commerce. By section 24, the 9th article above stated was ratified, any law, custom, or usage, to the contrary notwithstanding. The article before mentioned was adopted by the negociators of it, as they considered the people of Great Britain, and United States, to be aliens to each other; and the parliament confirmed this article, *ex abundante cautela*, notwithstanding the well-known law, custom, and usage, to the contrary; yet are there some, who consider this statute as a proof, that the citizens of the United States are not aliens. There is another statute, which also shews the sense of parliament on this topic: the 30th Geo III. ch. 27. for encouraging the settling of the British colonies, by inhabitants from the United States, required such emigrants to the Brit-

it not apparent then from the foregoing intimations, that in the judgment of the negociators of the several treaties between Great Britain and the United States, and in contemplation of parliament, the subjects of the first country and the citizens of the last were considered as foreigners to each other?

Yet are we still told that those people of the United States, who were born British subjects, even now continue to be entitled to their original birth-rights; and for this singular notion the great charter of English liberties is quoted, that no freeman shall be outlawed, or any way destroyed, except by the judgment of his peers, or by the law of the land. But is not this argument conceived upon too narrow principles to apply appositely to the present question, relative to thousands of men, rather than to one man? The fundamental principle is sound law, but it does not reach the case of the inhabitants of thirteen colonies, who revolted from the British empire, who rose in arms against the King's government, renouncing their allegiance, and claiming their freedom from any further obedience to British laws, and acting thus against all law during seven years, were recognized by the King, in pursuance of the high trust invested in him by those laws, to be independent and sovereign, without subjection or obedience. Is it not a sufficient answer to such pretensions, as a claim of rights without submission, *volenti non fit injuria;* you have elected to be aliens, and you have been recognized by the King, the fountain of all jurisdiction, to be what you have chosen for yourselves; and the laws, from which

ish colonies, to take the oath of allegiance, upon their arrival and settlement; but, in this case, none but aliens would have been required to take the oath of allegiance to the king.

you claim your rights, cannot acknowledge you in any other character than you have chosen for yourselves, and have been recognized to belong to you: you profess not to owe any allegiance to the King, or obedience to his laws, and under such circumstances, you cannot receive protection from either, whatever rights you may have once possessed, *quod est inconveniens, aut contra rationem, non permissum est in lege**.

In the argument of the instructive case of Campbell and Hall, in Hilary Term, 1774, it was said by Mr. ALLEYN, the learned counsel for the plaintiff, "the technical learning of Westminster-hall can give but little assistance to the decision of this question. The great principles of the law of empire must determine it, and the political history of England affords particular illustrations of it." This course must again be pursued, in illustrating the question of the alienage of the American citizens, which may be inquired into under two heads:

1st. How aliens may become subjects;

2d. How subjects may become aliens.

As to the first head; it is in general true, that an alien born, coming into England, and desiring to become a subject, cannot be naturalized but by parliament, that is, without the consent of the nation: this seems to have been always the law of England, though it was otherwise of old in Normandy, where the prince might naturalize. An act of naturalization, thus obtained from parliament, cures the alien's disabilities, as if he had been born in England, and by apt clauses an act of naturalization may be so made as to cure other disabilities;

* Coke, Litt. 178.

yet is it inaccurate to say that a person may be naturalized by being born in any dominion of the King while he was King of England, or born upon the King's seas, or born under the statute of Edward III. *de natis ultra mare;* for such subjects never were aliens.

During the late reign the parliament extended the benefits of naturalization to such foreign protestants, as should reside for a limited time in the King's plantations *, and protestant officers, being foreigners, were naturalized by parliament upon performance of special services; and foreign seamen, upon performing nautical services on board British shipping. The colonial assemblies did pass acts of naturalization, which were limited in their operation by several statutes imposing disabilities on aliens and denizens; they were bound also by the limited nature of their jurisdictions, and at the beginning of the present reign, a general instruction was given by the King to his governors of colonies not to assent to any act of assembly granting naturalization to any foreigners, as such acts might trench upon the statute law of the land, and thus operate against the policy of the state.

Yet, Ventris hath reported Sir Matthew Hale, the chief baron, to have said in Lord Holderness's case, that "Naturalization, according to our law, can only be by parliament, and not otherwise †." There must be surely some mistake here, as such a judge could not have so far allowed his vigilance of observation to have slumbered, as to say that naturalization cannot be otherwise

* 7 Geo. II ch. 21; 13 Geo. II. ch 4; 20 Geo II. ch. 45; 2 Geo. III ch. 25; 13 Geo. III. ch. 25; 20 Geo. III. ch. 20.

† 1 Vent. 419-20.

than by parliament. The chief baron, it seems, did not advert that thousands and tens of thousands, millions and tens of millions of people have been naturalized by the act and operation of law and thus became subjects. Mr. Wallace, who argued for the defendant in the case of Campbell and Hall, remarked, what may well be remembered, "It is not, as formerly, when the conqueror gained captives and slaves and absolute rights by the law of nations, but now, the conqueror obtains dominion and subjects." This beneficial change probably took place as early as the age when the ravages of the Danes were softened by the introduction of christianity or prevented by the progress of civilization. There is however but little in our law books, as hath been already intimated, of naturalization by conquest; for slow is the progress of jurisprudence as a science: yet was it said, "If the King of England make a new conquest, the persons there born are his subjects; but if it be taken from him again, the persons there born, afterwards, (after being conquered,) are aliens*." This was saying but very little in advance of a more rational construction, as it is not said that the alien people who had been conquered by the arms of the crown became subjects of the crown by act and operation of the law. It is not easy to ascertain the epoch when the law became thus understood; I should guess that such a principle of law became prevalent soon after the arrival of the Normans, who argued very acutely about sovereignty and subjection. It was certainly understood as early as the reign of Henry II. when the people of Ireland were supposed to have become his subjects, from his conquest.

* Dyer, 224; Vaughan, 281-2.

Let us now listen to the soft voice of Lord Mansfield, when delivering the judgment of the King's Bench, in the well-known case of Campbell and Hall. "In the acquisition of conquests, it is limited by the constitution," says he, "to the King's authority, to grant or refuse a capitulation; if he refuse, and put the inhabitants to the sword, all their lands belong to him; if he receive the inhabitants under his protection and grant them their property, he has the power to fix the conditions; he is entrusted with making the treaty of peace, and he may yield up the conquest, or retain it, upon such terms as he shall think fit to agree to." These powers, (in the King,) no man ever disputed; neither has it hitherto been controverted but that the King might change part of the government of Granada, or all the political form of the government of a conquered dominion. He afterwards added, "it is not to be wondered that an adjudged case in point has not been produced; no dispute ever was started before upon the King's legislative authority over a conquest; it never was denied in Westminster-hall; it never was questioned in parliament; it was so decided in Calvin's case." Lord Mansfield then run over the history of the conquests made by the crown of England, in order to confirm and illustrate his judicial doctrines; beginning with that of Ireland and ending with that of New York. In all those cases of conquest, the previous aliens became subjects of the crown, by subsequent conquest; and of course were virtually naturalized, by the act and operation of law. "The conquered inhabitants, once received under the King's protection," said Lord Mansfield, in judgment, "became subjects, and were to be universally considered in this light, and not as enemies OR ALIENS*."

* Cowper's Reports, 204. But Lord Mansfield, while he paid the

The first opinion which I have found on such topics is that of John de Witt, in 1667, with the remarks thereon by Sir William Temple who was then ambassador in Holland. This opinion, which was called a discourse, was given in consequence of the treaty of Breda, 1667, whereby England ceded Surinam to Holland; and Holland ceded New York to England, with plenary right of sovereignty, propriety, and possession. These expressions were deemed by De Witt, and tacitly acknowledged by Temple, of sufficient force to transfer the allegiance of the Dutch colonists at New York to the English crown, who thereby became subjects, as Lord Mansfield remarked, and ceased to be considered as enemies and aliens. The next opinion which I have found is that of the attorney-general Pratt, in August 1759, who, with the solicitor-general Yorke, was consulted by the board of customs on the effect of the recent capitulation of Guadaloupe. His opinion was, that this island must be considered as now one of the British plantations; the right of sovereignty being changed, the whole island as the King's, in right of conquest, and the whole colonists as become his Majesty's subjects*. Mr. Solicitor-general, C. Yorke, gave a separate opinion on that occasion to

greatest deference to the opinions of the law officers of the crown, when formally given, seems not to have been aware of the opinion of the Attorney-general Northey, in 1704, with regard to the part of St. Christopher's, then recently conquered. "Her Majesty may," said Northey, "if she shall be so pleased, under her great seal of England, direct that the like duty (of four and a half per cent.) be levied, for goods to be exported, from the conquered part; and that command will be a law there; her Majesty, by her prerogative, being enabled to make laws that will bind places obtained by conquest, and all that shall inhabit therein." This proves also that those conquered people, being now obedient to her power, were subjects and not aliens; as she could only legislate for such a people, by acts under the great seal of England.

* See this opinion, under this head.

the same effect: "I am of opinion," said he, "that Guadaloupe is now to be considered as a plantation or territory belonging to the King by conquest; and the people thereof owed in consequence an allegiance to his Majesty, as his subjects resident in a plantation belonging to his crown *." Yet some doubts being entertained by persons abroad and at home, whether the French and Spaniards who remained in the ceded countries after the peace of 1763 were aliens or subjects, the attorney-general, Norton, gave it as his opinion to the board of trade, that "those French and Spaniards are not to be considered in the light of aliens, but as his Majesty's liege subjects." Yet the bill in parliament which he advised for quieting those doubts, was never passed, perhaps never proposed; as wiser men than Norton, probably, considered such advice as weak; the law being clear. Who could doubt, whether such French and Spaniards, being the King's subjects, and not aliens, were not entitled to the rights of subjects! Lord Mansfield delivered it as the judgment of the court of King's bench, in the before mentioned case of Campbell and Hall, "that the law and legislative government of every dominion equally affects all persons and property within the limits thereof; and is the true rule for the decision of all questions arising there: whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in the island of Minorca, the isle of Man, or in the plantations, has no privilege distinct from the natives †." I have now delivered explicitly what has occurred to me on this first head of

* See this opinion under this head.

† See the report of the case of Campbell and Hall.—Cowper.

argumentation, how aliens may become subjects, which we now see must, and may, be done by act of parliament, or by the operation of law. By such operations of law, it is not too much to assert, that there have been acquired to the British empire, since the commencement of the present reign, forty millions of subjects.

Secondly, I will now proceed under this second head to inquire how subjects may become aliens? The persons and the property of the English people have been guarded with great anxiety by their laws, which have made surety, in those respects, double sure*.

Yet did the common law, as we may learn from Bracton, allow of disfranchisement and of banishment: an individual might be interdicted his province, his city, or his town; or he might have been interdicted his kingdom, for years, or for life; and abjuration was a legal exile, as well by the statute law, as by the common law†.

Yet neither the law of exile nor the law of security applies to the present operation, which relates to many subjects, not to one subject; and which turns upon circumstances of national policy, and not upon points of judicial practice; it involves this high consideration of public interest, whether, if the state be in danger, the rights of the few may not be sacrificed to the benefit of the many: and the foregoing considerations lead on to the inquiry, whether, as subjects may be obtained by the act and operation of law, subjects may not be relinquished also, by the act and operation of law.

* By the great charter, which has been so often confirmed, and by the greatest, and best explanatory act of the 28th Ed. III. ch 3.

† West, the second, c. 35; Selden Mare Claus. 12; Molloy, *De jure maritimo*, 358, 361.

The King certainly cannot, by any special act, disfranchise a particular subject: though by his judges, sitting in his bench, a subject may be outlawed on proper process for that end, operating upon the demerits of the party; yet the king, by authority of that high trust wherewith he is invested by the constitution of making war and peace, may relinquish, by treaty, the subjection of many subjects; as in the performance of this trust, the act of the King virtually includes the act of the nation, for if it were otherwise, by the understanding of the law of nations, treaties of peace could never be made between belligerent powers. *Rex et subditi sunt relativa,* said Lord-chancellor Egerton, in giving his judgment in Calvin's case*. There cannot, he adds, be a king of land, without subjects; for that were but *imperium in belluas:* so, neither can there be subjects, without their king; for then the terms king and subject would not be correlatives. Hence we may infer, as the Lord-chancellor intimated, that the true correlatives are sovereignty, and subjection†: if the subjection be withdrawn, and so admitted, the sovereignty is gone; if the sovereignty be removed, then is the subjection gone; and the subjection being gone, the people, owing no subjection, are no longer subjects; for they are all correlatives, which cannot exist without each other.

On this second head, how subjects may become aliens, any more than on the first, it is not to be wondered, as Lord Mansfield remarked, that an adjudged case in point cannot be produced; no dispute was ever started before as to the king's power, in making a treaty of peace, to relinquish a province with the allegiance of the provincials.

* His speech, printed 1609. p. 104.

† Ibid. 73.

But if we trace this point historically, the operation of law will become very apparent. The Lord-chancellor Egerton said, what all the judges indeed affirmed, in arguing the case of the *post-nati*, that King Henry II. had England and Normandy by descent from his mother, the Empress Maud; and Anjou and Main by descent from his father, Geoffry Plantagenet; and he that was born, the chancellor went on to say, in any of the king's dominions, and under the king's obedience, is the king's liege subject, and born *ad fidem regis;* (for that is the proper and ancient word, which the law of England hath used; *ad fidem regis Angliæ, ad fidem regis Franciæ;*) and therefore he cannot be a stranger or alien to the king, or in any of his kingdoms; and by consequence is enabled to have lands in England, and to sue, and be sued, in any real action for the same *.

King John, the youngest son of Henry II. lost all those French dominions to Philip, the French king, in 1204 †. Upon this transaction, whereby England lost so many provinces, what was the operation of law? Is it not apparent, that the people of those provinces no longer remained *ad fidem regis,* in obedience to John, and that they must have sworn fealty to Philip? When the sovereignty of those provinces thus ceased to be in

* The Lord-chancellor's published speech, 62, 4.

† Brady says, by his negligence, Hist. i. 474. The president Henault tells a somewhat different story: King John, who was a peer of France, was cited before the court of peers in France, to be judged for the murder of Arthur: he did not appear: he was declared a rebel, for his contumacy; and of consequence, his lands were confiscated: he was condemned to death for the murder of his nephew, committed within the jurisdiction of France: Philip annexed Normandy, and John's other French dominions, all but Guyenne, to the crown of France.—Chron. Hist. de France, i. 197-8. Consult du Tillet, Chron. abr. les Roys de France, 48, under the year 1204.

the king of England, the subjection of the people, within the same, also ceased. We may infer as much from the following records, M. 4, Henry III. in dower, the defendant pleaded, *quod petens est de potestate regis Franciæ, et residens in Francia; et provisum est a consilio regis, quod nullus de potestate, regis Franciæ respondeatur in Anglia antequam Angli respondeantur de jure suo in Francia* *: this the plaintiff's attorney could not deny; and thereupon the judgment was, *ideo sine die* †. There is a record of the 7th Hen. III. [1223]: *Baronibus Normanniæ quod ad servitium regis redeant* ‡; which evinces that the people of those French provinces, by the forfeiture of John, became aliens to England.

The Lord-chancellor went on, in the progress of his argument to say, that Henry III. had Aquitain by descent from his grandmother Eleanor, the daughter of the Duke of Aquitain; Edward I. had the same by descent, and part of Scotland by conquest; Edward II. and Edward III. had the same by descent; and Edward III. claimed all France by descent from his mother, and had the most part of it in possession; and so had Henry V. and Henry VI. Now, adds the chancellor, in those king's reigns the subjects born in those countries, being

* Fitz. Dower, 179.

† The Lord-chancellor Egerton's speech on the *Postnati*, 13, 14

‡ Rym. Foed. 1. 260: the writ therein contained was tested, by the justiciary of England, who knew the meaning of his own terms. Shard vouched the case of a Norman, who, with some English, had robbed divers of the king's subjects, in the narrow seas; and who being taken and arraigned, the Norman was found guilty only of felony, and the rest of treason; for that Normandy being lost by king John, was out of the allegiance of Ed. III. and the Norman was accounted an alien. Shard quoted 40 assize, pl. 24; and see Calvin's case, 7th report.

then under their obedience, were no aliens, but capable of lands in England*. History must tell how those kings of England lost those dominions in France: did the obedience of the people of those dominions continue to England? No: when the sovereignty of the kings of England was lost, the subjection of their French subjects also ceased, and thenceforth became aliens to the crown, and were therefore incapable of holding any lands in England; as we may learn from the before cited authorities and records, and even from Bracton.

But the aptest precedent for the American treaty, 1782-3, which can be found in the records of England, is the treaty of Northampton, 1328, that acknowledged the independence of Scotland†. The three Edwards endeavored, by the intrigues, the fraud, and force, of more than forty years, to subdue Scotland. The country was again and again overrun; the people and their chiefs fell in the field or bled on the scaffold; and the limbs of the illustrious Wallace were exhibited on the public places. Yet such was the persevering spirit of the nation, such the skilful valor of their leaders, such the unconquerable magnanimity of their king, that after a struggle of more than forty years, they compelled Edward III. with the assent of his parliament, to acknowledge the independence of Scotland‡. The sovereignty

* Speech, 1609. 64, 5.

† There was a previous act of parliament made, at York, on the 1st of March, 1327-8, entitled, *Relaxatio superioritatis Scotiæ*, Rym. Foed. iv. 337. This act of parliament went much beyond the mere release of the superiority: it relinquished the country, or kingdom, according to its ancient limits; and it released all subjection, service, claim, or demand of the country, or its people.

‡ See the cancelled Par. Rec. 85-7; 4 Rym, 337-8. Sir Edward Coke, and Sir Mat. Hale, in discussing the connexion of the English and

of England, and the submission of Scotland, were renounced; the people of Scotland were acknowledged to be free, and became of course aliens to England, as the subsequent events evince, as the treaty of Perth * in 1335 plainly shows; and owing to those causes, the people of England and of Scotland were aliens to each other at the epoch of King James's accession, as the reasonings of the judges in Calvin's case demonstrate.

Come we now to the case of Calais, which is somewhat singular: in 1347, it was taken by Edward III. who invited English merchants to settle in it; so that it now partook of a mixed nature, of a conquest first, and of a colony afterwards, something like the condition of St. Christophers after its colonization and conquest. In 1558, Calais was retaken by France, at the end of two hundred and eleven years connexion. In 1559, under the treaty of Chateau Cambresis, Calais was to remain eight years in possession of France, and then to be restored, provided Queen Elizabeth behaved well in the mean time †. But Elizabeth and Cecil were meddlers by nature; and they would interfere in the affairs of Scotland and of France: so Calais remained in the hands of the conquerors. The sovereignty of Calais seems thus to have remained during those eight years in a sort of abeyance; and during that period, persons who were born there were clearly aliens, as they were

Scots laws, wrote but idly; as they seem not to have known, that the treaty of Northampton was made under the authority of two acts of parliament: but, Sir Bulstrode Whitlock knew that it was, and says, "the peace between England and Scotland, 2 Ed. III. was concluded, by the parliament, at Northampton."—*Collectanea Juridica*, ii. 334.

* See the treaty, in Avesbury, 24-27.

† 15 Rym. 505, &c.; the president Henault's Abr. Chron. i. 476-7

born out of the ligeance of the king, and in a country out of the possession of the crown. The whole people afterwards were considered as aliens, by operation of law; as the sovereignty of the town and the subjection of the people were both lost to England for ever.

Let us now advert to the condition of Surinam and New York, under the treaty of Breda, 1667, when England ceded the first to Holland, in full sovereignty, propriety, and possession; while Holland, in the same manner, ceded New York to England. During the effluxion of the preceding century, the law of nations had been very much discussed by Grotius, Selden, and other eminent jurists; and statesmen now argued every case, arising from events, with more accuracy, and decided with more precision. The disputes arising out of the treaty of Breda, came to be settled by John de Witt and Sir William Temple: de Witt gave his opinion in a discourse, which is hereinafter printed; and he was answered by Temple, whose paper is also printed: it was plainly insisted on by the one, and tacitly agreed by the other, that the English who remained in Surinam became Dutch subjects so completely that they became aliens to England, and could not even apply to their native country in any manner, for aid or consideration, consistent with the law of nations. In the same manner, the Dutch people at Manhattan, as New York was then called, became completely English subjects and aliens to their native land *.

* It is to be regretted, that Sir Lionel Jenkins, who was then the leading civilian, did not answer De Witt; as we should have had disclosed more law, than Temple seems to have possessed: my researches lead me to suppose, that there was no law opinion asked, by the English government, on that occasion. The English people were afterwards removed from Surinam.

The wars and the treaties of subsequent times do not supply much information, and throw scarcely any light on this head of our inquiry. The peace of Ryswick, 1697, by restoring, generally, what had been lost by either party to their former possessor, furnishes very little observation: the main point of that treaty was the direct acknowledgment of William III. as King of England, and the dominions thereunto belonging. The peace of Utrecht, 1713, is much more instructive: the conquered part of St. Christophers was now resigned, in sovereignty and possession; Newfoundland, with its adjacencies, were resigned in full sovereignty to Great Britain: from this epoch the statute of William, regulating the government and fishery of this valuable island, attached upon both. Nova Scotia, according to its ancient boundaries, was resigned to Great Britain; but there was a proviso that the French subjects might remove if they should think fit; or if they should remain, to enjoy their religion as far as the laws of Britain allowed: this form of words shows in what manner an act of parliament limits the king's power of making treaties; and there was also a proviso, that commissaries should be appointed to settle "who ought to be accounted the subjects and friends of Britain and of France;" alluding chiefly to the American Indians, as the friends of both parties. From Spain, Britain obtained Gibraltar and Minorca, in full sovereignty, and the *assiento* trade, according to former stipulations; Gibraltar and Minorca have always been governed as conquests, but the *assiento* could not be received, according to former stipulations, as it was opposed by the acts of navigation. Here are sufficient illustrations of two of our principles of law in respect to treaties.

The peace of Aix-la-Chapelle, 1748, does not supply, though it provides for mutual restorations, any instructive observation. Yet the war which was then ended ought to be deemed productive of much information, if it produced nothing but the report of Sir George Lee, the judge of the admiralty court, and of the advocate, attorney, and solicitor-general, Paul, Ryder, and Murray, on the Prussian ships carrying neutral property*. There were published, about that time, various works on similar topics, which certainly made the powers of Europe much better acquainted with the instructive doctrines of the law of nations.

The peace of Paris 1763, as it retained much, and gave but little in return, left a wide field open for illustrative observation. The French King again relinquished the whole of Nova Scotia with all its dependencies, Cape Breton and the other islands in the gulf of St. Lawrence, Canada with all its dependencies and people. The King of Great Britain, on his part, granted to the inhabitants of Canada the liberty of the catholic religion; he allowed the Canadians the freedom of selling their estates to his subjects, and of retiring within eighteen months; but there is nothing said on the ligeance of the Canadians if they should not retire. The sovereignty, property, and possession, of the country of Canada, was ceded by the Most Christian King; and of course, the subjection and faith of the inhabitants, who

* *Collectania Juridica*, i. No. 5.—There is, herein, a note, stating that, "this report contains a thorough investigation, and justification, of the principles adhered to, by the court of admiralty, in England, in cases of capture of the ships and property of neutral powers, in time of war. It was composed on a memorable occasion, by the united abilities of the great law officers of the crown; and has ever since been received, as the standard authority, in cases of that nature."

thereby became subjects of the crown, and who, of course, became entitled to the several rights of the British subjects. The King restored to France the islands of Guadaloupe, Mariegalante, Desirade, Martinico, and Belisle; with a proviso that the King's subjects, who might have settled in any of those islands, might retire with their effects at any time within eighteen months; but there is nothing said of the King's subjects whom he had conquered thereon, or who might have been born after the conquest and before the restoration; they were relinquished, by operation of law, as well as in fact. Those clauses in this treaty, and those circumstances, come up fully to the law which has been already intimated from Dyer and Vaughan, "if the King of England make a conquest, the persons there born are his subjects; but if it be taken from him (or he cede it,) the persons there born (after such cession or capture) are aliens*;" but, how did they become aliens? The answer must be, by act and operation of law. This general principle may be illustrated by other clauses of this memorable treaty. The Christian King ceded Grenada and the Grenadines to Great Britain, with the same stipulations in favor of the inhabitants; who might retire, but, if they remained, became subjects. The neutral islands were partitioned in this manner: St, Vincent, Dominica and Tobago, remained to Great Britain; St. Lucia was delivered to France; and from this stipulation it followed, that the French people became English subjects; and the English planters on St. Lucia became French subjects, if they remained, by the act and operation of law. Great Britain and Spain arranged their conquests in this manner:

* Dy. 224; Vaugh. 281-2.

Britain restored to Spain the Havana and part of Cuba: Spain ceded to Britain the Floridas; and the island of Minorca was ceded to Britain, in the same condition as when conquered: so that the Spanish people of this island, who had become English subjects when originally conquered, became again English, by a sort of *jus postliminii* *.

The treaties of Versailles, 1783, are less glorious, but full as instructive: Great Britain restored to France St. Lucia, and ceded Tobago. The British subjects in both were allowed to retain their possessions or to retire within eighteen months: France restored to Great Britain, Grenada and the Grenadines, St. Vincent's, Dominica, St. Christophers, Nevis, and Montserrat, with the same stipulations in favor of the French planters. Great Britain ceded, in full right, Minorca to Spain, with the same stipulations in favor of British subjects: Great Britain also ceded to Spain the two Floridas, with a similar proviso that the British subjects might retire; and Spain ceded to Great Britain the Bahamas, with a similar stipulation in favor of the Spanish subjects who might there remain. It is quite apparent from the foregoing facts and reasonings, that those alterations of sovereignty changed the nature of the ligeance of the people; so that they were aliens or subjects, accoding to the nature of their residence and subjection.

After this full discussion of so many treaties, let us again advert to the definitive treaty with the United States; when this subject was considered in the house of lords, Lord Loughborough said, that the King could not, in virtue of his prerogative, cede Canada or Florida

* The case of Fabrigas, and General Mostyn, which was decided, in 1773, by a verdict of three thousand pounds against the General, evinces, sufficiently, that the Spanish people of Minorca were English subjects.

without the sanction of parliament. The Lord-chancellor, when he delivered his sentiments, treated Lord Loughborough's opinion with no great respect. What has been so often done before, could not be done now: But what sort of logic is it, to reason against facts? When the same subject was under consideration in the house of commons, with respect to the powers of the prerogative, Mr. Wallace and Mr. Lee maintained that the King could not abdicate a part of his dominions, or declare any number of his subjects free from obedience to his laws: the contrary was asserted by the attorney-general; and both parties pledged themselves, if the matter should come regularly into discussion, to make good their several opinions*. But the day of discussion never came, and all wise men saw that such extravagant doctrines, though they might have done very well at the sad epoch of civil war, could not be soberly maintained in time of domestic quiet. The King most undoubtedly enjoys from the constitution the exclusive power of making war and peace: this is a fundamental principle of the law of nations; it is one of the pillars of society itself; and it has been argued by writers on the law of nature and nations, that though individuals, antecedent to all society, (if such a state ever existed,) had the right of war, this right was given up when they entered into society: it is said to be upon the same principle that the King enjoys the sovereign power of making treaties, leagues, and alliances with foreign states and princes†. But was there not an act of parliament

* Annual Register, 1783.

† If, however, it were necessary to lay on, or take off taxes, the king cannot do this without the provision of parliament; if regulations have been previously made under parliamentary authority, as in the case of

made to enable the King to make a peace with the United States? Yes; yet is it singular to remark, that the said act was not used: it was neither recited nor alluded to, in either the preliminary, or definitive treaty of peace with those thirteen states. The King's constitutional power was deemed sufficient, without the special statute, which had been suggested *ex abundante cautela* by the same spirit which suggested the repeal of the stamp act; and thereby created much of the mischief which was now pressed upon the nation for remedy.

The history of our diplomacy evinces the truth of the general principle which is recognized by every law. King William, by the treaty of Ryswick, granted and received cessions of conquests in war. Queen Anne, by the treaty of Utrecht, made some cessions, and received more. King George II. by the treaty of Aix la Chapelle, agreed to cede and receive all conquests since the war commenced. King George III. by the treaty of Paris, received much and ceded little. By the peace of Versailles, 1783, when the treaties in question were made and ratified, the King granted to France fisheries, factories, islands, and territories, and received much in return The King ceded to Spain the island of Minorca, and the two provinces of the Floridas, and such other countries as might have been taken, and received in return from Spain, the Bahamas. It was the opinion of

Newfoundland and its fishery, a treaty cannot warrant the repeal of such regulations, as this must be done by parliament or not at all · so, in making commercial treaties, regulations are to be made or repealed which can only be done by parliament; and if parliament disapprove of such a treaty, it must fall. All those cases are exceptions to the general principle of the royal power to make war and peace.

parliament, that too much had been given to those several powers, yet this opinion did not nullify or vitiate the treaties: it only operated upon the responsibility of ministers, whom it virtually removed from the power of doing further mischief: this is merely a collateral point, which, according to the wisdom of our constitution, does not trench at all upon the King's authority to make war or peace

Whether that vote of parliament extended to the treaty with the United States is somewhat doubtful; but there can be no doubt whether that treaty were not the most exceptionable. Why relinquish, under the pretence of settling boundaries, countries larger than Great Britain, to which the United States had no pretensions? Why grant the Newfoundland fishery, which Britain guards as every man his nursery? They had no claim to any thing beyond their independence. In the other treaties, the rights of individuals were carefully guarded; in the treaty with the United States they were contemptuously disregarded. The statesmen who made this treaty pleaded in vain as a justification, that the congress would have the Western Countries—the congress insisted on a right to the Newfoundland fishery; the congress had only the power to recommend private persons and their claims to the particular states: yes, the congress have done nothing since but make claims and continue to make claims. If the congress or the president had not complete authority to make war and peace, this defect had been a fatal objection to the full powers of the negociators. This ought to be a beacon to such negociators who may be appointed hereafter to treat with the commissioners of the United States, whose full powers ought to be carefully examined.

But whatever there may be in those objections and defences, the question still recurs, could the King, under the authority and trust which he possesses from the constitution, acknowledge the independence and sovereignty of thirteen revolted colonies? Could he renounce the government of the people forming those United States in future? Could he renounce, of course, the subjection of the people? The answer must be in the affirmative; he renounced at the same time other provinces and islands, with British people thereon, and no doubt has been made whether those territories have not been legally ceded, and the subjection of the people constitutionally changed. After the restoration of peace, an asylum was offered within the remaining colonies to those colonists who might think fit to retire from within the United States; many did retire, but many more remained, and the question is, whether those who thus remained, and were acknowledged to be free from subjection, and independent in their governments, could nevertheless claim the privileges of subjects? If they be aliens by the renunciation of their submission, they cannot claim the privileges of subjects; and that they are aliens is clear: since they do not poseess any one of the characteristics of true and lawful subjects, they have neither *subjectio, fides, vel obedientia*; they lost all those characters of subjects by the act and operation of law, working upon their own actions; renouncing their allegiance and electing to be aliens. What is done by treaty is *juridice factum*; so *non læsura populi*: but although the King never could, and cannot now, disfranchise any subject, yet his courts of justice could, at common law, disfranchise and outlaw his subjects on proper process issuing upon the delinquencies of the offending parties.

In the same manner, when the King executes the great trust of making treaties of peace, whereby provinces are ceded, and the provincials, though unoffending subjects, are disfranchised, the law will justify and warrant what it empowers and enables the executive authority to perform and enforce: and a disfranchisement performed in this manner by the King's negociators, is as much done by the law of the land, as an outlawry pronounced by the king's judges, in the court of king's bench: *consuetudo regni Angliæ est Lex Angliæ.*

Mr. Professor Woodeson indeed informs us, that when by a treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of the king, or being under his protection while it appertained to his crown and authority, became effectually aliens, or liable to the disabilities of alienage, in respect to their future concerns with this country; and similar to this seems the condition of the revolted Americans since the recognition of their independent commonwealth *.

Now let us listen to Mr. Professor Blackstone, who says that "Natural allegiance is a debt of gratitude, which cannot be forfeited. cancelled, or altered, by any chance of time, place, or circumstance, nor by any thing, but the united concurrence of the Legislature;" * yet Professor Blackstone had already well argued the king's

* Woodeson's Vin. Lectures, i. 382. This law has been collected into Bacon's Abr. 1798, i. 129. I have argued the several points upon common law principles. To introduce the ratification of parliament is to weaken, rather than strengthen, the argument, from these principles: if parliament decide, it is decided; no one argues with the omniscience of parliament; no one contends with the omnipotence of parliament!

* 1 Blacks. 369.

constitutional authority to make war and peace, from the law of nature, from the law of nations, from the law of England: the Professor therefore wrote contradictorily, without knowing this unlucky circumstance.—His general position is sound law: that natural allegiance is such a debt from the subject, that it cannot be altered or cancelled by the act of the party himself, even with the concurrent help of any prince or potentate or power: it must be relinquished by some act of law, which amounts to the assent of the king and nation, and a solemn treaty is that necessary act; but the conclusion of Blackstone's position is not law, as he words it, yet may it be made law, by adopting the emphatical language of the great charter: no freeman shall be destroyed or disfranchised, but by the lawful judgment of his peers, or by the law of the land, which is the safest language, on occasions of this sort, as the law will attach according to the necessity and nature of the case before it.

Let us now hear what the judges said in Calvin's case:* "so, albeit the kingdoms of England and Scotland should, by descent, be divided and governed by several kings, yet was it resolved, that all those that were born under one natural obedience, while the realms were united under one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns, afterward be taken away; nor he that

* 7 Co. 27 b. Coke's report of Calvin's case was reprinted by James Watson, at Edinburgh, in 1705, when parties ran high, at the union, "for the information of such as would know the rights and privileges of Scotsmen residing in England, and of Englishmen residing in Scotland." I have in my library a copy of this reprinted report.

was by judgment of law, a natural subject at the time of his birth, become an alien by such a matter *ex post facto*; and in that case our *postnatus* may be *ad fidem utriusque regis*, as Bracton saith.

This resolution is supposed, and said, to be decisive of the case now in question, like other decided cases; but this resolve was not the point before the court, which was that of one Colvil, or Calvin, as he is called, who had been born in Scotland, after the accession of King James to the throne of England, and brought an action for the recovery of a house and tenement in London: it was pleaded in bar of his action, that he was a Scotsman who was born out of the allegiance of the King, and when the court decided, that being born after the accession of the King, Calvin was a subject, and not an alien, the case was decided in his favor, and of course the resolution of the judges on a supposed contingency, as beforementioned, was a mere extra-judicial opinion, which is no authority at all, whatever there may be in the argument.

Let us now attend to the Lord chancellor Egerton, when giving his judgment in this very case of Calvin: "Wherefore of the many and divers distinctions, divisions, and subdivisions, that have been made in this case, I will say no more, but *confusum est quicquid in pulverem sectum est*, and will conclude with bishop Juel, a man may wander and miss his way in the mists of distinctions.* As the king, nor his heart, cannot be divided, for he is one entire king over all his subjects, in which soever of his kingdoms or dominions he were born, so he must not be served, nor obeyed, by halves: he must

* His published speech, 62, 102.

have entire and perfect obedience of his subjects; for *ligentia* (as Baron Heron said well) must have four qualities: 1. *Pura & simplex*; 2. *Integra & solida*; 3. *Universalis non localis*; 4. *Permanens continua, & illæsa.* Divide a man's heart, and you lose both parts of it and make no heart at all, so he that is not an entire subject, but half-faced, is no subject at all." Apply this solid sense to the condition of the American citizens, after their allegiance was renounced by the king's acknowledgment of the sovereignty of the United States, and the subjection of their citizens was also disowned by the king's solemn act, under a constitutional trust; yes, say some, the United States are sovereign and independent, the American citizens owe no allegiance or subjection, yet do they claim their birthrights. The proper answer to such pretensions is, you have lost your birthrights by your own acts, and the operation of law upon your several acts; *ab assuetis non sit injuria.* When the king, acting in pursuance of a solemn trust derived from the constitution, renounced all claim of government over you, and of course released your subjection, the king thereby signified the assent of the nation that you should be no longer subjects but aliens; for in making every treaty, the king, as trustee for the nation, binds the nation by his diplomatic acts, and *lex nil jubet frustra.*

Who sees not, that the Lord chancellor, in what he said above, glanced at the extra-judicial resolution and illogical reasoning of the judges before mentioned? What sort of logic was it to reason in a circle? It never was a principle of the law of England that subjects could be *ad fidem utriusque regis*, as we have already seen in the learned Craig's discussions. It never was a principle of the law of nature, as we may learn from our

Saviour's declaration, though there might be exceptions to the general rule, under special privilege, as the Earl marshal, who was mentioned by Bracton; so, in the treaty of Utrecht, article 21, the French king engaged to cause justice to be done to the family of Hamilton concerning the dukedom of Chatelherault, and to the Duke of Richmond concerning such requests as he had to make, and to Charles Douglass concerning some lands to be claimed by him, and so of others. Thus might the Duke of Hamilton, and the Duke of Richmond, and the Duke of Queensberry, owe a double allegiance; but this exception only proves the general principle.

Well, but, says Sir Edward Coke, naturalization, due by birthright, cannot, by any separation of the crowns, afterward be taken away; yet how was it before and after the treaty of Northampton, 1328, of which Sir Edward seems to have been but lamely informed? In the 21st of Edward I. Macduff, a Scotsman, appealed against a judgment of his sovereign, John Baliol, to Edward, as his superior lord, and the King of England received the appeal and caused justice to be done; * but when the sovereignty of England was renounced by that treaty, the homage of the Scottish king and people was determined and they became aliens, † and therefore no such appeal or suit can be shewn in any record under the treaty of Northampton, as Scotland was now alien to England, as hath been already shewn: so after King John lost the Norman provinces, the two kingdoms, with their people, became aliens to each other, as hath been already shown, and as Bracton tells. Those two

* Riley's Placita, 152, 157.

† Molloy, 375.

great precedents from well vouched history and record clearly prove that a natural subject, by birthright, may become alien by such matter, *ex post facto*, and thus doth Sir Edward Coke fail in his argument. Then, as to the general resolution of the judges, not upon the case referred to them, but upon a case which might by possibility happen, in the progress of time and chance: What is it but a mere *petitio principii*, begging the very question which ought to be answered? How does it stand with the fundamental principle of the *feudal* law, which is quoted by Craig, the profound feudist, *unus et idem duorum dominorum homo ligius esse non potest?* How does it consist with the law of nature, as quoted by our Saviour, no man can serve two masters, for he will hate the one and love the other? How does it quadrate with the general law, as to alienage of the European nations? Doth it not tear up by the roots the chief grounds of all those laws, in respect to alienage? Doth it not pretend to out-argue the historical facts which have been quoted as to the loss of the English dominion, in Scotland, and in France? *Magis docet, qui prudenter interrogat*, said the Lord chancellor Egerton.

Lord Mansfield, indeed, in delivering the opinion of the king's bench in the case of the king against Cowle, with regard to the legal state of Berwick, whether within the jurisdiction of that court, and reprobating some *other opinions* in the case of Calvin, remarked of Sir Edward Coke, "that he was very fond of multiplying precedents and authorities, and in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite other cases, which were not applicable to the particular question under his consideration."

After all those considerations, can it be doubted within Westminster-hall or without, whether the judges regard themselves as at all bound by manifest error? Lord Mansfield, in delivering the opinion of the King's bench in the case of the king against Cowle, rectified two mistakes of very great lawyers: It is manifest, said his Lordship, that Coke is mistaken in saying, generally, "that Berwick was not governed by the laws of England; for in criminal matters the fact is undoubtedly otherwise: and, his Lordship added, the Lord Chief Justice Hale is clearly mistaken in saying, "that Berwick sends members to the parliament of England by charter;" for it is by writ of summons that they send them thither, in consequence of their being a borough. We may thus perceive that the vigilance of even the greatest lawyers cannot always be awake; as the minds of men, according to Johnson's remark, cannot be constantly attentive to evanescent actions. We are told by Sir William Blackstone, that an appeal lies from the colonies to the king and council. * The commentator seems to have borrowed this form of words from Sir Matthew Hale's History of the Common Law; but great names and high authority cannot justify such inaccuracy of language and of law. The appeal is to the king in his council. Sir Matthew Hale had said, that naturalization can only be by parliament, and not otherwise. † Naturalization, saith Blackstone, cannot be performed but by act of parliament, copying again Sir Matthew Hale, though without using his idle expression, and not otherwise; but such general positions cannot

* Comment. 12th edit. 1, 108.

† Vent. Rep. 419 20. That position of Hale is true, in a particular sense, but is not true in a general sense.

stand against known facts, as well as juridical policy; and it was overruled by the court of king's bench in the case of Campbell and Hall, while the policy of considering aliens, conquered in war, and ceded by treaty, as subjects, was confirmed as law. The whole observations of Sir Edward Coke, in support or explanation of the hypothetical resolution of the judges before-mentioned, may be considered as mere mistakes, and extra-judicial inferences, leading to little information and to mischievous consequences. We all know the fatal effects of double allegiance during the latter periods of our domestic history.* "Indeed," saith Blackstone, † "the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings himself into those difficulties of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he was connected to his natural prince."

But I have done. I have shown, satisfactorily, I trust, in what manner millions of subjects may become aliens, by mere act and operation of law, as millions of aliens, by the same operation of law, may become subjects.

February, 1, 1814. G. C.

(1.) *The opinion of Sir Lloyd Kenyon, in* 1783, *on the question, whether the goods imported from the United States must pay alien duties, and are subject to the regulations of the acts of navigation.*

* See Foster's Crown Law; 184, &c.

† Comment. 1, 370.

Case for the opinion of Mr. Kenyon, states, stat. 12 Ch. II. ch. 18, sec. 3, 8, 9.

Quære.—The United States of America, having now become independent of this realm, and their plantations and territories in America not now deemed as to his Majesty belonging, are not the goods imported by the people thereof in ships to them belonging, to be considered as goods imported from any foreign states in amity with this kingdom, by the people thereof, in ships of their country; and such of them as are enumerated in the 8th section preceding, liable to the aliens' duty imposed by the 9th section?

Quære 2.—Are such goods held to be absolutely prohibited to be imported, under the pain of forfeiture, by the said 3d section of said law? For as the case now stands, if this section is to bear that construction, the others, and it, seem irreconcilable.

N. B.—These questions are put, merely to know how the law stands upon these clauses, without any regard to any orders of council that may be made relative to the trade and commerce of North America under the act of the last session of parliament 23 Geo. III. ch. 26.

Sept. 30, 1783.

I think that the fair construction of the act, as circumstances now stand, is, that goods, the produce of the United States, may be imported into this country from the place of their growth, upon payment of the duties payable by foreigners, and upon no other terms.

Chester, Oct. 11, 1783. LL. KENYON.

(2.) *The opinion of Sir William Wynne, in which the Attorney, and Solicitor-General, Arden and Macdonald, concurred, on the state of American ships, after the independence of the United States* *.

I do not think, that since the ratification of the treaty of peace, by which the United States of America are declared to be free, sovereign, and independent states, and his Majesty, for himself, his heirs, and successors, relinquished all claims to the government, propriety, and territorial rights of the same, a register could be legally granted to any vessel belonging to the subjects of the said States, because such vessel could not be said to belong to any colony or plantation to his Majesty belonging, or in his possession, or to be wholly owned by the people of the said colonies or plantations, or any of them, as required by statute 7 and 8 William III. ch. 22; nor could it, I think, be truly sworn, that no foreigner had any part, share, or interest in the said vessel, as subjects of the United States must, I conceive, be considered as foreigners, within the intent and meaning of the said statute of King William, from the time that his Majesty relinquished his claim to the government of the said states. I think that vessels which were built in any of the British colonies of America before the commencement of the late war there, and which are *bona fide* the property of British subjects, are without doubt qualified to obtain registers; but I do not see how such vessels as were purchased by British subjects in any of the states which were declared independent by the late treaty,

* I was assured by the late Mr. Thomas Boone, the chairman of the board of customs, that the Attorney and Solicitor-General had concurred with Sir William Wynne.

since the beginning of the year 1776, can be legally registered as British ships; as, from the beginning of the year 1776 to the conclusion of the war, all trade and intercourse with the revolted colonies was prohibited by the 16th George the Third, ch. 5; and consequently the purchase of a ship in any of those colonies during that period by a British subject must, I conceive, be deemed illegal and void; and a ship built in any of the said states since the ratification of the treaty must, I apprehend, for the reasons before given, be deemed a foreign-built ship. Secondly, I think it is advisable for the officers of the customs to seize and prosecute vessels, the property of subjects of the United States of America, or which were built and purchased by British subjects in any of the said states since the beginning of the year 1776, though registers have been granted for them, if they are found trading to, or from, or in, any British island or plantation, or to any part of this kingdom, or other his Majesty's dominions.

N.B. A vessel built in the American states during the rebellion, and before the independence, being sworn to be the property of his Majesty's subjects residing in Ireland, the officers of Ireland have lately granted her a register; but upon her arrival in England, on a voyage from the British West Indies with goods, the produce thereof, she was seized here, and is claimed in the exchequer; and an application for the delivery is now depending before the lords of the treasury.

W. Wynne.

(3.) *The opinion of the Attorney-General Arden, in* 1788, *on the American trade.*

About three months ago a brig cleared out of the port

of Kingston, in ballast, for Hispaniola, from thence to proceed to New York: she accordingly proceeded to Hispaniola, and as she was designed for New York, the supercargo on board her ordered the captain to stop at Turk's Island and take in some salt, thinking it was allowable, as many vessels had done, and are still doing the same. She accordingly proceeded to New York with the salt on board as ballast, where she landed it, and took in a cargo of flour for Turk's Island, and having landed it there, proceeded to Cape Francois, where she took in mill timbers, and arrived at the port of Kingston on Wednesday the 28th instant.

The officers of the customs having had intimation of the above circumstances, seized her, alleging that the above vessel had committed a breach of the navigation-act. Your opinion is therefore requested on the part of the owners, whether or not, from the above circumstances, the said vessel is forfeited and liable to seizure? I think this a hard case upon the owners; but I am of opinion, no trade can be conducted between the United States of America and the West India Islands, amongst which the Bahama Islands are included, except as to such articles as are expressly mentioned in the King's late proclamation, and to those only: I think the vessel is liable to be seized.

P. Arden.

(4.) *Discussions on the question, "whether inhabitants of the United States, born there before the independence, are, on coming to this kingdom, to be considered as natural-born subjects?" By a Barrister.*

December 9, 1808.

I thought the affirmative of this question was ac-

knowledged by all lawyers. One authority, it seems to me, is sufficient to support it; I mean, what is laid down in Calvin's case, on the supposition that the crown of Scotland might possibiy be separated from that of England: upon which point the judges resolved, "That all those who were born under one natural obedience, while the realms were united under one sovereign, should remain natural-born subjects, and no aliens; for that naturalization, due and vested by birthright, cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such matter, *ex post facto*, and in that case, upon such an accident, our *ante natus* may be *ad fidem utriusque regis*," (7 Rep. 27. b.) or, to apply the words to the present case, our *ante natus*, or American born before the separation, may be *ad fidem regis*, and also a citizen of the United States*.

Such a plain and explicit authority as this seems to make it unnecessary to search for any other; however, objections are raised to the claim of such persons to be considered as British-born subjects.

1st. It is objected that, admitting the common law to be as laid down in the above resolution, there are circumstances in the American revolution that distinguish it from all other changes of sovereignty. The island of Jamaica, say they, may be ceded by the king, and this being done without the consent of the inhabitants, there is no reason why they should lose their birthright of British subjects; but the Americans, a whole people in arms, claimed to be released from the English govern-

* The *post natus* there, that is, one born after the union with Scotland, corresponds with the *ante natus* here, that is, one born before the separation from America.

ment, and the king at the peace consented to give up his authority: how can such a people be afterwards considered as British subjects!

2dly. It is objected that there are certain statutes and public acts which stand in the way of the above mentioned common law principle taking effect.

3dly. It is even objected by some, that no principle of the common law can support so unwarrantable an anomaly as that the same persons should belong to two states, and that admitting them to levy war against the king in the character of American subjects, without being deemed traitors, and then allowing them to come into his kingdom in the character of British subjects, is an inconsistency which they think cannot be countenanced by the law of England.

To the first of these objections it may be answered, that the peace which put an end to the American war ought to be considered as putting an end to all the consequences that might be imputed to the Americans by reason of their rebellion; and, indeed, there is in the definitive treaty, article 6, an express provision, that no person should, on account of the war, suffer any future loss or damage, either in his person, liberty or property.

Further, we should inquire what the Americans could be supposed to relinquish by making war, and what was the result ot the king making peace? The Americans could not mean to renounce the privileges of British subjects; because they rebelled and made war in order to get something they had not, and not to surrender what they possessed; it was to release themselves from their allegiance; but no man can throw off his allegiance

at his own option, as must be admitted by every one. Did the king, then, make peace with them, in order to take away their rights as British subjects? But, surely, it is well known that the king alone cannot take away the rights of a British subject from any one. In the peace, therefore, made with the Americans, there seems to have been no legal competency in the contracting parties to produce the effect supposed, of making the Americans aliens. This must appear even upon general principles only; it will presently be shewn that there was not, *de facto*, any thing in the treaty upon the subject of British rights, that warrants the supposition of their being taken away from the Americans.

There cannot, in a judicial point of view, be any difference between the supposed case of cession of territory without consent of the inhabitants, and the present case of cession to gratify the wishes of the inhabitants. The allegiance in both cases is of the same nature; the allegiance is not to the soil, but to the person of the King; and as no transfer or cession of the soil to a foreign prince makes any alteration in the allegiance of birthright of the subject, but the same still remains in the person of the subject, it imports nothing whether succession is made with or without his consent. In both cases he becomes a British-born subject, living in a foreign land, and liable to the alteration of circumstances which every where attends a British subject when out of the king's dominions.

That going out of the king's dominions under the charge of criminality, at the choice of the party and by the king's consent, does not make a British subject an alien, is evinced from the old law of sanctuary, in cases of felony and abjuring the realm to save the felon's life.

It is expressly laid down, "*Quid abjurat regnum, amittit regnum, sed non regem; amittit patriam, sed non patrem patriæ;* for notwithstanding the abjuration, he oweth the king his allegiance, and he remaineth within the king's protection; for the king may pardon and restore him to his country again. Allegiance is a quality of the mind, and not confined to any place." (Calvin's case, fol. 9. b.)

As to what is now said, of the Americans being a whole people in arms demanding to be released from their allegiance, it should be recollected that the language in this country during the whole of the American war was different: it was said, "the thinking part, those who had property and character," and some said, "the majority of the people," were against the violent measures which were driven on by an active minority of agitators. Is it then at all reasonable to infer upon those persons who were friendly to this country, the consequences of such resistance and rebellion? Indeed there is nothing so unjust in the law of England. The law does not consider the king's subjects in a mass, under the name of the people, in any number more or less. They cannot be considered in a legal view, but as individuals. what is the law respecting one, is the law respecting one million, and every man's case stands upon its own ground and circumstances. It is, therefore, utterly inconsistent with the law, to impute to the Americans any disfranchisement as a people: if there is any such extinguishment of rights, it must be in some individual; and if it is not to be discovered in one, it is not to be found in a million.

Secondly, as to the statutes and public acts which are supposed to stand in the way of the above mentioned

principle of common law: the principal statute which, I believe, is relied upon, is statute 22 Geo. III. c. 46. This is a parliamentary authority, enabling his Majesty to make peace with America; an authority which had become necessary, because the parliament had passed some acts of prohibition and penalty which might stand in the way of peace, as stat. 16 Geo. III. c. 5. and stat. 17 Geo. III. c. 7.* for prohibiting trade and intercourse with America, and for authorising hostilities against the rebels. The American war having thus become a parliamentary measure, it required the concurrence of parliament to make peace, which in ordinary cases belongs to the king alone.

Accordingly, stat. 22 Geo. III. c. 46. authorises the king to conclude "a peace or truce with the said colonies or plantations, or any of them;" and that the above mentioned prohibitory acts might not be an impediment to the progress of negociation, the statute authorizes the king "by letters patent, under the great seal, to repeal, annul, and make void, or suspend the operation or effect of any act, or acts of parliament, which relate to the said colonies or plantations;" meaning under these general words, most probably, the above mentioned prohibitory acts, and none other.

There might be another reason for an act of parliament, namely, some hesitation as to the persons with whom the king's commissioners were to treat, whether they had competency: therefore, the act speaks of treating with commissioners named by the colonies, with any body or bodies politic, with any assembly or assemblies, or description of men, or with any person or persons whatsoever.

* These acts were afterwards repealed by stat. 23 Geo. III. c. 26.

Such are the provisions of the act for making peace with America, which is supposed to give authority to the king to take away the rights of British-born subjects from the inhabitants of the United States, and make them aliens. I can only ask those who allege this act, to shew us by what words, or by what construction of words, such power is given to, or is intimated to reside in the king? And with such an appeal I dismiss this statute.

The next document that occurs, in course of time, is the definitive treaty made in September, 1783, in pursuance of such parliamentary authority. In the first article of this treaty, the king "acknowledges the United States (naming the several colonies) to be free, sovereign, and independent states; and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof." This leading and general provision being made, there follow in the treaty some few subsidiary stipulations, all tending to give effect to the above relinquishment of sovereignty, and to the confirmation of peace and amity. After reading these, I must again ask the like question as before, where is the provision in the treaty for doing that which I have not yet discovered the king was authorised by the act to do? It appears from reading the treaty, that the king has not, *de facto*, done that which he was not enabled by the act, nor was otherwise authorised, *de jure*, to do. He has not taken away the rights of British-born subjects residing in the United States, nor has he renounced the allegiance of his natural-born subjects residing there; he has acknowledged the colonies to be free and independent, and relinquished all sovereignty over their ter-

ritory: in doing so, he has departed with some of his own royal prerogative, and has circumscribed the claims he before had on the allegiance of his natural-born subjects residing there. This was his to give, and he has given it, but the rights of British subjects the king had no power to take away; nor was it a time for taking, but a time for giving and conceding: the Americans meant to add to what they already enjoyed. They would have felt it an injury, if it had been proposed to them no longer to be deemed British-born subjects; and recollecting, as we must, the feeling and speculations in this country, looking forward, as many did, to the colonists quarrelling amongst themselves and coming back, all or some of them, to their old connection with us, we may be sure no one in this kingdom would have ventured to propose that they should be stripped of the character of British subjects to which they were born, and be rendered aliens under circumstances which would indicate on our part a disposition to perpetual estrangement and enmity.

So far from this, I think, there is even in the treaty an express saving of the rights of a British-born subject, among other rights and claims. In article 6, it is provided, "that no person shall on that account, (meaning the preceding war) suffer any future loss or damage, either in person, liberty, or property." If an American comes to this kingdom and is treated as an alien under the alien act, he assuredly suffers in his person and liberty; and such suffering must be on account of the war, which those ought to allow who make the first of the above objections; he surely cannot be said to suffer by the peace, which was meant for conferring advantages, not for taking them away.

The next document, where we are to look for something which is to control the above principle of the common law, is the commercial treaty, 19th of November, 1794. But in this I can find nothing to the effect supposed, and I must put the like interrogation as before; yet with still less expectation of an answer, because, in this treaty, we have something more than negative evidence we have here express testimony, that the rights of British-born subjects were intended to be continued to the Americans by the first treaty, and that it was intended by the commercial treaty to give them a longer continuance to their posterity. By the 9th article it appears that the American citizens then held lands in the dominions of his Majesty; but they must be British-born subjects to hold lands, and not aliens. It appears, therefore, that his Majesty, in November, 1794, eleven years after the treaty of peace, recognized the citizens of the United States as British-born subjects.—I lay this stress upon the declaration of the fact, because I cannot suppose a public and solemn instrument, as this treaty is, would speak of lands being holden in any other sense than that of being lawfully holden.

The framers of the treaty certainly understood it in that sense, because the provision they intended to make was to fortify the titles to these lands in future times, when certainly the title to them would become not lawful. They foresaw that although the present possessors were British-born subjects, their descendents, born in the United States, out of the king's allegiance, would be aliens.* It was accordingly stipulated, "that neither they nor their heirs or assigns shall, so far as may respect

* They might for their sons, and grandsons, have the benefit of stat. 7 Ann. c. 5. stat. 4 Geo. II. c. 21. and stat. 13 Geo. II. c. 21. but for later descendents, they needed a new provision.

the said lands, and the legal remedies incident thereto, be regarded as aliens." If it should be objected, that the provision here speaks as well of the present possessor as the heirs, the answer is, that it would not have been so well worded if the present possessor had not been named; and if he had not been named as well as the heirs, it might have been construed into an implication that he was to be excluded from the protection intended for the heirs only.

Another more probable reason for this stipulation was to bind the two nations, not to make any disqualifying law, that by rendering the others aliens, would disable them from holding lands. This future possibility, without any doubt about the then present state of the law, might be sufficient reason for such a cautionary provision.

Whatever observation may be indulged on this part of the article, the averment in the beginning of it remains unaffected; and this averment, of Americans being British-born subjects, is again published, ratified, and confirmed by parliament, in stat. 37 Geo. III. c. 97. sect. 24, 25. which was made for carrying into execution the treaty. This article of the treaty is there recited at length, and the two clauses, sect. 24. and 25. purport to carry it into execution.

If there is any thing in this statute to control the effect of the common law position so often alluded to, I think it should be in these two clauses; yet I have not been able to discover such a meaning, and I must leave it to be demonstrated by those who have found it out. The clauses appear to me to have something particular in them; they omit the naming of heirs, which was the enactment most wanted, and they supply this omission

by a winding wordiness in the proviso, that is not easily evolved. There is a grudging caution in the whole conception of these clauses: I believe the framers of them did not like the matter of them, being unwilling to bear this parliamentary testimony to the legal conclusion, that *ante nati* Americans are British-born subjects, so as to hold lands.

As to the third objection, the anomaly and inconsistency of Americans being citizens of the United States while there, and being British-born subjects when here; this is not a novelty, nor is it peculiar to Americans. It may happen to any British subject, and it is allowable in our law, which recognizes this double character of a person being, as was before shewn, *ad fidem utriusque regis**. British subjects may voluntarily put themselves in such a situation; it is part of the privileges of a British subject to be at liberty so to do. Have we not British subjects who are naturalized in Holland, in Russia, in Hamburgh, in various places on the continent of Europe? Do not British subjects become citizens of the United States? Some persons are born to such double character; children and grandchildren, born of British parents in foreign countries, are British-born subjects, yet these, no doubt, by the laws of the respective foreign countries, are also deemed natural-born subjects there.

Thus far of individuals; the like may happen to a whole community, a whole people. When the king relinquished his sovereignty over the United States, the land became foreign, while the inhabitants remained all British subjects. When the king's forces took Surinam

* Vid. ant pa. 693.

and the other Dutch colonies, the land became British, but the inhabitants still continued foreigners. The personal character of alien, with which the Dutch colonists were born, still remains to them, and the indelible character of British subject, with which the Americans were born, remained to them after their country was made foreign.

I am aware of the difficulties which such persons may labor under, with those double claims of allegiance upon them. Such difficulties must be got through as circumstances will allow, and consideration should be had for the parties according to their respective situations; more especially with a distinction between those who brought themselves into such embarrassing situation voluntarily, and those who were born in it; and more particularly with regard to the difference between that which is the act of private individuals, and that which is a national proceeding, involving a whole people. In weighing such circumstances, it will soon appear that these are all objections which relate more to facts than to the law of the case; they are inconveniences in the way of full exercise and enjoyment of the rights in question, but detract nothing from the rights themselves. On the one hand, the king cannot reckon upon the full and absolute obedience of such persons, because they owe another fealty besides that due to him; on the other hand, the subject cannot have full enjoyment of his British rights. Indeed, it will be found, he will have as little of his own rights as the king has of his obedience; for if the rights of a British subject are examined, it will appear that almost all of them depend on a residence in the king's dominions, and that when he removes into a foreign country, as they are without exercise or application, they are suspended and have no apparent existence.

I have heard it asked, if the king was to send his writ to command the attendance of Mr. Jefferson in this kingdom?—I agree he would not come; but that would be no test of the law upon the subject; it is an inconvenience in point of fact. The law, in the execution of it, is liable to many obstructions which prevail, and yet the judgment of law is not deemed thereby invalidated. If the king had sent such a writ to General Washington, at the head of his army, I suppose he would not have obeyed it, yet no one would have deemed it a demonstration that he was not amenable to our law: Why then should a pacific refusal from Mr. Jefferson have in it more of the force of a legal argument? And yet, I think, Mr. Jefferson might decline obedience to such a command, admit himself to be a British subject, and have the law on his side too.

Mr. Jefferson might answer such a call upon him by saying, true it is, I was born a British subject, and I myself have done nothing to put off that character. But your Majesty has, by the treaty of 1783, relinquished all sovereignty over the United States; and as your Majesty and all the world know, it was thereby intended that your subjects here should form a government of their own; we have so done, under the faith of your Majesty's grant and covenant; and it has happened in the progress of events that I am now exercising an office in that government which necessarily requires my presence here. I am brought into this situation in consequence of an act of your Majesty, by which it was designed that myself, or some other of your subjects here, should come into such a situation: being so circumstanced, I am no longer at liberty to make a choice of my own. There is a moral and political necessity, that

makes it impossible, at present, to obey the commands of your Majesty; I pray your Majesty's forbearance; I plead your Majesty's own covenant and good faith: and I rely upon them as a justification, or excuse, for my disobedience.

Surely this would be a good plea in point of law, and Mr. Jefferson might have the benefit of his American citizenship, in perfect compatibility with the claims upon him from British allegiance. Such *scintilla juris* in the king of England, can, I should think, raise no flame in any American bosom.

There are much stronger cases of a similar kind that have never startled any one with their anomaly or incompatibility. Mr. J. and other American citizens have entered into their offices, their engagements, and their situations, under the faith of the king and the parliament. But how many British subjects have become citizens, burghers, burgomasters, and have taken other offices in foreign countries, voluntarily, upon speculations of private interest, and from various inducements, all of them of an individual and personal nature. If such persons had been called upon by the king's writ, they would not have had so good a plea as Mr. J. and yet, probably, none of them would have moved from their station. Was it ever heard that such persons, when returned to this kingdom, were deemed to be less of British subjects, because they had lived and risen to public stations in foreign states? No, certainly, they are considered as having exercised the liberty belonging to all British subjects, respecting whom there is no restraint but the considerations of prudence which are suggested by the occasion; and yet none of these volunteers in foreign service have so much to say for themselves as an American

citizen who chooses to leave the United States and to spend the remainder of his days in this kingdom. The local allegiance he has acknowledged to a foreign government is recognized by the king and parliament: he has never lived wholly out of the view of the sovereign power under which he was born; and the language, law, and manners he has been conversant with during the whole of his residence in the ceded states of America, restore him to this kingdom, and to his original and natural allegiance, unchanged, and quite British. Why should a person of this description, an American citizen, be the only one rejected and excluded from the rights of a British subject, because he owes a local allegiance in another country?

There is a parliamentary record, testifying instances of such contumacy. In stat. 14 & 15 Henry VIII. c. 4. it is recited, that Englishmen living beyond sea, and becoming subjects to foreign princes and lords, "will obey to none authority under the great seal of England; but they give themselves over to the protection and defence of those outward princes to whom they be sworn subjects." It is herein recorded by parliament that Englishmen thus expatriated themselves and refused obedience to the king's writ; and yet no declaration or enactment was made by parliament on that point of disobedience, so as to disfranchise them, and make them aliens; but there is by that act imposed on them merely a penalty in one particular article, that of importation of goods. Such persons, it seems, had abused their privilege as Englishmen, and had lent their name to cover the goods of persons of the foreign country where they resided. To put an end to such impositions, they were in future to pay alien duties, as the subjects of the country where they resided.

Compare these recusant absentees alluded to in the statute, with the American now in question. The former voluntarily leave the kingdom, make themselves subjects of a foreign state, refuse obedience to the king's writ, abuse their privilege of natural-born subjects to defraud the revenue. The latter is born under the king's allegiance, in a country which the king has since ceded and made a foreign land. It does not appear, this particular person had any concern in the public affairs of the country, till it was so settled by his Majesty's solemn covenant and grant. He chooses in the latter part of his life "to go home," (for such is the phrase in the United States to the present moment,) and end his days here. No act of recusancy or contumacy is imputed to him.

Now compare the consequences in the two cases: the former, though solemnly noticed and censured by parliament, is not marked by any penalty of disfranchisement, though thus alienated from his native country, but is merely mulct in the payment of alien duties; the latter is told he is an alien and has lost his right of a natural-born subject.

The further we go, the more we find of precedent and principle against such a sentence of disfranchisement.

These are the answers which, I think, may be made to the above three objections *. These answers seem to me sufficient, and nothing further need be done but to come round to the place from whence we set out, namely, the position of law resolved by all the judges in

* I recollect another objection: how is the question of American citizens to be tried? I see this was an objection in Calvin's case: it is the second of the five inconveniencies, and it is answered in the Report, fol. 26, b.

Calvin's case, according to which the *ante nati* in the United States continue still British-born subjects, and, coming here, are entitled to all the privileges of such. The plain and explicit principle laid down on that occasion, has, I suppose, governed the minds of lawyers, whenever they have been consulted on the application of it to American citizens. It is owing, no doubt, to this uniformity of opinion, that the question has never been brought to argument in any court. During the space of 25 years, since the independence of America was declared, there has never been so much doubt on this claim as for any lawyer to advise a contest by suit. I deem this want of judicial determination, coupled with what follows, to be a great testimony for the affirmative of the question.

In the mean time lawyers have been consulted, no doubt, very frequently, and written opinions are in the possession of many. I have been able to obtain a sight only of two. I have seen an opinion of Mr. Kenyon, in 1784, where he declares in few words and without hesitation or qualification, that American citizens may hold lands as British-born subjects. I have seen an opinion of the attorney-general Macdonald, in Feb. 1789, that engaging American seamen for foreign service should be prosecuted as the offence of enticing British seamen into a foreign service: the prosecution was commenced, the indictment found, but the attorney-general entered a *noli prosequi* upon the party paying the costs.

Among the opinions of lawyers, I must mention what I received from Mr. ———, to whom I sent a statement of the case, with the view of learning whether any alteration had taken place in the opinions of lawyers of late days: I knew I should have from him the current

opinion of Westminster-hall; he at once wrote with pencil on the back of the paper, that such persons are British subjects, he seemed to answer it as if it was as known and as established as that the eldest son is the heir in fee simple.

I made inquiry at the Custom-house, where, I was told, I might possibly find notes of some decisions at *nisi prius* in the Exchequer, which conveyed the chief baron's opinion, that a domiciliation in America took away the British character from a seaman employed in navigating a British ship. The solicitor said he knew of no such cases nor of such opinion; on the contrary, he said, it was the usage of the Custom-house to consider the *ante nati* in America as British-born subjects, and they were registered as owners of British ships: he informed me also of the above prosecution for enticing British seamen, and he gave me copies of the papers.

These authorities from the opinions of lawyers, and the practice of a public office, cannot be closed better than by an authority superior to all of them; I mean what has been already mentioned, the 9th article of the treaty of commerce, and sect. 24. and 25. of stat. 37 Geo. III. c. 97. where there is a solemn declaration by the king and the parliament, that American citizens did then hold lands; which they could not lawfully do, unless they were deemed British natural-born subjects.

After such authorities, there does not seem to me any need to add a word more.

Dec. 9, 1808.

December 15, 1808.

Since writing the above, I have been told that the subject of *ante nati* is no part of the present question, and what the objectors mean to urge is as follows: First,

That the Americans, at the time of making stat. 22 Geo. III. c. 46. were in a state of legitimate war, bearing the character of foreign enemies, and not that of rebels. This is implied in the passing of such an act, and in the wording of it:—Peace and Truce—was not the language to hold to rebels; nor did the king need the authority of an act of parliament to proceed with traitors: the act has no object, if the Americans are not admitted to be foreigners in this transaction. Secondly, That after the peace made, it still remained for Americans, if they chose, to adhere to the British character; and it is not meant to deny, that *prima facie*, the Americans are to be deemed British subjects. But those who domiciliated themselves in the United States, showed thereby a determination to become American citizens; and after such choice, they cease to be British subjects, and cannot resume that character.

If I have not stated the above points quite correctly, nor with all the advantage that belongs to them, I hope I shall be pardoned by those who made them, and who rely upon them: they were communicated to me in a rapid conversation only; for nothing on that side of the question has been put into writing: I have done my best to retain what I heard and to state it fairly and fully.

I am totally at a loss to comprehend, at what period of the war, or by what modification of carrying it on, either on one side or the other, or by what events or circumstances, that which was once rebellion ceased to be so, and the traitors became changed into aliens waging legitimate foreign war. As to the words peace and truce, I do not understand why they are not as applicable to war coupled with rebellion, as to war not coupled

with it. For war is still war, whatever may give rise to it; and I do not see why the war of rebels is not legitimate, *quatenus* war, and therefore needing every consideration that attends all wars. Surely, in the time of Charles I. there were treaties and truces and peace too; there was a peace for a short time I think in 1645, and yet, the Lord-chancellor Clarendon entitled the narrative of these transactions, a "History of the Rebellion;" and no man has ever doubted, be he law-man, or layman, that the war levied against Charles I. was treason and rebellion; although it was attended with success, and could command names, and although many amongst us have long agreed in applying to it the qualified appellation of civil war.

As to the necessity of making such act of parliament, and giving thereby power to the king to make peace and truce, because the Americans were become alien enemies, and ceased to be traitors and rebels; it is very curious that a different reason for making it was given by the makers of the act; that reason is recorded in the parliamentary debates of the time; and the reason so given, seems to me to supersede the necessity of inventing any new one like the present.

The bill was called "the Truce Bill," and was brought into the house of commons, on February 28, 1782, by the attorney-general Wallace. It does not appear that it became a subject of debate in any of its stages; the nation and parliament were bent upon peace, and any measure tending to bring it about was too welcome to be questioned or criticised.—[See Debrett's Debates, vol. vi. p. 341, 363.]

However, this act, which came into existence without a struggle, afterwards was made a subject of discussion.

When it had been carried into execution, and the provisional articles with America, together with the other preliminary treaties, came to be considered in parliament, in February 1783, this act was brought in question, and there was expressed great difference of opinion as to its original design, the construction to be put on it, and the effect it produced. In the first debate it was objected to the provisional articles, that the king has no right, by his prerogative, nor by the act of last session, viz: stat. 22 Geo. III. c. 46, to alienate territories not acquired by conquest during the war. The gentlemen of the law being called upon by this objector*, Mr. Mansfield answered, that, certainly by the act of last session, the king was authorised to alienate for ever the independence of America.—[Debrett's Debates, vol. ix. 280.]

On a subsequent day, the same gentleman [Debrett's Debates, vol. ix. 312.] again raised a question upon this act. It appeared to him that no such power was given to the king by the act; that any power to alienate part of his dominions, or abdicate the sovereignty of them, should be conveyed in express words, and not left to implication and construction. This brought up Mr. Wallace, who was the framer and mover of the bill, and who declared that such power was given by the act: he said, he knew of no power in the king to abdicate part of his sovereignty, or declare any number of his subjects free from obedience to the laws in being. As soon, therefore, as the resolution for peace had passed the house, he had, with a view to enable his Majesty to make peace, drawn the bill; and as the subject matter of it was extremely delicate, he had been exceedingly cautious in

* Sir W. Dolben.

wording it as generally as possible; but the whole aim of it was to enable his majesty to recognize the independence of America; and that it gave the king such a power, was, he said, indisputable, because by the wording of it that power was vested in the king, any law statute, matter, or thing to the contrary notwithstanding.

This explanation, by the mover of the act, did not satisfy the objector, who had been the seconder of it, but who now declared he had never supposed such an interpretation could be put on the bill; and if he had thought it could, he would not have seconded it: but it was defended by the attorney-general Kenyon *, who said the act clearly gave authority to the king to recognize the independence of the Americans; adding that it was obvious, the Americans, standing in the predicament of persons declared to be rebels at the time of passing the act, it was necessary to word it in the general and cautious manner in which it stood upon the statute book.

Though the attorney-general Kenyon thus supported the late attorney-general Wallace in the construction and effect of his act, he, at the same time, denied the position, that the prerogative of the crown needed any such special act of parliament to empower it to declare the American independence. Mr. Lee joined in opinion upon that point with Mr. Wallace. [Debates, p. 314, 315].

A like difference of opinion was discovered among the law lords, in the discussions of the provisional article

* He succeeded Mr. Wallace, on the change of the ministry, in March 178[illegible].

and the preliminary treaties. It was maintained by Lord Loughborough, that the king had no authority, without parliament, to cede any part of the dominions of the crown, in the possession of subjects under the allegiance and at the peace of the king; and this, his Lordship said, could be proved by the records of parliament. This doctrine was treated by Lord Thurlow as unfounded, and he strongly maintained the contrary.—[Debates, vol. ii. p. 88, 89.]

The difference between the two lords had arisen, not upon the independence of the United States, but upon the cession of the Floridas to Spain; and it was on that account, no doubt, Lord Loughborough stated his proposition with the words, under allegiance and at the peace of the king, which was a proper description of the Floridas; but the same could not be said so fully of the United States, which, though under the allegiance, could not be so well said to be at the peace of the king. Lord Thurlow, it is plain, did not admit that this difference in circumstances made any difference in the power of the prerogative. It must surely be confessed, that this cession of the Floridas to Spain, at the very moment that the American independence was acknowledged, makes a great breach in the hypothesis of Mr. Wallace, Mr. Lee and Lord Loughborough, who thought stat. 22 Geo. III. c. 46, absolutely necessary for enabling the king to alienate part of his dominions. Indeed, the precedents are all against such a restriction on the prerogative; for when has there been a peace, that some West India island has not been ceded, not only such as has been taken during the war, but those of ancient possession? In truth, this is another distinction that has no solid foundation in law, but is a mere conceit. It is well

krown that, the laws of navigation attach upon a possession in America or Africa immediately on a surrender; and the territory is, to all intents and purposes, as much the king's as any ancient colony or plantation. It is therefore wholly assumption to raise the above distinction, and to consider such a conquest as less a part of the dominions of the crown, and less under the protection of parliament, than the more ancient possessions.

But taking the judgment of parliament, (which finally approved all these treaties) for the supreme authority on this question of law, we are obliged to conclude that the king had power to relinquish to the king of Spain his sovereignty over the two Floridas, without the special authority of any act of parliament enabling him so to do. This is a decision, after argument, when the objection had been taken and reasoned upon, and both sides heard openly and fully. It cannot, after that, as I think, be doubted, that the same parliament would have recognized the king's power to relinquish his sovereignty over the United States, although there had been no such act as stat. Geo. III. c. 46. The relinquishing of sovereignty to the king of Spain, whereby he parts with all royal authority over his subjects in the Floridas; and the relinquishing of sovereignty over the colonies of New Hampshire, &c. &c. to the United States, whereby he parts with all royal authority over his subjects in New Hampshire, &c. &c.; where is the difference, in a juridical view, between these two cases? If you analyse them, and bring them down to their first principle, you will find it amounts to the same thing in both cases; to this, and nothing more, namely, that he makes the Floridas, and makes New Hampshire, &c. equally foreign dominions. Every consequence that follows upon the re-

linquishment of sovereignty, is ascribable to that, and to that only. The inhabitants of the Floridas, and of New Hampshire, &c. &c. become British subjects living in a foreign land, and lose all British advantages, now that British ground is taken from under them, in like manner, and in none other, as if they had removed themselves to the foreign soil of Spanish, or Portuguese America. Indeed, no one has ever pretended that the inhabitants of the Floridas, who were British subjects born, were made aliens by the cession, though some do mistakenly suppose this deprivation to happen to Amercans of the United States, who were put under the same circumstances, at the same time, by the same, or by asimilar operation, certainly for the same purpose, that of peace.

I say, that the cession has the single effect of making the Floridas, and the united states of New Hampshire, &c. &c. foreign countries; and, that no alteration is made in the birthrights of British-born subjects, because what is covenanted, granted, and agreed in the treaty, relates wholly to the former, and there is not a word that relates to the latter. The Floridas are ceded to the king of Spain; that contains in it nothing so particular as to raise a question: the material consideration is, the case of America. The definitive treaty begins by the king acknowledging the united states of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claims to the government, propriety, and territorial rights of the same: the king here parts with the states, that is, the political machinery formed for the government of those colonies, the governor, the assembly, &c. &c. &c. and declares them independent; to make this independence quite clear and unclogged, he relinquishes all territorial sovereignty. The

thing given up by the king, is his own superintendance and authority over the local authority of those places; of the individuals his subjects, there residing, he says nothing; there is not a word in the treaty affecting their birthright as British subjects.

There is certainly not a word expressed upon that point; but I think the great mistake in this discussion, and that which misleads those on the other side, is, an implication which they think necessarily arises upon this transaction of granting independence to America; and they allow themselves to be carried away by the force of expressions, which, without any defined meaning, seem to signify something, and are repeated without examination into their import. It has been said, that by acknowledging the independence of the United States, the king dissolved the allegiance of the Americans, and they of course were made aliens; this is an inference drawn from the independence, but it is wholly a fiction of imagination among politicians; there is no such principle in the law of England; it never was heard of; can any book, case, or dictum be shown, that gives the most remote intimation of any such operation? In the cession of territory, the king has always forborne to declare any thing expressly on the article of allegiance, and never before has any one raised the construction, that allegiance was ever surrendered by the king, any further than the nature of the cession did, in point of exercise and enjoyment, circumscribe the scope of it. As the king has in no case of cession made an actual relinquishment of allegiance due to him, so has he in no case of such cession ventured to take away what was not his, but belonged to the individuals his subjects; who were to suffer enough in being compelled thence-

forward to live in a foreign land, and who might very well be indulged with the consolation of retaining their birthright of British subjects; a right which might be brought into enjoyment and exercise, whenever they should again come to live upon British ground.

With all the instances of cessions which are examples to the contrary, I cannot understand how any one should entertain the imagination of their effect in dissolving personal allegiance, accompanied too with such an inconsequent result, as that the British subject so released becomes thereby an alien.

To return to the objection which I was to consider, in regard to the design and effect of stat. 22 Geo. III. c. 46.; it appears, from what I have before detailed out of the Parliamentary Debates, that the statute was deemed necessary, in order to satisfy the scruples of some persons, who thought that the king had not at common law power to alienate any part of his dominions; further, that it was necessary the king should have power to suspend the operation of certain acts of parliament, which it was foreseen might stand in the way of making peace. It was afterwards contended that the statute had also the special effect of authorising the king to grant independence to the colonies; because, as it empowered him to make peace or truce, any law, statute, matter, or thing to the contrary notwithstanding, it of course, say these objectors, empowered him to grant independence, or indeed any thing that should be deemed necessary towards making such peace or truce; meaning by such independence, disfranchisement, and converting the Americans into aliens.

After such explicit discovery as was before made of the nature and design of the act, how are we to acqui-

esce in the construction thus put upon it in the objection? What reason is there for saying that the act has no meaning or object, unless the Americans were admitted to be aliens and foreigners, in a state of legitimate war, and not rebels?

The second of these renewed objections to the grand common law position on which I build this argument, is, to my understanding, as extraordinary and as anomalous as the preceding; but it is not so novel. I admit, I have before heard the notion of Americans domiciliating themselves in the United states, and being, in consequence of such election, pronounced to be no longer British subjects, but aliens and American citizens only; yet it always seemed to me to be an arbitrary and groundless assumption, totally irreconcilable to principle or precedent.

As to the precedent, I must again recur to to the instances of the Floridas, Tobago, and other places that have been ceded to foreign powers. Was it ever objected to the British-born subjects inhabiting those countries, that having domiciliated themselves there, they were considered as aliens in the British dominions? Where should men be domiciliated, but where their home is? And did it ever enter into the mind of the king or his ministers, that, upon a cession of territory, the British-born subjects inhabiting there should migrate, at all hazard to their worldly affairs and the prosperity of their family? There are no such migrations, no such expectations of them; nor have they ever been deemed necessary for keeping alive the birthright of a British subject. Why then should it be necessary, for the first time, in the case of the inhabitants of the United States?

I think it erroneous in principle, because it makes that depend on the option and capriciousness of the person himself, which has ever been deemed an indelible character, one he is not at liberty to put off, that of a British subject. All the maxims that we have heard about birthright and natural allegiance are contrary to such a supposition, of a person choosing whether he will cease to be a British subject and begin to be an American citizen; but all those maxims are consistent with the construction which I contend for, namely, that such persons owe a local allegiance while in America; and when they come here, their rights of British subjects revive, and their natural allegiance attaches: and it cannot be denied, that in such a state of things there is a reciprocity of duty and protection between the sovereign and the subject, which is quite commensurate with their respective situations.

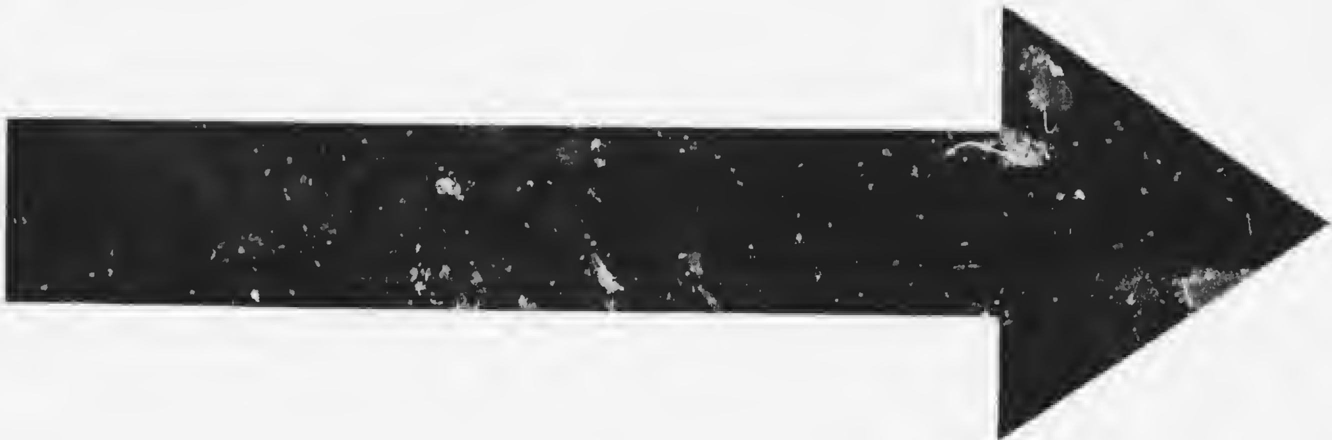
This imagination of optional allegiance, and extinguishment of natural rights, is wholly inconsistent with the position resolved in Calvin's case, which is laid down generally, without making the consequence of continuing the rights of birth to depend on any condition or observance whatsoever. Such absolute, entire, and indelible quality, is what the common law ascribes to those rights of subjects that come to us by birth, and by birth only.

Such are the observations to which these two new objections seem to be open. These objections do not appear to me to have more force in them than the former; and I do not see any thing in either of them to invalidate the resolution in Calvin's case, and the application of it, without any qualification, or deduction, to citizens of the United States. *Dec.* 15, 1808.

December 16, 1808.

In a conversation with a civilian upon this subject, I found he had made up his mind to the negative of the question; but it was upon principles wholly independent of the common law. He considered British-born subjects, residing in an island or country ceded by his Majesty, to become thereby aliens; he could not, therefore, he said, doubt about the state of Americans, especially after the act of parliament which has been so often cited. He called for some case lately decided in the courts at Westminster, to contradict what he alleged of ceded countries; I had none to adduce, and could only refer to the common law principle, which had never been denied.

I preceive that the civilian went upon the law of his court, where they hold that persons take their character from the country where they reside; so, the ceded country becoming foreign, they deem the inhabitants foreign too. Such is the rule in prize causes, where hostility is to be regarded, which must ever be a national, not a personal consideration; accordingly, an enemy's country makes all the inhabitants enemies. So, indeed, at common law, the country gives the character to the persons who inhabit it, in matters that are governed by the character of the country. The British-born subjects of a ceded colony lose their character of British colonists, because their country has become foreign; they are restrained by the navigation laws that before protected them; they cannot trade as British colonists. They are foreigners, therefore, in everything that relates to the country they live in, as the civilian contends; but the common lawyer will add, they are in their own per-



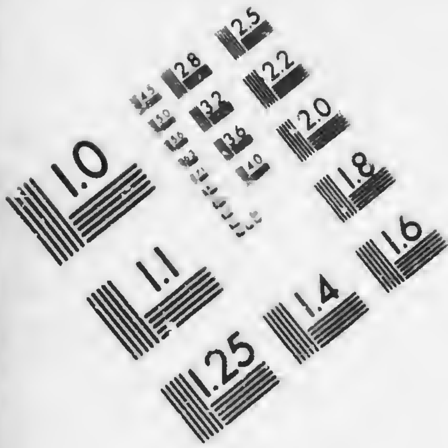
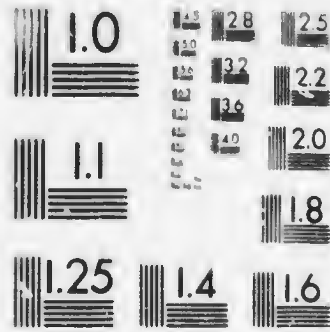
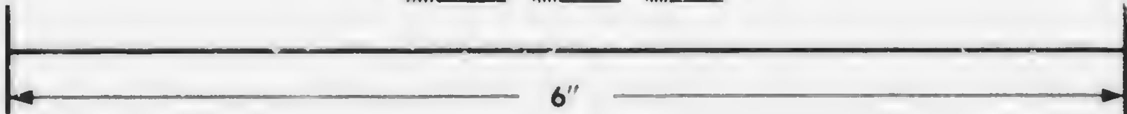
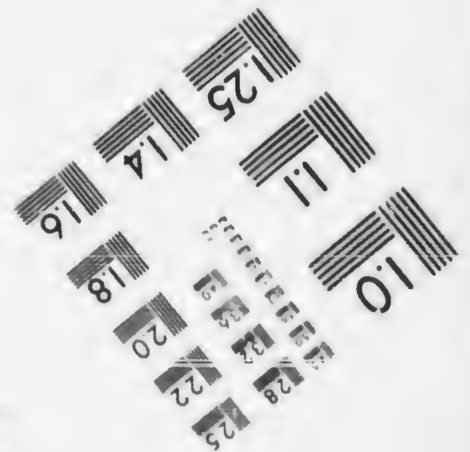


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

sonal rights still British subjects, as they were born; and they will be entitled to claim the privileges of such whenever they remove from the foreign country which obstructs the application and exercise of them, and come to a place, that is, some place in the king's dominions, where alone the privileges of a British subject have their exercise and application.

In truth, the character of a British-born subject is not merely national and local, but personal and permanent. It is born with him and remains with him during life, never to be divested; unchangeable, indelible. It is not so with what is called a British subject; that does, indeed, depend upon locality; and that is the character which the civilian contemplates. I believe, much of the misapprehension, upon this occasion, has arisen from not preserving the distinction between British subjects, and natural-born British subjects; they are not the same, though, I believe, they are reasoned upon as if they were.

British subject, and alien, are not terms contradictory; because the two characters may concur in the same person: the inhabitants of the Dutch colonies, now in our possession, are British subjects, they have taken the oath of allegiance, and they have the advantages of British colonists; but they are aliens, because they were born out of the king's allegiance. The inhabitants of the Floridas, born while those were British colonies, are, however, not now British subjects, because they inhabit a foreign country; nor are they aliens, because they were not born out of the king's allegiance; but they are natural-born British subjects, because they were born within the king's allegiance: so that it may be predicated of the same person, that he is a "British

subject," and an "alien;" that he is "a natural-born British subject," and not a "British subject;" accordingly as you speak of the local and national character, or of the personal character. "British subject" is a term of common parlance, that has not properly a legal defined meaning: it serves sufficiently in ordinary discourse for "natural-born subject," but it can be properly applied only for intimating the local and national character.. The true legal description is that of natural-born subject: this is the opposite to alien; and these are the terms that describe the personal character, which is the only one sought in the present inquiry, and the only one that is a subject of discussion in the books of the common law.

Through the whole of the argument, I have been insisting on this personal character of British-born Americans; but those who object to my conclusion in favor of them, from the common law principle (which principle, however, they do not pretend to dispute,) keep their eye principally on the local and national character of the present Americans. Their two great topics are quite of that sort; namely, the stat. 22 Geo. III. c. 46, for making peace or truce with the colonies and plantations; and the definitive treaty which acknowledges the independence of the United States, and relinquishes sovereignty, propriety, and territorial dominion. Surely all these are national and local ideas, riveted to the very soil, and limited by metes and bounds. Nothing is, by either instrument, said or done, as to the personal character of the inhabitants, that was left, as the personal character of the inhabitants of the Floridas, to the sentence and disposition of the law, when any of the individuals residing there

chose to remove himself into a situation where his personal character could be brought into question, and considered distinctly from local and national character, which the king of Great Britain had been pleased to superinduce upon him by ceding the country where he was born; that is, when any such individual should choose to come into the king's dominions, where alone his personal rights can have their application and exercise.

The only consideration for us, in this country, seems to be such personal character, whether it is the case of Florida, or a native of the United States, born within the king's allegiance.

Dec. 16, 1808.

December 17, 1808.

A passage has been cited by the objectors from Mr. Wooddeson's lectures; and as this is the only book authority they have been able to adduce, it must not be let pass without observation; especially as it has acquired a sort of reflected consequence, by being inserted in Sir Henry Gwillim's edition of Bacon's Abridgment, title "Alien." The passage is this, "But when by treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of our king, or being under his protection, while it appertained to his crown and authority, become, I apprehend, effectually aliens, or liable to the disabilities of alienage, in respect to their future concerns with this country. And similar to this, I take to be the condition of the revolted Americans, since the recognition of their independent commonwealths."—[Vol. i. p. 382.]

To those who insist on this as an authority for saying that such persons become aliens and cease to be natural-born subjects, it might be enough to reply, that a proposition laid down with an alternative, as this is, has not in it sufficient precision to be authority for any thing: "effectually aliens, or liable to the disabilities of alienage," is a circumlocution that does not suit with the plainness required in a juridical proposition. And yet, I think, the author has expressed himself not unsuitably with another sense of the word alien, accompanied, as it here is, with an exposition. It seems to me that "or" is not intended here to be a conjunction merely; but it bears a sense that is not uncommon, it introduces a member of a sentence that is meant to be explanatory of the foregoing; and is the same as "or in other words," "or to speak more plainly," "or to speak more properly." In this sense of "or," he explains the meaning of "effectually aliens," by shewing, they are liable to the disabilities of alienage in respect to their future concerns with this country." Their "future concerns with this country" must be the trade they carry on with this country; something which they transact from a distant place, something that affects the whole community, something that arises out of their locality and national character. He is speaking of the local and national character, which we discussed before (in pa. 694,) and which was superinduced on the inhabitants of these ceded countries, in respect of which the inhabitants become a species of aliens, or as the author expresses it in an undefined epithet, "effectually aliens," or, I suppose, "in effect aliens;" that is, in the case of trading with this country.

I take this to have been what the author's mind was

then contemplating, the local and national character of such ceded colonists; and by no means their personal character, that of natural-born subjects, which he knew, as well as all lawyers, can neither be surrendered nor taken away.

Mr. Wooddeson has certainly been not sufficiently technical in expressing himself upon this occasion. It may be fit enough to oppose what he has said by an expression in the treaty of peace, which, though in like manner not technical, has evidently a meaning that cannot be mistaken, and that makes against his conclusion. In the fifth article, it is agreed, that congress shall recommend to the legislatures of the respective states, to provide for restitution of confiscated estates which belong to real British subjects. Now, if there are "real British subjects," it is implied there are British subjects who are not real, that is, less so than the others. No one can doubt, that the one expression means British subjects, not comprehended within the new states, erected and recognized by the king's acknowledgment in the treaty; the other must mean those inhabiting the United States. It is plainly indicated therefore by this phrase, that both contracting parties in the treaty admitted that the inhabitants of the United States did remain, in some sort, British subjects; and the mode in which they so continued can only be that which I have been contending for.

Dec. 17, 1808.

According to the foregoing reasoning, I think the law officers, if consulted, would give an opinion somewhat to the following effect.

Supposed opinion of the law-officers.

"In obedience to your Lordship's commands, we have

considered the question, whether inhabitants of the United States, born there before the independence, are, on coming to this kingdom, to be considered as natural-born subjects; and we are of opinion, that such a person, coming to this kingdom, cannot be denied the character and privilege of a natural-born subject.

In forming this opinion, we have given due consideration to all the topics that have been suggested to us from different quarters, on both sides of the question, as well as to the principles of the common law, which are to be found in books of known authority amongst lawyers.

Among the suggestions that have been made to us, are stat. 22 Geo. III. c. 46, and the definitive treaty of peace with the United States; and we find ourselves obliged to declare, that nothing in those two instruments appears to us to make any alteration in the case of Americans, when compared with others of his Majesty's subjects who reside in a ceded country. In like manner as the inhabitants, natural-born subjects of his Majesty, in the two Floridas, ceded to the king of Spain, (at the same time that the independence of the United States was acknowledged) are still deemed to retain their privilege and character of natural-born subjects, so, we think, these persons being similarly circumstanced, when they come into this kingdom, cannot be denied to retain their original privileges and character.

Our reasons for thinking that the statute and treaty make no difference or peculiarity in the case of the United States, are these: The statute, upon the face of it, appears to have been made for two purposes; First, To enable the king to make peace or truce with the colonies or plantations in question; Secondly, To enable the king to suspend the operation of certain acts of parlia-

ment that might stand in the way of peace. The need of the second provision is obvious; the need of the first is not so plain; but we are told, in a debate in the house of commons, by the attorney-general Wallace, who drew the bill and moved it, that it was intended to give the king a power of alienating those colonies; a power which he, and some others, considered the king as not possessing by the common law. Without saying any thing, at present, on the justness of such opinion, we allege it as the best testimony to the design of the act. This design is perfectly consistent with the conception and wording, and it does not appear to us necessary or proper to suppose any other meaning in this act. We conclude, therefore, that there was no particular design, by this legislative measure, to make any alteration in the character of the Americans, beyond that which necessarily must and always has followed upon the cession of any of his Majesty's colonies.

After these observations on the act for enabling the king to make peace, we come to the definitive treaty itself; and we find ourselves compelled to declare, that as we perceive no design in the act to enable the king to alter the personal character of the Americans, so in the treaty we discover no declaration or provision that can be construed expressly, or impliedly, to alter their original character of natural-born subjects, and to make them aliens.

In the first article of the treaty, the king acknowledges the United States of New Hampshire, &c. &c. to be free, sovereign, and independent states; and he relinquishes all claim to government, propriety, and territorial rights of the same. It is upon this provision, and these words, that the separation and independence

of those colonies are grounded. The effect of this provision appears to us to be confined wholly to the soil and territory, which is thereby made foreign and ceases to be a part of the king's dominions; we cannot discover any thing that at all affects the personal character of the natural-born subjects, inhabiting such foreign territory.

Indeed, we are much surprised that any such peculiar effect should be ascribed to this cession of territory to the United States, (for so it is, in truth) when at the same peace, the adjoining colonies, the Floridas, were ceded to the king of Spain; and no such consequence of the cession are supposed by any body to affect the natural-born subjects residing there. We may here too remark, that the cession of the Floridas was made without any such enabling statute, by the king's common law prerogative; which demonstrates, that in the opinion of the majority of parliament, who approved the treaty, the act of the attorney-general Wallace owed its origin, not to an absolute necessity in law, but to an abundant caution, or some scruple in politics, which deserves no regard in a judicial consideration of the subject. We are not able to discover any distinction in the two cases of the Floridas, and of the United States. In both instances the soil was made foreign, and the inhabitants had superinduced upon them a new local and national character; that is, they became locally the inhabitants and subjects of a foreign nation, and they lost advantages of trade and benefits of various sorts, which natural-born subjects must lose, when they inhabit and make themselves subjects of a foreign land. But, under the control of this new local and national character, their personal character of natural-born subjects still re-

mains; and we see nothing in law to prevent it reviving and enjoying all its privileges when the person comes into the King's dominions, where alone the rights of a British-born subject have their full application and exercise.

Having declared this our opinion, that nothing is, *de facto*, done by the act or the treaty to take away the personal character of natural-born subjects residing in the United States, it may seem unnecessary, though we think it not unsuitable to add, that we know of no instance where the crown has presumed to exercise the power of taking away the personal rights of a natural-born-subject; neither have we met with any principle in the law of England that warrants such a supposition; nor can we conceive any proceeding by which such a divestment or extinguishment of natural rights can be enforced. As the common law recognizes no such principle as that of disfranchising a natural-born subject, the character has been deemed indelible; and the parliament has never interposed, on the occasions of cession of territory, to take from the British inhabitants of such countries that which the common law has permitted them to retain.

Such having been the construction of law in cases of cession, which have been made sometimes, no doubt, against the wishes of the inhabitants, and always without asking their consent, a principle of law has grown up and established itself, which it seems too late now to question in the case of the United States. We have given full consideration to the difference of circumstances which led to that cession, the rebellion and war that preceded it, and were the cause of it, and the claim of the colonists to be independent; but, we think, this dif-

ference of circumstances makes no alteration in the legal result arising from the new situation of the parties. Such matters are, as we think, wholly political; and as they are not of a nature to be subjected to any juridical examen, we do not see how they can be brought into the account, when we are applying the legal principle before mentioned.

Conformably, therefore, with the principle and practice that have long been acknowledged, and declaring that there appears no reason in law for not applying the same principle to the inhabitants of the United States, we repeat the opinion we before expressed, that the persons described in the question ought to be considered, in this kingdom, as natural-born subjects."

Such, I think, would be, or should be, the opinion of the law-officers on the present question.

Dec. 20, 1808.

Reply to observations on the subject of the foregoing argument.

January 17, 1809.

First, I cannot admit there is any straining to bring the Americans within Calvin's case; and I maintain, the circumstances that distinguish them from the precise point in that case are fairly and fully considered by me.

It may not be necessary, in arguing with you, to adduce such authority as Calvin's case, because you do not dispute it. But the persons I had to deal with were ignorant of the principles of that case, and I needed such an authority to set them right. I know no book case where the principles of allegiance and native rights are laid down and explained, except in that only instance;

the principle and nature of allegiance and of native rights is the first step in the present argument, and the subsequent parts of it would have been without foundation if I had not taken that case for a basis.

The necessity for going so far back in the argument was shewn to me by the civilian *; who laid down the law, that the king's subjects of a ceded country become thereby aliens; when he called for some decided case to show the contrary, I had no decided case (you know there is none) but the resolutions and arguments of Calvin's case. He felt this to be an important authority; and the piece of law, which you admit, I doubt whether you can ground upon any other authority in the books. The circumstances in Calvin's case are different from those of the Americans; but the principle is the same (I mean the principle of the resolution that I quote): whether that difference in circumstances makes any difference in the application of the principle is the very question in hand.

Secondly, You here admit that natural-born subjects, continuing their residence in a ceded country, do not thereby become aliens: you go so far as to think that, if they joined in war with their new sovereign against this kingdom, it would be treason in them. I will not say any thing upon this point, except to remind you that my argument is wholly confined to an American coming to this country, and residing here.

The other point in this part of your answer makes the main of your third article.

Thirdly, Your third topic is, the difference between ceding a country to a foreign power, and the constitu-

* Ant. pa. 721.

ting of a sovereignty from among British subjects, and ceding the country to such new made sovereignty. You call it making a treaty with the subjects themselves, that they should hold the country as an independent state; "he ceded his sovereignty to them." You rely upon this difference in circumstances, which you make between ceding to a foreign sovereign, and ceding to British subjects, as you term it; and you mention one certain result from this difference, that, in the former case, the levying of war by the natural subjects would be treason; in the latter case, it would not. I protest, I do not discern this distinction; in both cases, the subject is put into such peculiar situation by the act of the new sovereign, and being so circumstanced, why should it be treason in an inhabitant of Florida, more than in an American, to obey the militia law of his new sovereign, and bear arms against us, like the rest of his fellow subjects!

Some persons would argue differently from you on this point: those who distinguish the British subjects of the Floridas, because they were given up against their will, or without their consent, from the Americans, because these claimed to be independent, would not infer upon the former, who were wholly passive, the crime of treason, and acquit the latter, who sought and made choice of the peculiar situation of double allegiance in which they have placed themselves.

However, this point, as I before said, does not bear upon our present question, which relates to the American while he is in the king's dominions.

But you rely upon the difference of "the treating with the Americans, and giving up to British subjects the sovereignty of the country." I think there is in this an

assumption, and a reliance upon words, which has no support from the real transaction. To come up to the representation you make about "them," and "they," there ought to be a covenant and grant from the king, to Mr. A., Mr. B., Mr. C.; and the said Mr. A., Mr. B., and Mr. C., ought to be plainly estopped and barred by what they took under such covenant and grant from the crown. When we had thus ascertained who are legal parties to the transaction, and legally bound by it, we might then inspect the charter or instrument, and search whether the king, by the terms of it, relinquished his claims of allegiance wholly or in part; and whether the British subjects, therein named, had expressly relinquished, or were expressly deprived of their native rights, or whether such deprivation arose out of it by necessary construction.

I think such should have been the form of the transaction, in order to come up to your supposition; but when we examine it, we find it to be quite another sort of proceeding. As to Mr. A., Mr. B., and Mr. C., it is a matter *inter alios acta;* they are not parties, not named, not alluded to; it does not appear to have been transacted by them. Let us consider the treaty of peace which must be the instrument, if any, that produces the supposed effect.

The treaty declares New Hampshire, &c. &c. &c. to be free and independent States, and the king relinquishes the government of them. When this grant and covenant is brought to plain facts, it amounts to this, that the king will no longer send governors to those states, nor expect the legislative and executive authority to be subordinate to him. The king gives this to the States; but how can this be construed to take any thing away

from Mr. A., Mr. B., and Mr. C.? The king gives away the allegiance, which the States owed him; it was his to give; but how should such free gift be construed to take away from Mr. A., and other individuals, the private rights to which they were born? Two questions arise upon this, First, Are the native rights of individuals hereby, *de facto*, pretended to be taken away? Secondly, Could the king *de jure* take away such rights?

To talk of "treating with them," and "they holding the country independently of the king," is speaking in a popular manner, and without sufficient regard to juridical circumstances. Any inference of that sort will not be allowed by law to deprive a man, living peaceably in his house in New Hampshire, of his British rights, that he was born to, and that are personal to him, (namely, which he can carry about with him, and which do not depend on locality,) merely because some daring men have forced the king to allow the States of New Hampshire to govern him, without enjoying any longer the right of appeal to the king. I say, the law will not allow this, because personal rights of British subjects cannot be taken away from multitudes in a lump; they must be discussed in every individual case, and there must be a several judgment and execution against every person. Even the act of the king in this instance, though a national act, and relating to millions, is but a personal act; when he acknowledges them Free States, and relinquishes the government of them, he acts only for himself, his heirs, and successors: and accordingly thereto, and agreeably with the true principles of the law, he alone is bound, and the sovereignty of those States ceases to be his. But where is the personal act of any American relinquishing his own rights? or if there was any

such proceeding, in fact, shew me the authority in law that recognizes any such principle, as that a natural-born British subject can divest himself of his native character: there is no such authority; and there is the known maxim of law against it, *nemo potest exuere patriam.*

I cannot, therefore, bring myself to distinguish the treaty with America from the ordinary case of cession to a foreign sovereign: in both cases, it is a transaction between the two sovereigns in which the inhabitants bear no part; and it seems to me a departure from principle, to say, that the American is thereby rendered an alien, while the inhabitant of Florida is allowed to be still a British-born subject.

Fourthly, I have raised no question of the king's authority to make the American treaty. I agree with those who think he might have made it without the act of parliament; and I agree also with those who thought the treaty fell within the authority of the act. I am satisfied with the treaty, whether with or without the act; but I contend, that neither the act nor the treaty had in contemplation to make the Americans aliens; and that neither one or other of those instruments has, in point of law, the power of producing such an effect. I raise no question upon what passed in parliament; if the parliament approved the treaty, they left us to draw the inferences and make the construction that shall appear to belong to it.

Fifthly, and lastly, you admit there are difficulties in deciding that "the treaty exempted the Americans from their allegiance, and excluded them from their rights as British subjects." In my opinion, these difficulties are made and increased by introducing phrases and raising

constructions upon them, without looking to the real proceeding and adhering faithfully to the letter of it.—You talk here of exempting the Americans from their allegiance: Why make a question of allegiance, when the king does not claim it? And what consequences can be built on the affirmative or negative of this question? What is a subject's allegiance worth to the king, if he resides in America, although he is, *bona fide*, a native of London? It is worth nothing. And if he refuses to come home, what does the law say, and what did the parliament do in a like case, in stat. 14 and 15 Henry VIII. c. 4.*? Allegiance has nothing to do with the treaty. Allegiance is personal; the treaty is national and territorial. The treaty regulates land, its metes, and its bounds: and the government of it the treaty leaves and transfers to others, the States of the country; the persons and their allegiance remain unaffected. Allegiance is general or special, local or personal; these may, and do often, in fact, consist together in the same person; why not, then, in the instance of Americans?

It is for want of attending to this modification to which allegiance is subject, that some persons started the expedient which you here mention, and which seems to me to contain much more difficulty in it than the one it was meant to cure. You agree with those who think that such Americans as "after a reasonable time allowed for election, subsequent to the ratification of the treaty, settled themselves in America, and chose their domicile there, became exempted from their allegiance, and excluded from their rights as British subjects."

* Vid. ant. pa. 706.

This expedient of a "reasonable time," and "a domicile," for making a distinction between one American and another, seems to me to be a greater departure from principle, than any of the other anomalies that I have observed in their argument. There are, I admit, legal considerations that depend upon a man's local character, which may be changed by change of residence, and therefore must be ascribed to his own act and choice.—But those are in cases of such a character as is capable of being acquired, and, as it is acquired, so it may be lost, by his own act; such is a man's local and national character. But the character of natural subject, which a man is born to, and to which is applied the maxim, *nemo potest exuere patriam;* to lay it down as a position of law, that it is in a man's own choice to decide whether he will put off this character or retain it, and that his continuing his native character depends upon altering his domicile; this is, surely, one of the most singular novelties that ever was attempted in the face of an acknowledged principle to the contrary. For which principle I must again refer to Calvin's case, the whole doctrine and result of which is, that the personal rights of a subject to which he was born, remain through life, and through all circumstances, unchanged and indelible; and that allegiance, and native rights arise wholly from birth, and do not depend on actual local sovereignty for their continuance.

Such a device as this is not interpreting the law, but making it. A temporizing scheme, reduced to an act of parliament, for settling this national question, might very well be so modelled: it would be a half measure that probably would be thought reasonable enough; but this very character of it is sufficient to discredit it

as a piece of juridical reasoning: it is void of all steadiness of principle; it has not even in it the consistency of the former arguments and conclusions, that "relinquishing the sovereignty," that "acknowledging the states to be free," &c. &c. implied that there was an end of allegiance and of British rights. The device was, I believe, contrived by those who found they could not maintain the above bold conclusions, in opposition to acknowledged principles of law; and, desirous of doing something, they were content to lower their notions to a medium between the two, which would sound, as they thought, reasonable in the effect of it, however unsupported it might be in principle.

So much for this half measure of "reasonable time," and "domicile," which I have had occasion before to reprobate. I hope the difficulties in point of law, with which this arbitrary notion is pregnant, will be avoided: if so, the other difficulties in point of fact, which you mention, will be escaped, namely, the necessity of enquiring in every particular claimant's case, when and how he was domiciliated in America, or in this kingdom.

Upon the whole I see nothing to distinguish, in a legal view, the condition of Americans from that of other British subjects residing in a ceded country; nothing done by the king, nothing by parliament, nothing by themselves: and it seems to me, the person in question coming to this country is still entitled to the privileges of a natural-born subject.

Jan. 17, 1809.

January 21, 1809.

An authority is quoted for the notion of "optional domicile." It is said that Chief Baron Eyre has been

heard, over and over, to lay it down, that Americans domiciled in the United States could not be deemed British subjects, so as to navigate a British ship. There may be good reason for such an opinion. The Chief Baron might have considered that, under the order of council for carrying on the American trade, (it was before statute 37 Geo. III. c. 97.) American ships were to be navigated by subjects of the United States. He might consider domiciliation as the best evidence of being an American subject. It might appear to him reasonable, that such persons being allowed to navigate American ships, as American subjects, they should not be recognized occasionally as British subjects, when navigating a British ship. Such a discrimination might appear to him to promote the principle of our navigation system: as no ships are allowed to be British-built, unless built in the king's dominions; it might seem to him an appropriate construction, to exclude from the character of British mariners, all those who chose to domiciliate themselves in America, then become a foreign country.

Be it so; but can they report to us, the Chief Baron ever laid it down that persons who so made themselves Americans, by residing in the United States, might not afterwards be deemed British subjects and British mariners, by changing their domicile to some part of the king's dominions? Is there any thing in the principle of domiciliation, which will enable them to say that the first choice is final, and the character thereby acquired cannot be put off? Is there not as much efficacy in a second, a third, or any other subsequent choice of domicile? And do not such persons become *toties quoties* successively British or American? And if not, why not?

If their notion is grounded on any principle, they should be able to explain to us why the first choice of domicile precludes the advantage to be derived from any subsequent choice.

Such are the queries that may be put on this piece of exchequer law, confined only to the very peculiar case of navigation and of mariners. There still remains the principal query, why should such a construction on the navigation act, supported as it is there by the special circumstances of the case, be adopted, and made to govern in the general question of natural-born subject, where there is nothing similar to make the application of it fit or colorable? Certainly domiciliation, or residence, temporary or permanent, never made a part of the consideration whether a person is a natural-born subject; but simply this was the question, whether he was born within the king's allegiance? However, if domiciliation weighs any thing, the claimant in this case is resident here, and professes to make this kingdom his future residence. Perhaps the Chief Baron, upon a *habeas corpus*, would, in the case of this claimant, have deemed his present residence, and his determination declared to reside here in future, to be a sufficient choice of domicile within the principle of his exchequer decision; perhaps he might consider this case as standing on different grounds from the exchequer case, and to be decided on general principles, without regard to domiciliation.

We are so uninformed as to the extent of what the Chief Baron is supposed to have ruled at *nisiprius*, that it seems to afford no safe ground of reasoning.

Jan. 21, 1809.

March 22, 1809.

I have been desired, by a great lawyer, to look at the statute *de prerogativa regis*, ch. 12. *de terris Normannorum.* I suppose, he meant this should prove to me that on King John losing Normandy, the Normans became thereby aliens, and therefore the lands holden by them in England escheated to the king; but the statute does not import this, nor is it so understood by Staunforde. On the contrary, Staunforde understands that the Normans still continued English subjects, and were *ad fidem utriusque regis.* The statute expressly speaks of those who were *non ad fidem regis angliæ*, which must be such as were born after the severance of the two countries; and the design of the statute is to fix that the escheats, in the case of such *postnati*, accrued to the king and not to the lord; and that the king was to grant them to be holden of the lord, by the same services as before.

This chapter, therefore, of the statute *de prerogativa regis* is an express authority, that the severance of Normandy from the English crown did not make the inhabitants there aliens, though their children, born after the severance, were aliens.

This authority becomes also an answer to another point maintained by the same great lawyer; he goes beyond the rest that I have had to contend with, except the civilian, and he holds with the civilian, that the inhabitants of a ceded colony become thereby aliens.—Yet in this I cannot but allow there is consistency; for the principle appears to me to be the same: those who call the Americans aliens, ought to consider the inhabitants of Florida, ceded at the same time, in the same light; and those who consider the inhabitants of Florida as not deprived of their personal rights of Englishmen,

ought to admit the American claim to continue natural-born subjects.

Mar. 22, 1806.

March 24, 1809.

Perhaps the objectors have never considered the persons to whom naturalization and denization are granted. In both cases, in the act of parliament, and in the patent, the party is alleged to be born out of the king's allegiance, and in applying for either, he must allege the same in his petition; but an American cannot do this with truth. What then is to be the conclusion on the peculiar circumstances and situation of this supposed alien? Is he to be deemed an alien beyond all other aliens, that is, irredeemably such? Assuredly he is not susceptible of denization or naturalization in the ordinary course, because he cannot bring himself within the description which alone makes him the object of such favor; or may we conclude that, not having the defect which is to be supplied by such grant, he is already in possession of the character to be conferred by it; in other words, he is not an alien, but a natural-born subject?

The latter appears to me the just conclusion; and I shall accordingly say with confidence, that there is the authority of the lord-chancellor in cases of denization, and of the two houses of parliament in cases of naturalization, for the proposition that birth out of the king's allegiance is the only circumstance which constitutes an alien. We may be sure such forms would not have been settled and constantly acted upon, if they were not known to be required by the general law of the land. Indeed, it is nothing more than the definition of alien laid down in all the books, whether elementary or practical; the following examples are sufficient:

Natural-born subjects, are such as are born within the dominion of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance of the king; and aliens, such as are born out of it.—[Blackstone, 1. book, ch. 10.]

An alien is one, who is born out of the ligeance of the king.—[Comyn's Digest. article, alien.]

An alien, is one born in a strange country.—[Bacon's Abridgment, article, alien.]

And thus I conlude this discussion, as I began it; relying upon established and known positions of law for maintaining juridical truth against hypothesis and the speculations of political reasoning.

March 24, 1809.

(5.) *A discourse by Mr. J. De Witt, concerning Surinam.*

The undernamed counsellor, the pensioner of Holland, having understood by the ambassador Temple, that the King of Great Britain, his master, had not been entirely satisfied with the answer of the states-general of the united provinces, given to his Majesty, the 6th of June last, upon the account of the business of Surinam, believed it his duty to acquaint the said ambassador, that it is evident and notorious:—

1. That the colony of Surinam is possessed by their high mightinesses, in their proper right, with all the rights, and a power unlimited of superiority and sovereignty, established and confirmed by these words, inserted in the third article of the treaty of peace, "*cum plenario jure summi imperii, proprietatis, et possessionis*;" and by consequence, that all the inhabitants of the same colony are subjects of their high mightinesses, privately, as to the exclusion of all others.

2. Also, secondly, that by virtue of the capitulations which are found to have been made between the sovereign and his subjects, none can form any pretence, but only the said sovereign and the said subjects, reciprocally; nor can any other, no, not he or those who before the date of such capitulations might have been sovereigns to the same subjects, after an entire cession and confirmation by a treaty of peace, or otherwise, pretend any right, or so much as permit himself to make complaint of the breach or contravention of the said capitulations: so far are they from a power of demanding a redress or any reparation to be made to them for the same.

3. That what is already said is not only conformable to the disposition of common right, but also to the judgment and practice of all kings, states, and princes. For example, their high mightinesses have, by their arms, made a conquest upon the king of Spain, upon the towns of Bois le Duc, Maestricht, Breda, &c. and yet acquired not possession of them, but upon large and advantageous capitulations; and, nevertheless, after the full and entire acquisition of the propriety of the said towns and places by the treaty of peace, when any question was made about the explication of the said capitulations, or complaint made of want of execution, the said lord, the king of Spain, never undertook (as indeed he could not) to urge their high mightinesses, or to speak to them about the execution of their capitulations.

4. The king of France possesses in like manner Lille, Doway, Tournay, &c.; and yet, all the world agrees, the king of Spain has nothing to do, since his entire cession of those places to the crown of France, by the treaty of peace concluded lately at Aix la Chapelle, to interest

himself for the execution or not execution of the capitulations which were made upon their surrender, and hath yet less to do, to make any quarrel with France upon this account. But, in case the inhabitants of Maestricht, Bois le Duc, Breda, &c. as also those of Lille, Doway, Tournay, &c. judge the capitulations are broken, all they can do is to carry their complaints and petitions to their sovereigns, viz: to their high mightinesses, and to the king of France, respectively; otherwise, they would render themselves notoriously guilty of the crime of rebellion, if, in this case, they should address themselves to the king of Spain, and desire his succor and intercession, and highly offend the majesty of their lawful and only sovereign; as also the king of Spain would, on his side, notoriously violate the treaties made by him, and the law of nations, should he interest himself therein, although he should do it upon his own proper motion and without being required to do it; since in so doing he would still attribute to himself some right of superiority, or at least of protection over those which have quitted his protection and subjection; as to what concerns the possession, by the right of war, and as to what concerns the propriety, by the said treaties of peace.

5. It is, without all dispute, that their high mightinesses are obliged, by virtue of the said capitulations, to let the inhabitants of Maestricht, Bois le Duc, and Breda, &c. enjoy the free power to transport themselves from thence, without any hindrance, into what other place they please, as also to carry away their goods, moveables, and to continue the propriety and possession of their immoveable goods, notwithstanding their remove, or else to sell either of them as they please.

But this, notwithstanding, if their high mightinesses

think fit to forbid them, or to hinder one or other of them; yet doth it not belong to the king of Spain to complain of it to their high mightinesses, nor to demand reparations for it: moreover, his majesty, by so doing, would notoriously wrong their high mightinesses. But the said inhabitants have this only way left to them, to address themselves to their high mightinesses, as to their lawful and only sovereign, by their complaints and petitions.

6. The colony of the New Netherlands has been likewise subjected to the power of his majesty of Great Britain, with a very large capitulation, and it is probable those of Cabo Corco, upon their surrender, have also made some stipulation. Nevertheless, their high mightinesses well know that at present, since the conclusion of the treaty of Breda, they are not permitted to enter into dispute with the king of Great Britain upon the account of the capitulation of the New Netherlands, or by virtue thereof to demand any favor for those who were their subjects before the said capitulation; but in case those, the said formerly subjects to their high mightinesses, and at present subjects to the said lord, the king of Great Britain, find that they have been formerly, or shall be for the future, ill-treated, contrary to their capitulations, they have and shall be permitted to have recourse to his majesty, who is now their sovereign, and to demand redress from him.

7. By what has been said, it is hoped from the usual equity and prudence of the said lord, the king of Great Britain, that his majesty may, and will well comprehend, that it belongs not to him, nor hath he any right to enter into any dispute with their high mightinesses, upon the explication and obligation of the capitulation

with Surinam, or to complain of any pretended want of execution thereof.

8. And since that most kings, princes, and states, possess countries, towns, and places very considerable, which had formerly other sovereigns, and which had been subjected by the said kings, princes, and states, either voluntarily, or by force of arms, under certain agreements, conditions, or stipulations; and that the said possessions have been since confirmed to them by solemn treaties made with the said first sovereigns; the whole world would be disturbed and turned upside down, if the said sovereigns should still form their pretensions, and plead that they had a right of protection upon their former subjects, to obtain from them the execution of the articles stipulated for in the said capitulations: so that it cannot be justified in this controversy, what is held to the contrary, or what is excepted upon what has been before applied, viz: that at the end of the said third article of the treaty of Breda, were added these words, "*cum prorsus in modum quo eo die* $\frac{10}{20}$ *Maii proxime elapsi occupaverat et possedit*," as if by these words was meant something more than the extent of the possession, which one of the two contractors effectually had upon the day there mentioned; or as if it might be maintained, that the words limited also the power of the possessors for the future, which is, nevertheless, notoriously contrary to their true sense; and it appears yet evidently to be so, upon what passed in the very negociation of the peace; for since the same article determines very clearly and expressly concerning the right of the possessors for the future, that it should be an absolute and unlimited sovereignty in these words, "*conventum præterea est, ut utraque jam designatarum partium, cum plenario jure*

summi imperii, proprietatis, et possessionis, omnes ejusmodi terras, insulas, urbes, munimenta, loca, et colonias teneat et possedeat in posterum, quotquot durante hoc bello, aut ante hoc bellum, ullis retro temporibus, vi et armis, aut quoquo modo, ab altera parte occupavit et retinuit," one cannot believe, that the said words, "*eum prorsus in modum, &c.*" do overthrow or limit the right which had been already acquired and fixed by the words "*plenario jure summi imperii, &c.;*" but, forasmuch as the extent of the possession had been comprized so generally in the words "*quotquot durante hoc bello, &c.*" since that the parties were agreed among themselves, that the places which had been or should be taken after the $\frac{10}{20}$ of May should be restored, it was evidently necessary that the said general extent of possessions should be limited and restrained, by another more particular clause, only to such posse‸ions as it should appear either party had the said $\frac{10}{20}$ May, without extending them any farther, or pretending by virtue of the said treaty any right beyond the limits of the possessions which it should appear either of the said parties had the said $\frac{10}{20}$ of May, which is thatwhich appears to be expressed by the words there added, "*eum prorsus in modum, quo eo die $\frac{10}{20}$ Maii proximeelapsi, occupaverat et possedit,*" where it may be particularly observed, that the words, "*eum prorsus in modum, quo eo die $\frac{10}{20}$ Maii, proxime elapsi, occupaverat,*" cannot any way be applied to any right or to any conditions, by virtue where of either one or the other should that day possess, but only to the manner or extent or to the limits of the occupation; that is to say, what countries, or what places, and how far it appeared, that one or the other party should have in his power, the said $\frac{10}{20}$ of May. For to give any other sense to the

said words, it were necessary to omit wholly the word "*occupaverat*," and instead of the words, "*cum prorsus in modum*," to have put in, "*eo prorsus jure;*" and yet, even this way, we should meet with a contradiction and notorious absurdity, viz: that on one side countries and places should be given up with a right of absolute and unlimited sovereignty, and on the other side, and as to the same rights, as the possessors had possessed them in the $\frac{10}{20}$ of May; for, if by the latter words was understood any thing less than a right of an unlimited sovereignty, they must necessarily fall into a contradiction and manifest absurdity.

But all this will appear with much greater evidence if we well consider what passed at Breda during the negociation of the peace, and particularly that when it was insisted upon, on the behalf of their high mightinesses, for all that had been taken by either of the parties, until the knowledge of the peace should arrive at all the territories of both parties, either by proclamation, or otherwise, or at least, till the day of signing the said treaty; they ordered their intention to be expressed, and to be put in the hands of the mediators the 30th of May, in the same year, 1667, in these words, "*Conventum praterea est, ut utraque jam designatarum partium, cum plenario jure summi imperii, proprietatis, et possessionis, omnes ejusmodi terras, insulas, urbes, munimenta, loca et colonias teneat et possideat in posterum, quotquot durante hoc bello, aut ante hoc bellum ullis retro temporibus, vi et armis, aut quoquo modo, ab altera parte occupavit et retinuit, cum prorsus in modum, quo ea possidebit tunc temporis, cum præsenti pacis tractatui subscribetur*," which last words having a relation to a time to come, and to things which might happen after the date of the

said proposition, could not contain any thing but a limitation or designation of the possessions, in such state as they should be found at the day of the signing of the treaty; and so, according to the precedent words, which are clear and express, the possessors should continue to enjoy, with an absolute and unlimited sovereignty, all those countries and places which he had in his power on the day of the said signing.

But, forasmuch as at the instance of the English ambassador the said term was anticipated, and brought back to a time even already past, in which regard, the said $\frac{10}{20}$ of May, was in the end agreed to, not only these words, "*tunc temporis, cum presenti pacis tractatui subscribetur*, were changed, to put in the following ones, "$\frac{10}{20}$ *die Maii proxime elapsi*," and the word "*possidebit*," turned into that of "*possedit*," but also, because, by the said change, the said clause rendered the business applicable to a time past, and affairs already done; and, consequently, that hereafter it might be thought that the said clause, according to the intentions of the parties, might be applied to the right and to the conditions by which they were rendered master of such a conquered country, or to things of the like nature, and not properly and only to the occupation and to the conquest itself, to take off all ambiguity, the word "*occupaverat*" was added, by which was prevented all that could be imagined of any other interpretation: as it is also notorious that the English plenipotentiaries, in causing the alterations of their words, had no other thought but only to anticipate the said term, and not to take any thing from the treaty which should limit the absolute sovereignty of the possessor; the proposition which they made thereupon, and which was delivered in writing to

the plenipotentiaries of this state by the mediators in solemn conference, July 7, 1667, not containing any thing from whence can be directly or indirectly gathered any other sense. The formal terms of the said proposition are these: "*Omnes regiones, terræ, insulæ, coloniæ, civitates, oppida, præsidia, propugnacula, cæteraque munimenta quæ ab alterutra parte, ante* 26 *diem Martii anno presenti* 1667 *capta sunt, et eodem die in illius partis possessioni remanserunt, penes eos maneant, a quibus sic capta et possessa sunt, cum plenario jure summi imperii, proprietatis, et possessionis,*" words in which no ambiguity at all is to be found, nor any other thing from whence can be raised any conjecture that the intention of the said English plenipotentiaries was to stipulate, or cause to be inserted into the treaty which was negociating, anything whatsoever which might derogate from the absolute sovereignty, or to a privative disposition of the possessors of the countries and colonies which one of the parties gives up by the said article. So also nothing past, neither before nor since, upon this subject, between the plenipotentiaries of either side, neither by word of mouth nor writing, which can persuade us that they had this intention or any thing near it; because, they only by a joint agreement, fixed the $\frac{10}{20}$ of May, the term which the English plenipotentiaries demanded, to the 26th of March, and the plenipotentiaries of their high mightinesses, to the day of signing; so, that in this respect, nothing was capitulated between England and this state, that was extraordinary nor out of the road which was usually followed by kings, princes, and states; but every one was left to an absolute and privative disposition, according to the order and custom, upon all places conquered and given up, as also u[illegible] all their inhabitants.

And thus, in regard of the capitulations which might have been made, or the conditions which have been agreed to upon their conquest, they cannot have acquired, nor can they so much as pretend to any right by it, but only by making remonstrances and petitions, as of subjects to their sovereign, as without doubt the king of Great Britain and his ministers would have understood it, if their high mightinesses had endeavoured to raise differences with his majesty about the explication and execution of the capitulations, made upon the conquest of New Belgia, and the town of New Amsterdam, with the forts and places thereon depending.

For these reasons, we expect it from the most renowned equity of his majesty, that he will look upon it as an effect of the discretion, civility, and friendship of their high mightinesses, whatsoever they have, from time to time, disputed with his ministers, and declared in the answer, which hath been above spoken of, concerning the expounding and execution of the capitulations of Surinam, as they will also be always ready to make it known to his majesty and his ministers, that they will not be less diligent in the punctual observation and execution of all their promises to their own subjects than they shall be of that to which they are formally obliged by the solemn treaties made with other kings, princes, and states: they also hope it, from the so much renowned equity and discretion of his majesty, that he will not look upon these explanations and declarations otherwise than as they are here said; and, that neither from hence, nor from any precedent treaty, he will draw any consequence, as they gave him any right or action against their high mightinesses; and the said counsellor, pensioner of Holland, desires the said ambassador Temple,

that he would maturely consider the abovesaid, according to his accustomed equity and that he would so well inform the king of Great Britain, his master, that hereafter there may not be any further difference upon this point, between his majesty and their high mightinesses. Given at the Hague,

July 2, 1669. JEAN DE WITT.

An answer to Mr. de Witt's paper, concerning Surinam.

My Lord;

As there is great matureness in the discourse of my lord de Witt, and much strength of argument in what he hath delivered in that paper, so the main of its force doth seem partly to lie in the equal right granted by him to his majesty, in the country of Manhatous, as is desired for Surinam, and partly in his allegation of matter of fact; and, therefore, the substance of all my lord de Witt's managment of this matter, concerning Surinam, may, as I humbly conceive, be reducible to two heads only.

The first, drawn *de jure gentium* from the custom of all treaties and the rights following thereupon, which, as to the matter in hand, admits but of two cases, viz: either where a country, province or city is taken by articles made at the surrender of the said places, no after-capitulation being at all made for the said places with any sovereign, but the places absolutely held by virtue of the said surrender, which case is sufficient for the acquiring of a possession.

The second, where any country, province, or city is taken by articles or conditions, made at the said surrender, an after-capitulation for the cession and reliction of

all rights or pretence to the said places, made by the state receiving the said surrender, and the crown that had the former sovereignty of the said places, which cession conduces to settle a right for ever after the said cession, and which last is granted to be the present case of Surinam, on the part of the Dutch, and of the Manhatons, equally on the part of the English. In both which cases, the lord de Witt doth frankly grant, that the said articles and conditions, in honor, justice, and conscience, ought to be strictly observed and inviolably kept with the said inhabitants, by that state that hath acquired the said plenary possession and sovereignty of them, as what is but the indubitable and perpetual right of the said inhabitants.

But that which my lord de Witt insists upon, and principally contends for, is, that after the said cession or reliction of the sovereignty of the place to any state is past, the dispensing of that justice, due to the said inhabitants, by virtue of any former treaty or articles of surrender, doth, not only singly, but exclusively belong to the right of the said state who is present possessor of the said place, as an inseparable branch or part of the sovereignty; and that there lieth neither any right of appeal in the inhabitants of the said places so surrendered, nor so much as right of mediation or intercession, and much less of judgment and arbitration in him that was the former sovereign; although the present sovereign of the said places should either fail of observing the said articles, or should do any injury to the said inhabitants, and therefore though the English at Surinam have several undeniable rights, which do belong to them by virtue of the articles made by them at the surrender of the said place, and such as they may in justice ex-

pect to be made good to them; the judgment, nevertheless, of the rights, with the due dispensing and administering of them, is, since the general articles of peace, so much and so exclusively the right of the states-general, as the said English neither can, may, nor of right ought to apply themselves to any other than the said states-general for the making good of them; nor hath his majesty any right now, nor any color of right, to become a mediator or intercessor on the behalf of the said inhabitants, his majesty having by the articles at Breda relinquished the sovereignty of the said place wholly to the states-general.

And this assertion of the lord de Witt's he doth endeavor to enforce by the precedent of the town of the Burse, and Maestricht, and other places taken in the war between the Spaniards and them, not without conditions or articles of surrender, and since relinquished in point of sovereignty to them by the general treaty at Munster; since which treaty, therefore, as the inhabitants of Burse, or Maestricht, can have no right to apply themselves to the king of Spain for the remedying of any injury or wrong that might be offered them by the states-general in their non-performance of the said articles; so, neither can the king of Spain, by virtue of his former sovereignty, so much as interpose on their behalf with the said states-general, even though all the said conditions should be violated that had been formerly made with them.

Secondly, he enforceth it from the instance of Flanders, as now held by the king of France, upon the treaty at Aix la Chapelle, where, though the inhabitants have many rights reserved to them upon the surrender made by them, yet the observance or non-observance of

the said rights, or of any of the articles or conditions made with them, is equally as much at the pleasure of the king of France, since the king of Spain's relinquishing his dominion to them, as it would have been had he held them merely by virtue of his conquest or obtaining of them without any after capitulation; and, therefore, though the king of France be in honor and justice bound to conserve the said conditions and articles made with the inhabitants of Flanders; yet if he shall neglect it, or do any thing to the contrary of it, the king of Spain, nevertheless, cannot interpose in it, nor can, upon any such injury as shall be offered them, pretend to any right to become a mediator and much less an arbitrator for them.

Thirdly, he enforceth it from the general inconveniences that must follow on all treaties, dispositions, and translations of the sovereignty of places, if the places, once so conceded or relinquished, should have their jurisdiction or dominion so mixed, as that any, beside the present sovereign of them, should challenge a right of interposition, mediation, or arbitration, by virtue of their prior right of the sovereignty to them; seeing if this should be once admitted, there could never be any peace, or any end put to the settlement of the sovereignty or dominion of them.

Fourthly, he enforceth it from an argument (*a pari*) that, seeing by the same articles which have been made with his majesty at Breda, the Dutch have relinquished their sovereignty to the Manhatons and the whole region of it: the states-general, therefore, neither can nor ought to interpose for the inhabitants of the said New Netherlands, in reference to any articles or conditions made formerly with them, or to the performance of them,

but ought to leave the whole dispensing of that right to the proper jurisdiction, power, and sovereignty of his majesty, and that without any interposition or mediation on their part, though his majesty should think fit to violate all the said articles or conditions with them.

All which arguments, my lord, are so strongly founded, and so advisedly laid down, that I see not at present what can be said against them, if we shall admit the sovereignty of the said colony to be, by virtue of the said articles of Breda, really and plenarily relinquished to them.

The only difference I can possibly discern in this case of Surinam is, and must be, therefore, whether the said sovereignty of Surinam be as perfectly and absolutely relinquished, by the said treaty at Breda, to the Hollander, as the Burse was, and those other places before named, which is the next part or head of the said paper.

Only by the way, my lord, inasmuch as the States of Zealand do pretend to the sovereignty of Surinam, and seem not to allow of an appeal to the States-general, though it was the States-general, and not the States of Zealand, to whom the said country was by the articles of general peace delivered; it must of necessity create not only a great difficulty, but a great disadvantage to the inhabitants of Surinam, who may by this means be much defeated of what is the proper right of them, unless the States-general shall, as in reason they ought, assert their plenary jurisdiction and sovereignty over them, and give not only countenance, but leave, to apply themselves to them, which is the utmost I can see his majesty can request on the behalf of them; admitting the right of absolute sovereignty really to belong to them.

The next principal head, therefore, of my lord de Witt's paper, is to clear the absolute right of sovereignty, and to remove the objection that is made to it by his majesty, from these words of the treaty, "*cum prorsus in modum, quo eo die Maii $\frac{10}{20}$ proxime elapsi, occupaverat & possedit*," which we english, "and that altogether, after the same manner as they had gotten and did possess them, on the $\frac{10}{20}$ day of May last," which words are therefore contended for, by us, to be a qualification or restriction of that cession or reliction which is made by the said treaty of the sovereignty of the said place, and are urged by us, as it seems by those words, that they are obliged to hold the said place after no other manner in point of jurisdiction or dominion than as they were possessed of it on May $\frac{10}{20}$, which, as we truly allege, they were by virtue of those articles only which were made with the inhabitants of the colony at the surrender of it; and this I must freely confess to your lordship, I always took to be not only the genuine and natural, but the indubitable sense and intent of the said words.

But these words, as they are thus applied by us to a qualification or restriction of the plenary right of sovereignty and jurisdiction, will, I perceive, by no means be admitted by the lord De Witt, and the reason he seems to give is this, because such a qualification, if intended with reference to the said inhabitants, must suppose a power to be placed in some or other to be an arbitrator, and to judge whether that *modus*, or manner of possession, be all along kept with the said inhabitants or not; for otherwise, such a qualification or restriction can be to no purpose, nor of any efficacy or *materialnesse* at all. But this interpretation of it he utterly de-

nies, in regard it would then unavoidably interfere with the concession of that plenary sovereignty and jurisdiction which is granted of the said place in the very same third article of the general peace, and must imply also with it a contradiction in the very words and grammar of the said article; and that in regard a sovereign right cannot possibly be transferred, without the privation and exclusion of all right after any manner whatever in any other person beside; and because a right of judgment, arbitration, or mediation, if reserved to or in any other, doth and must destroy, of necessity, such a right as is plenary and sovereign, so that these two can be no way consistent together; and therefore either the latter clause of the said 3rd article, "*eum prorsus in modum, &c.*" cannot be meant, as if it could be intended thereby to put a modification or restriction upon right of absolute sovereignty before granted, or if it shall be so interpreted, then must the words before mentioned, "*cum plenario jure summi imperii, proprietatis, & possessionis, omnes ejusmodi terras, loca, & colonias, teneat & possideat in posterum,*" that is, "that either party shall keep, and possess, for the future, all such lands, places, and colonies, how many soever, with plenary right of sovereignty, property, and possession," be wholly rescinded, seeing these two clauses, being directly opposite, can no way stand one with another. But that by the first words, "*cum plenario jure,*" an absolute and unlimited cession of sovereignty was intended, the lord De Witt doth appeal to the circumstances of the treaty, and principally to a paper given in by the lords plenipotentiaries of the English themselves, July 7, 1667, in which the former clause, "*cum plenario jure*" is provided fully for, and the latter clause, "*eum prorsus in mo-*

dum," is wholly left out, and so the scruple is removed: the truth and examination of which matter of fact, I must humbly leave to your lordship; for upon this ground, it is plain that the lord De Witt will have the latter clause, "*eum prorsus in modum*," to be added only to limit and restrain the possession, as intending that those places strictly, which were actually possessed on either side on May $\frac{10}{20}$, should, as they were possessed without claim to any others, which were not so actually possessed by them at that time, be mutually conceded to each other, in the point of plenary right and sovereignty to them; and indeed my lord, this consequence is so rational, that if the matter of fact be granted, and the plenary right of the sovereignty to Surinam be yielded to be conceded in the former part of the words of that article, there is no avoiding the latter possibly: seeing, as it cannot be denied, that the latter words, "*eum prorsus in modum*," do bear the force of a limitation, it must inevitably follow, then, that if this limitation be not to be applied to the sovereignty, it must of necessity be applied to the possession and detention, because, besides these two things there is nothing else before mentioned; and I must needs acknowledge also, my lord, that my lord De Witt's plea, for the not applying the said limitation to the sovereignty, but rather to the possession and detention, is, beside the said fact, so much the more strong, firmer, and more valid, by how much no mixed sovereignty is usually at any time transferred, nor can well be done; but it would in its own nature introduce a manifest confusion, and create endless disputes about the lawfulness of the said dominion: and should it be granted, it would equally be as inconvenient for his majesty in reference to the country of the Manhat-

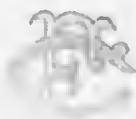
97

ons, as it is for the Dutch in reference to Surinam; so that upon the whole, my lord, I see no cause but to acknowledge the great judgment, maturity, advisedness, and civilities of my lord De Witt's answer. This therefore, being the only material thing that seems to be untaken notice of in it, which is the enumerating what places they are of which on May $\frac{10}{20}$ the Dutch were strictly possessed; for in regard it is wholly agreed by my lord De Witt himself, and so agreed as it never can by his own answer be avoided, that his possessing Surinam can give him a right to no other place beside Surinam, that he did not actually possess at that time: so, inasmuch as he cannot pretend to be possessed of every river in that coast, then he cannot pretend to have the right of sovereignty over all the whole coast, or the right of sovereignty in or over any place more of the said coast, than of those places strictly and limitedly, of which he was liquidly and certainly possessed. Which being granted, your lord President will see, that to assert the "*plenarium jus*," or sovereign right, what it is, which the Dutch now have upon the coast of Guiana, by virtue of the articles of peace, it is absolutely necessary for them that they should prove what they did so strictly possess, and should enumerate the places, rivers, countries, or colonies, distinctly and exclusively, which they had the possession of, and which as we have said is not done, but is omitted wholly, in that otherwise most full and accurate answer of my lord De Witt: for as we must grant they have not only a right to the river of Surinam, but to so many other rivers also upon that coast, as it doth appear were not only seized, but actually held and possessed by them on May $\frac{10}{20}$, so must we equally and strictly insist upon it, that beside what riv-

ers they so possessed, and can prove that they were then really, actually, and strictly held by them, they cannot challenge, nor ought we to grant they have any right of sovereignty in them; and consequently that as they have no right, so no pretension of any right, to whatever river or place was certainly and actually held by us, upon any part of that coast, be it where it will, so that, to apply the whole, as the Dutch there being possessed of the river Surinam on May $\frac{10}{20}$, could give them no right of sovereignty to, or over, Marawyn, Mapawyn, or Comowyn, which are other rivers upon the same coast of Guiana, had not these rivers been then also actually possessed by them, so their right of sovereignty over those rivers coming strictly by their actual unlimited possessing of them, can give them possibly no right to the river of Saramica, which they were not at that time actually possessed of but was actually held by us; seeing if their possession of the rivers before mentioned can give them a right to Saramica, which they cannot pretend to be possessed of, it may as well equally give them a right to a second river, and so to a third, and so to all the rivers upon the coast, which is absurd even by my lord De Witt's own reasoning. Wherefore, I conclude, my lord, that Saramica being held by us on May $\frac{10}{20}$, is ours in the sovereignty of it, by unquestionable right, and that, beside the rivers of Surinam, Mapawyn, Marowyn, and Comowyn, we have a right, equally with the Dutch, to any other rivers or places upon that coast, which was the thing principally aimed at in my last to express the duty of, my lord,

Your lordship's servant.

W. TEMPLE.



POSTSCRIPT.

The Discussion, by the Barrister, before inserted, was written by JOHN REEVES, Esq., the Author of the History of the English Law, and of other Works, legal and political.

INDEX.

A.

Absentees from general assemblies may be proceeded against in the courts of justice, and punished by fine and imprisonment, 296.

Acts of parliament extending to the king's dominions, are in force in the plantations, notwithstanding some of the provisions may be applicable only to Great Britain, 212.

————and an act, declaring such acts perpetual, is equally extensive, *ib.*

————but it seems that a clause introducing a new crime, and made to render more effectual an act not extending to the colonies, will not, unless the colonies be referred to, extend to them, *ib.*

————whether an act, which was to continue so long as Mr. Worsley continued governor of Barbadoes, ceased, if a new commission was granted to him within six months after the king's death, 238, 244.

————if the new commission be granted after the expiration of the six months, it seems that the act is determined, 238.

————where land is given to the king by act of parliament, or where a conveyance by a statute is made good against a particular person, all other men's rights are saved, without any proviso, 356.

————are perpetual, unless there are words in them to determine their duration, 429.

Administration, right of granting, belongs to the archbishop of Canterbury, where a man dies intestate in the plantations, having personal estate in England, 63.

————if granted in the plantations, that administrator will be

accountable to the administrator in England, but will be allowed the payment of just debts, if paid in the order the law allows, *ib.*

———————letters of, under the seal of the prerogative court of Canterbury, when received at the plantations are to be allowed there, and the authority of the administration, granted in the plantations, ceases from that time, 65.

Administrator in the plantations (See titles *Administration* and *Intestate.*)

———————will not be allowed the payment of any debts, without specialty in the colonies, if there be debts of a superior nature unsatisfied in England, 63.

———————if there be debts of equal nature in England and the plantations, he may discharge which he pleases, before he be sued for any other of the like nature, *ib.*

Admiralty, vessel taken by a non-commissioned ship is a perquisite of, 533.

Admiralty courts in England and the colonies.

————their jurisdiction respecting matters relating to the colonies, 499, 502, 503.

————can only, as such, try pirates by the civil law, 511, 512.

————their power is the same, but an appeal lies, from the courts in the colonies, to the court of admiralty in England, 516, 518, 531, 532.

————in acts in which the terms "essoign," "protection," or "wager of law" are used, with reference to the king's court, the admiralty is excluded, and it is not a court of record, 519

————may fine and imprison for contempt in court, but not for any thing done out of court, 520.

Advowsons in plantations subject to the laws of England, where there is no express laws of the plantation concerning the same, 58, 60.

————in case of avoidance, the ordinary of the plantation, according to the stat. 28 Hen. VIII. c. 11. s. 5. is to appoint a minister to officiate till presentation or lapse, 58, 61.

————and he may collate to a church by lapse, 60.

Algiers, observations on report relating to the trade of Minorca with, 624.

Aliens, how they become subjects, 660 to 666.

Alien enemies preserve their rights, by the law of nations, to property in the public funds of the hostile government, notwithstanding the war, 638.

American acts of the 10th of February 1715, 1716, and the 17th of July 1740, expired with the war, 232.

————goods taken under the American act of the 6th Ann, and carried to ports in America, chargeable as prize goods, with such duties as would be left in England if the same had been exported after an importation, 586.

American citizens, whether British subjects or aliens, 648.

Ancient rights restored on a re-conquest of lands, 131.

Appeal in legal proceedings lies to the king in council, 230.

———lies from the court of exchequer to the governor and council of the plantation, 489.

———and from the governor and council, to the king in council, 496, 532.

Assemblies, general, in the colonies, king's right to call and continue, 200, 231.

————under adjournment or prorogation, may be prorogued without a meeting, 239.

————whether entitled to the privileges of English parliaments, *ib.* and see 265, 292.

————the king's prerogative in relation to them is as extensive as in England, *ib.*

————are not dissolved by the publication of a commission, determining the commission of the governor by whom the king's writs were tested, 249.

————but are dissolved on the death of the king, 252, 322.

————*contra*, 299, to 320.

————are regulated by their charters, usages, and the common law of England, and are not entitled to the same privileges as the house of commons in England, 264, 293.

————the right of sending representatives to, may be altered, 270, 273, 275.

————neglecting to meet at the time to which they were adjourned, are not dissolved, 271.

————their acts are good till repealed, and are void only from notification of the repeal, 292.

————conviction of person in England is no legal objection to his sitting in, 295.

————absentees from, may be proceeded against in the courts of justice, and punished by fine and imprisonment, *ib.*

Assemblies, general, have no power to impose a tax upon convicts from England, 336.
———acts of, of the same effect in the colonies, as acts of parliament in England, 351.
———cannot alter the common law of England, or the common securities of the kingdom, or affect the king's prerogative, or take away any authority vested in the governor by virtue of the king's commission, 376.
———where patentees of lands have not planted them, assemblies have passed acts for the resumption of those lands, 387.
———acts, unwarranted by the charter, void, 402.
———act ought not to be repealed which would injure the rights of purchasers under it, after a long acquiescence. 460.
Assent, royal, precedent, as effectual as subsequent to, a session, 309.
Attorney general, informations by, observations on, and act respecting, 493, 496.

B.

Bahamas, division of an intestate mulatto's estate in the, 150.
——— treasure trove, the property of the crown, *ib.*
———charter of these islands does not entitle the proprietors to an admiralty jurisdiction, 507.
Barbadoes, regulation of proceedings in the court of common pleas in, 196.
———whether the commission of governor ceased by the king's death 234; and see title *Act.*
———act for laying a duty on wines and strong liquors imported into the island, objectionable, 360.
———private acts for docking entails objectionable for particular grounds in each act, 367.
———act of 1722, for supporting the honor and dignity of the crown, objectionable, 369.
———act relating to the payment of bank bills objectionable, as variant from the instructions of the crown, and being insufficient and repugnant to the laws of the land, the rights of the subject, and the prerogative of the crown, 373 to 383.
———act prohibiting the carrying away white servants, without the consent of the owners, under a penalty, objectionable, 384.
———act obliging officers to hand up tables of fees in their offices and courts proper, but punishment, without trial, for the omission, unjust, 391.

Barbadoes, act to empower licentiate lawyers to practice as barristers objectionable, 392.

——decree of the court of chancery, under which lands had been seized for non-payment of a charity rent, which was not charged on the grantor's real estate, controvertible, 467.

——act to bar entail in lands there proper; as by the laws of that plantation, a deed registered there will be as effectual a bar as an act of assembly, 485, 486, 487.

——approbation of acts passed in 1701, 502.

——observations on acts in 1701, 507.

Bermuda islands, report on the acts of assemblies in 1690, 1, 4, 8, and 1701, 408 to 422.

——act affecting the importation of British goods, objectionable, 422.

——observations on judicial proceedings there, 461 to 467.

Bonds from the governor of a proprietary government, for observing the acts of trade, should be to the king, his heirs, and successors, 261.

C.

Canada, Upper, crimes committed in, triable in the courts of justice there, 215.

Canary Islands not esteemed part of Europe, and wines may be carried directly from thence to the plantations, 572.

Canterbury, archbishop of, his prerogative power concerning wills and administrations, 64. See title *Administration.*

Carolina, constitutions, 276, *et seq.*

——observations against duty of 10 per cent. on British goods, 586.

——, *South*, funds arising from taxes in, disposable only by the same authority which raised them, 296.

——therefore a grant by the assembly alone, of part of the funds for supporting the rights and liberties of Great Britain and America, and the consequent payment, illegal, 296.

——acts for regulating courts of justice in, illegal, as passed by an usurped authority, 342.

——and the act relating to the biennial and other assemblies, and regulating elections of members considered derogatory of the authority of the crown, 344.

——act for the government of Charlestown objectionable, as

establishing an oligarchy, and being against the inclinations of the majority of the inhabitants, 395.

——— —act passed in 1746, relative to coins, objectionable, 425.

——— —observations on the act passed in 1747, empowering two justices and three freeholders, or a majority of them, to determine in actions of debt, where the matter in dispute did not exceed 20*l.* 476.

——— observations on their acts for the regulation of the Indian trade, 592.

———, *North,* acts not ratified by the palatine or his deputy, and three of the lords proprietors and their deputies, in the same session of parliament, not binding on the crown or people, 359.

——— acts concerning attornies from foreign parts, and for giving priority to country debts, void, so far as it postpones the execution or judgment for foreign debts, as being unwarranted by the charter. 402.

Ceded countries, inhabitants of, being French and Spaniards, not to be considered as aliens after the peace of 1763, 646.

Cession, effect of, with regard to the sovereignty of the ceded place, 485, to the end.

Chancery, by the practice of, defendant after process of contempt has extended to a sequestration, appearing and paying costs of the contempt may set aside the sequestration, 479.

Chancery may issue writs prohibiting subjects from going abroad, 548

Circuit courts can be established only by the legislature of the colony, or the parliament of Great Britain, 459.

Coin. (See title *Counterfeiting.*)

—— foreign, value of, established by proclamation, and the tender thereof, according to that value, is a legal tender; and proprietary governments, making laws to give such coins a currency beyond the proclamation, are guilty of a misdemeanor, 610.

Colonies. (See the several titles in the index.)

Commission, governor's, determination of, cannot operate to dissolve a general assembly, 249 to 261.

——— ceases by the death of the king, 252.

——— cannot empower the passing an act repugnant to the laws of England, 375.

——— its authority cannot be affected by an act of assembly, 376.

Commissions of oyer and terminer, for trial of offences, cannot be

granted in the colonies under the stat. 33 Henry VIII. c. 23. 470.

———————— but they may issue in England for the trial of offences committed in colonies, in which there are no settled courts of justice, 171, 526.

———————— and under the stat. 11 and 12 William III. c. 7. 513, 525.

Common law of England, and statutes in affirmance of it, passed antecedent to the settling of a colony, are in force there, unless there is any act to the contrary, 292, 511.

———————— but statutes made since the settling are not in force, unless the colonies be particularly named, 228, 511.

———————— cannot be altered by acts of assemblies, 376.

Connecticut, construction of the charter of, as to the power of making laws, 341.

Conquered parts, king may, under the great seal, tax and make laws to bind, 158, 231.

Conquest by the enemy suspends private property, and on a re-conquest the ancient rights revive, and are restored *jure postliminii*, 130.

———— binds inhabitants to allegiance by the law of nations, 642.

Convicts, tax imposed by the assembly of a colony upon, illegal, 336.

Conviction in England no legal objection to a person's sitting as a representative in a general assembly, 294.

Corporation cannot purchase lands which shall enure to themselves unless by license, 134.

———— establishment of, for insuring ships, observations on 544 to 609.

Conspiracy to entice subjects into a foreign service is a misdemeanor, and punishable by fine and imprisonment, 556.

Counterfeiting coin is only a misdemeanor in the colonies, unless their charters make it a great offence, 209.

Crown. See title *King*.

Customs, officers of should seize prohibited goods, and goods for which the duties have not been paid, 574.

———— cannot be concerned in trade and shipping, 598.

D.

Denizen may be master of a ship trading to the plantations, 644.

E.

East India Company, laws against British subjects engaging in foreign 557.

——————license given them to trade, with a prohibition to others, good in law, 582.

Ecclesiastical authority abroad, the king's, 41.

Escheats on the death of the tenant, without heirs, cannot be granted before they happen, otherwise than by grant or alienation of the seignory, 142.

————, on attainder of treason, belong to the crown, as a prerogative royal.—*Quære*, if grantable before they happen? *ib.*

European goods, landing of at Venice, and carrying them from thence to Guinea subjects ship and goods to forfeiture, under the stat. 15 Car. II. 267.

Evidence of a slave against one who is or has been a slave is good proof, and an act was passed in Jamaica to prevent such evidence against a free negro, 498.

Exchequer, court of, king by his prerogative may erect in the plantations, with the same powers as the court of Exchequer in England, 567.

—————— decree of, may be appealed from, to the governor and council of the plantation, 489.

F.

Fees, acts of Barbadoes, obliging officers to hang up, in their offices and courts, tables of, proper, but punishment, without trial, for the omission, unjust, 390.

Felo de se, grant of felons' goods does not extend to, 170.

Felons' goods, what passes by grant of, and what not, 170.

Fines and recoveries, in England, of lands in plantations, cannot bar the entail of such lands, unless the laws of the plantation have provided they shall have that effect, 488.

Fish, royal, may be claimed by prescription, 150.

Fishing admiral in Newfoundland, their authority under 10 and 11 William III., 539.

Fishery, observations on the charter establishing, 533.

Forfeiture, if a province has incurred, no advantage can be taken thereof but by *sacire facias*, to repeal the charter, or by inquisition finding such forfeiture, 130.

Forfeiture, but it seems the king may appoint another governor without inquisition, and his authority will be legal, 66.
———— what passes by the word forfeiture in a grant, 170.
———— effect of pardon, with reference to forfeitures, 171.
———— distribution of, under the acts of trade, 577.
Freeholders disobeying the precept of judges, punishable in a summary way by rule of court, by fine and imprisonment, 74.

G.

Georgia, surrender of the charter for establishing the colony, 148; and see title *Surrender*.
———— observation on act of, respecting trade with Indians, 591.
Gibraltar, establishment of civil jurisdiction in, 183.
Governors of plantations empowered to appoint naval officers, to receive the particulars of ships arriving at the plantation, 183
———— their commissions continue for six months after the king's death. 234, 300, 310.
———— cannot vote as councillors in the passing of bills, when the council sits in a legislative capacity, 238.
———— empowered to exercise the king's prerogative, 239, 300.
———— by virtue of their commission may dispossess the acting government, and assume the government, until the arrival of another governor, 243.
———— should use the great seal of the colony, in granting offices by virtue of their commissions; but a grant under the governor's seal may be valid, if usage dispense with the use of the great seal, 246, 247.
———— may prorogue assemblies, 247.
———— may meet, adjourn, and legally act with assemblies chosen by virtue of the king's writs, tested by a former governor, 250 to 261.
———— their commissions cease by the death of the king, 252.
———— by their death or removal, their commission does not determine; but the lieutenant governor or president of the council, may exercise the powers of it, 254, 302, 326.
———— determination of their patent does not determine the office of any person holding also by patent, nor any office held by the seal of the province, *ib.*

Governors of plantations cannot legally issue writs for choosing new representatives, without dissolving the assembly, 271.

——————— stand in the same relation to the other branches of the legislatiure, as the king to the other branches of the parliament, 302.

——————— should transmit, in due time, laws for the king's approbation, 348.

——————— cannot (by virtue of their commissions) empower the passing an act contrary to law, 375.

——————— if they have authority by their commissions and instructions to erect courts, they may grant a commission of oyer and terminer for trial of offences, 471.

——————— clause, empowering them as chancellors, to issue commissions for the care and custody of the persons and estates of idiots and lunatics, 481.

——————— by virtue of a general power of erecting courts of justice, they may appoint a chief baron of a court of exchequer, 484.

Grants King's, 160.

——————— of the office of auditor-general of the revenue of a colony, good in law, and may be exercised by a sufficient deputy, 160.

——————— of felons' goods, what passes by, 169.

——————— what passes by the word "forfeiture," 170.

——————— the circumstance of their having been warrants for making grants, many years before the grants issued, is not sufficient to support grants, otherwise irregular and void, 174.

——————— where grantees possess a greater quantity than they should hold by the words of the grant, they are liable to a resurvey, and the remedy is by information, in the name of the attorney-general of the province, in a court of equity there, to have the real quantity set out, and the excess pared off for the crown, 174.

——————— where grants are voidable, the remedy is by an information of intrusion, in the proper courts of the province; and in case of error there, by appeal to the king in council, 175.

——————— of two baronies in Carolina, "*quarum singulæ contineat* 12,000 *acras terræ*," void for uncertainty, 176.

——————— by the crown, of the office of registrar of a province, valid, 178.

——————— of office, should be under the great seal of the colony, 247.

Greenland fishery, act for encouraging, does not extend to Newfoundland, 535.
———— difference between this and the Muscovy company, 546.
Guadaloupe, considered as a plantation belonging to the crown by conquest, 640 to 643.
Guernsey and Jersey, no writ of extent out of the court of exchequer, nor any process from the court of king's bench, can be executed in, 89.
———— remedy for crown debts, is by proceeding in the courts there, *ib.*
———— are governed by laws of their own, subje[illegible] to the king's orders in council, *ib.*

H.

Hemp, of the growth of Russia, may be imported in English bottoms from the Netherlands, 569.

I. J.

Jamacia, original constitution, and commissions of the different governors of, on its conquest from the crown of Spain, and acts passed by the governor and council, and by the assembly of freeholders, and their validity and continuance, 217, *et seq.*
———— whether to be considered as a colony of English subjects, or as a conquered country, 231.
———— whether the governor of, has a right to issue writs for electing members on a vacancy, without waiting for a message from the assembly, 293, 352.
———— the "act to provide an additional subsistence for her majesty's officers and soldiers, and for other uses," objectionable, as intrenching on the queen's prerogative, 350.
———— the "act for granting a revenue to his majesty, his heirs, and successors; for the support of the governor of this island, and for revising and perpetuating the acts and laws thereof," objectionable, from its non-conformity to the instructions, 353.
———— act of foreclosure, passed by the assembly, not objected to, as doing no more than a court of equity would do, but the interference of the legislature, in private matters, generally objectionable, 356.
———— similar act, approved under particular circumstances, 385.
———— revenue acts, observations on, 397, 428, 452.
———— objections to an act, making all their laws and acts perpetual, 399.

Jamaica, "act for regulating fees," objectionable in part, from its unreasonableness, 400.
——— observations on, and objections to the acts of assembly passed in 1757 respecting the judges of the supreme court of legislature, the election of members of the assembly, the quieting, possessions, and establishing reputed boundaries, the appointing commissioners of *nisi prius*, and enlarging the jurisdiction of justices of peace in matters of debt, and the establishing the credit of the island, 430.
——— objections to a clause in an act of assembly, by which, vessels having blacks on board, amounting in number to above one-fourth of the hands, were to be forfeited, and estates of non-resident, were taxed higher than those of resident prorietors, 454.
——— objection to the acts relative to the removal of the seat of government to Kingston, and an act to enlarge the jurisdiction of the inferior court of common pleas, 456.
——— king may open ports of entry and clearance in different parts and direct officers to attend for the business of such ports, 458.
——— circuit courts, could not be established but by the act of the legislature of the island, or the parliament of Great Britain, 459.
——— commissioners of *nisi prius* not empowered, under the act passed in 17‑1, to hold a court of *nisi prius* without a commission from his majesty, 472.
——— and a commissioner so holding a court is liable to be prosecuted, by information, for misdemeanor, *ib.*
Idiots and Lunatics, form of clause, giving the governors of plantations, as chancellors, power to issue commissions agreeably to the usage and practice of England, 481.
——— the chancellor, under the king's warrant, has only powers of administration and management, and all questions (except between the lunatic and his committee) must be decided by a bill or action, 483.
Importation, is accounted from the time of the ships' coming within the limits of the port, with intent to land its cargo there, 576.
Indictment, injury to trade punishable by, 557
Informations, by attornies general, act respecting, and observations on, 494, 495.
——— lie for injuries to trade, 552.
Insurance of ships, proposed charter to a corporate body for, observations on, 599 to 609.

Intestate's, personal estate in England, and in the plantations, liability and application of, 64.

——— mulatto, in the Bahamas, dying intestate, without relations, one moiety of his estates goes to the crown, the other to his wife, 150.

See titles *Administration* and *Administrator*.

Judges, empowered to issue their precept to freeholders, where a justice of the peace has resigned, and freeholders disobeying, may be punished in a summary way, by rule of court, with fine and imprisonment, 474.

——— commission of, not revocable without misbehavior, 491.

Jus Postliminii, after a war, reverts to creditors, relative to debts contracted before the war, 633.

Justices of peace are to act according to the laws of England, 537, 538.

——— and offences against them are punishable by fine and imprisonment, 537.

——— their power is restrained to criminal matters, mentioned in their commission, 538, 541.

K.

King, his ecclesiastical authority abroad, 41.

—— his prerogative cannot be lessened or taken away, by general words, but only by express terms, 55, 135, 139.

—— his civil authority abroad, 65.

—— where a governor has committed a forfeiture, the king may, though it has not been found by inquisition, constitute another governor, and his authority will be legal, 66.

—— upon an extraordinary exigency, he may resume the government of any province, or colony, and constitute a civil and military governor thereof, 67.

—— but such governor cannot alter any of the rules of property, or methods of proceeding in civil causes, *ib.*

—— he may receive a surrender of the powers wherewith the proprietor and governor of a province is invested by grant from the crown, 67, 69, 72.

—— his authority over Guernsey and Jersey, 88.

—— his right to grant ceded lands, 105.

—— his right to a moiety of an intestate mulatto's estate, and to treasure trove in the Bahamas, 150.

King, no prescription against, where a colony has been gained within time of memory, 150.
—— his power of taxation, 158.
—— may, under the great seal, direct duties to be levied for goods exported from conquered parts, 159.
—— may, by virtue of his prerogative, make laws that will bind places obtained by conquest, *ib.*
—— may take off unappropriated duties, 160.
—— his grants, 160; and see title *Grants.*
——, his power to resume granted lands, where the conditions of the grant have not been fulfilled, 167.
—— his remedy, where grantees hold more land than the words of the grant warrant, and where the grants are voidable, 174, 175.
—— may, by virtue of his prerogative, establish courts of equity in the plantations, 195.
—— and courts of exchequer, 481.
—— and criminal courts by commission under the great seal, but not otherwise, 542 to 544.
—— should, after a surrender by trustees, of a charter for establishing a colony, issue a proclamation under the great seal, in order to authorize officers to continue in the exercise of their offices, until a new government is established, 198.
—— has always exercised the right of calling and continuing assemblies in the colonies, when, and as long as it was necessary for the public service, 200.
—— whether his prerogative under the stat. 21 James I. c. 3, concerning monopolies to grant patents to first inventors, extends to the plantations doubtful, 214.
—— may, under the great seal, give powers to governors for doing all acts which belong to him by his prerogative, 230, 231.
—— in legal proceedings, an appeal lies to the king in council, 230.
—— effect of his death upon his patents and commissions, 234.
And see titles *Patents* and *Governors.*
—— his prerogative, in relation to general assemblies, 239, 259.
—— his prerogative in the West Indies is that power, which, by the common law, he could rightfully exercise in England, 239.
—— his powers of summoning and proroguing parliament, 240.
—— by his death his commissions cease, and general assemblies are dissolved, 252, 253, 238.

King, but as to the dissolution of assemblies, see *conora*, 302 to 320
—— and acts done under commissions after his death, but before notice of it, are good, 307.
—— may, by instructions to his governor, alter the right of representation, where it was founded on instructions, if there have been no act of assembly approved by him to the contrary, 269, 273, 275.
—— as a province increases, he may erect towns and counties, and give them the privilege of choosing representatives, 292,
—— his name in acts of assembly unnecessary, 310.
—— his writ of summons is necessary for the convention of an assembly, 327.
—— taxes should be granted to the king, his heirs, and successors, 360.
—— bonds to the king, have the effect of judgments, 362.
—— his prerogative cannot be affected by any act of assembly, 376.
—— ought not (on account of the final appeal) to interfere in a case between party and party, 480.
—— cannot, by law, direct the rehearing of a cause, 490.
—— may allow an appeal in cases of any value, *ib.*
—— may grant a *nolle prosequi*, in prosecutions for duties charged by an act of assembly, 491.
—— cannot by his letters patent make bonds assignable, or make things personal descend to the heir, 576.
—— where commissioners are appointed for the trial of capital offences, he may instruct the governor to carry their sentence into execution, 544.
—— cannot enforce regulations contrary to act of parliament, 546.
—— may prohibit his subjects from going out of the realm without license, 547.
—— and may command their return, 553, 554, 555.
—— may, on special occasions, and for state reasons, restrain particular subjects from an uncontrolable liberty of trading, 549 to 554.
—— may make laws in plantations, inhabited by his subjects, with his permission, 582.
—— cannot, by treaty, make his subjects liable to other punishments, than they are subject to by the laws of the country. 623.

L.

Laws of nations, 612.
Laws, passed after the sale of a province, but before notice of such sale, are valid, but not after notice, 244, 312.

Legislature should not interfere in matters of private right without the greatest necessity, but should leave them to the legal course of justice, 357, 358.

Licentiate Lawyers, objections to, 392.

Lieutenant-governor, may be indicted, and tried in the king's bench, under the act for punishing governors of plantations, for offences committed in the plantations, 260, 644.

——————— whether subject to the penalty under the 7th and 8th Wil. III. for regulating abuses in the plantation trade, *quære, ib.*

Logwood, carriage of, from Honduras to Venice, 563.

London, bishop of, is diocesan of the colonies, 42.

Lunatics: see title *Idiots*.

M.

Man, Isle of, custom house officers cannot, by virtue of their office, make seizures in; but under the 7th Geo. I. they may, as common persons, make seizures for importations there contrary to that act, 214.

Manufactures, what machines or tools used in, are prohibited from exportation, 560.

Marshal is the proper officer in the colonies, to whom warrants should be directed, 363.

Martial law, proclamation of, does not suspend the execution of the legislative authority, nor is the ordinary course of law and justice suspended any further than is necessary to answer the military service of the public, and the exigencies of the province, 269.

Maryland bill, observations on the clauses in, and objections to, 264.

——— "act for the establishment of religious worship, according to the church of England," valid, notwithstanding the king's death; and sheriffs might execute for the 40lbs. of tobacco, established by that act, for the maintenance of ministers, 299 to 320; *contra*, 320 to 332.

——— act of recognition of queen Anne, by the assembly of, deemed improper, 332.

——— suspending act in force for eighteen months, or until the queen should declare her pleasure, but could not be continued longer, 349

Massachusett's Bay, establishment of a court of equity in, 194.

——————— construction of their charter, as to the time allowed to the king for the approval or repeal of their acts, 338.

Merchants abroad, refusing offices necessary to support the society, are debarred of all privileges, and of the protection of the consul, 588.

Minorca, with algiers, observations on the report relating to the trade of, 623.

Monopolies, doubtful whether stat. 21 Jac. I. c. 3. concerning, extends to the plantations, 214, 581.

——— action will not lie upon that statute for seizing goods of the African company, 580, 581.

Murder, persons guilty of, in the colonies, may be tried under a commission issued into any county in England, 210.

N.

Natura. ..ation act of, by assembly of a province, effect of, 332.

——— ——such an act deemed proper, 333.

———without license, will not discharge a natural-born subject from his allegiance, 645.

Naval stores, importation of, from foreign parts, by merchants for the use of the navy, prohibited by stat. 14 Ch. II. for preventing frauds, and regulating abuses in the customs, but such stores may be imported in king's ships, for the service of the navy, 567.

———carriage of, by a nation in alliance with another, to the enemy of the latter, is against the laws of nations, 621.

Navigation, act of, liberty to aliens to trade is against, 561.

———privileges of trade proposed to be granted to the Spaniards, against, 562.

Trading of Spanish ships to the British islands, is against, 567, 573.

Neutral ships: see *Trade*.

Neutrality, treaty of, with France: see *Trade*.

Newfoundland, act for encouraging the Greenland fishery, does not extend to, 536.

———trade, by 10 and 11 Wm. III. is a [illegible]e trade, and not taxable for building a prison, 537.

———powers of justices of peace there, *ib.*

———objections to articles between Great Br[illegible] and France respecting the trade, as contrary to 10 and 11 Wm III. 545.

New Jersey, construction of the king's commission, and instructions to th[illegible] governors of, with respect to his power of pardon, and suspending process, or stopping proceedings in cases of high treason or murder, 201.

———recommendation of the "act for ascertaining the places of the sitting of the representatives to meet in general assembly," 445.

New Jersey, objection to the acts for shortening lawsuits, enforcing the observance of the ordinance for establishing fees, and for acknowledging and recording deeds, 445.

———objections to a naturalization bill, and other acts passed in 1748, for punishing counterfeiters of coin and bills of credit, for staying actions against rioters, for the suppressing of riots, and for the pardoning of rioters, 446.

New York, king's right to call assemblies in, 299.

———act, declaring the illegality of the proceedings against Bayard and Hutchins, objected to, as not conformable with the queen's order in council, 340.

———observations on, and objections to the act of 1727, for preventing prosecution by information, 493, 496.

Nolle prosequi, may be granted on prosecutions for duties, charged by an act of assembly, 492.

Nova Scotia, governor and council of, have not alone a power to enact laws, 263.

———until there be an assembly, the government of the colony must be pursuant of the king's commission, *ib.*

P.

Pardon, effect of, with reference to forfeitures, 176, 531.

Parliament, king's power of summoning and proroguing, and customs of, in that respect, 240.

Patents for new inventions, whether prerogative of granting extends to the plantations doubtful, 214

———at common law, determine by the death of the king, 234.

———but by stat. 7. and 8 W. III. c. 27, and 1 Anne, c. 8, s. 2, they continue for six months after the king's death, unless suspended by his successor, 235.

———the determination of one patent cannot determine another independent on it, 254.

Pennsylvania charter, construction of, as to the six months thereby allowed to the crown to repeal laws passed in the province, 334.

———acts passed in 1723, for establishing a paper credit, and act exempting freeholders to the value of fifty acres from arrest, improper. 441.

———observations on acts passed in 1712, 13 14, and 15, 442.

Pepper, black, patent respecting, 609.

Piracy, persons suspected of, cannot be detained in custody, 207.

———stat. 11 and 12 W. III. c. 7, for suppression of, does not extend to cases of murder, 211, 527.

———is felony by the civil law, 511.

———and made so by stat. 28 Hen. VIII. c. 15. *ib.*

———by stat. 11 and 12 W. III. c. 7. special commissioners in the colonies may try piracies, 513.

———the goods of pirates are forfeited on their condemnation; and goods, piratically taken by them from others, belong to the crown, in case of non-claim by the right owners, 514, 515.

———construction of proclamation of pardon to pirates and robbers in the American seas, 529.

———pardon of pirates saves their goods from forfeiture, but goods piratically taken may be recovered by the owners by action, 531.

Plantations: see the several titles in the index.

Plantation and culture of lands, is a condition in law, annexed to the title to lands in the colonies, 387.

Plantation trade, act of 7 and 8 W. III. for regulating abuses in, extends only to governors and commanders in chief, 263.

Prerogative: see title *King*.

Prescription, royal fish may be claimed by, 150.

Prescription, a colony acquired within time of memory, excludes prescription against the crown, *ib.*

Prohibitions, the constant remedy of the common law to prevent the encroachments of the civil law, 516.

————their necessity and propriety, 517.

————if legally granted, cannot be hindered by the governors; if illegally, an appeal is the proper remedy, 521.

Proprietary plantations, laws made in, should be subject to the king's approbation, 340.

————————and should not exceed the charter, 290.

Prussia, treaty of commerce with, observations on, 325.

R.

Recognition, of a sovereign act of, improper, 332.

Recoveries: see title *Fines*.

Remedy of the crown where grantees hold more lands than the words of the grant warrant, where the grants are voidable, 175, 176.

Repeal of acts of assembly, takes place from its notification, 292.

Repeal time allowed to the crown, to repeal laws, is to be counted from the period of their delivery to the privy council, 337.

Representation, where the right of, is founded on instructions from the crown, it may from time to time be altered in the same manner, if there have been no act of assembly approved by the crown to the contrary, 269, 273, 275.

Reprisals will not lie, where there is no denial of justice, nor a delay amounting to a denial, 316.

——— when to be granted, and what steps should be taken before they are granted, 618, 619, 620.

Romish priests, laws of England in force in the plantations against, 43, 44.

Russia Company, their privileges of importation, against the navigation act and the charter of the East India company, 587.

S.

Scotchman is an Englishman within the act for regulating abuses in the plantation trade, 644.

Seal Great, of a colony. all grants of offices, and acts of the crown should be under, 247, 248.

——— but the governor's private seal may be used, if it be the custom, *ib.*

Seamen, the king may, by proclamation, under the great seal command them to return if employed in a foreign service, and prohibit them from going into a foreign service, 561.

Seamen, cast away, duty for relief of, and observations on the distribution and evasion thereof, 588.

Subjects English, carry with them the laws of England whereever they form colonies, and receive the king's protection, 206, 517.

——— such colonies cannot be taxed, but by the parliaments of Great Britain, or with the consent of some representative body of the people of the island, 231.

——— may be prohibited from going out of the realm without license, 231, 257.

——— and may, except they are merchants, be recalled by letters of privy seal, 554, 560.

——— and if they do not return, they forfeit the rents of their lands for life, and all their personal estate, 560, 646.

——— may be restrained by the crown from liberty of trading,

and punishable for a breach of the regulations of the crown, 549, to 554 and 582, to 646.

Subjects, English, how they may become aliens, 666.

Surrender, by proprietors and governors to the crown, of their powers and privileges, 67, 69, 72.

———method of making such surrender, 71.

———after a surrender, by trustees, of a charter for establishing a colony, the king should issue [illegible] clamation under the great seal, in order to authorize officers to co[illegible] nue in the exercise of their offices until a new government is established, 198.

Suspension of rights by conquest of land, revival of those rights on a reconquest, 131.

T.

Taxation of colonies, king's power of, 158; and see title *King*.

Taxes should be granted to the king, his heirs and successors, 360.

Temporary laws in the plantations, whereby the king's prerogative was evaded, to his governors in plantations not granted in property, and in proprietary plantations by an act of the parliament of Great Britain 338.

Tenure of lands in Virginia, being free and common socage, as of the manor of East Greenwich, where any person dies without heirs, his lands escheat to the crown, 142.

———but escheats on attainder of treason belong to the crown, as a prerogative royal, *ib.*

Title to lands in the colonies must be supported by an actual culture and plantation of it, 387.

Trade is under the control, management, and direction of the king, 549.

———injuries to it, punishable by indictment and information, 551.

———carried on from France to Portugal by unlicensed English vessels, against the stat. 3d and 4th Anne, 571.

———in neutral ships, with an enemy's country, prohibited, 576.

———license to trade, with a prohibition to others, is good in law, 582.

Treason escheats, on attainder of: see title *Escheats*.

———foreign may be tried in the colonies by virtue of a special commission from the crown, 529.

Treasure trove in the Bahamas the property of the crown, 151.

Treaties, subjects breaking and taking commissions from a foreign power to cruize against the king's allies, aro guilty of an offence against the law of nations, and by the civil law, of the "*crimen læsæ majestatis*," and by the law of England are punishable by fine and imprisonment, 617, 618.

——French ships trading in breach of treaties, in British plantations, subject to seiznre and confiscation, under the treaty of neutrality in 1686, and *vice versa*, 627.

——but British ships not liable to confiscation in England, for breach of the treaty, 628.

——that treaty in force in 1756, 629, *et seq*.

——are compacts, superseding the law of nations, 630.

——, o[illegible]gations in, may be entered into by implication, 631.

——essence of a definitive treaty of peace, that the commercial and friendly intercourse of the contracting powers is replaced in its former state, 633.

U.

Union with Scotland, goods imported into London after, seized as forfeited, and suggestion of mode of proceeding for discharging the seizure, 583.

United States, whether persons born in the king's allegiance, and remaining in the United States, after the acknowledgment of their independence, were aliens or subjects, from the period of that acknowledgment, 648

Usage long uninterrupted, of a law, imports the consent of the proprietor and people of a colony, that it should be in force there, 208, 228.

Usage, by stat. 25 Geo. II. c. 6. s. 10. it was considered sufficient to have extended an act to the colonies, *ib*. 209.

V.

Vice-[illegible] by his patent, is receiver of the dues and perquisites of the [illegible] and they aro restrained by [illegible]

Virginia, [illegible] prescribed by tho governor's commission [illegible] ed, 344.

Virginia, construction of the clauses in the act for laying a duty on liquors, and respecting the appropriation and application of 200*l.* per anum, for the relief of the college of William and Mary, 403.

——— observations upon acts of the assembly, passed in 1700, 1701 and 1702, 405.

——— objections to the acts for the better government of convicts imported, and for the further preventing the clandestine transportation of persons out of the colony, that they amounted to a prohibition of convicts being imported into the province 436.

——— act passed in 1723 objectionable, from its preventing free negroes, mulattoes, and Indians, from voting at elections, 439.

W.

War is a temporary exertion of force, to decide a point of interest, which no human tribunal can determine, 633.

Wares painted, importation of, prohibited by 3 Edward IV. c. 4, 579.

Warrants for issuing grants not sufficient to support those grants, if otherwise irregular and void, 173.

——— to disseize a person of his freehold, without trial, contrary to law, 375.

Waste and unimproved lands, where persons under grants from the crown have possessed, it is hardly possible for a stale title to prevail against them, 105.

West Indies, whether the general assemblies of the provinces they are entitled to the privileges claimed by, and allowed to parliaments of England, 239.

Wreck, no salvage duty or gratification due on; and nothing but reasonable compensation for labor in saving cargo, 625.

———, cargo of, in the nature of pledge for the frieght, *ib.*

Writ of cessavit, is only where a tenure is created by a grant in fee farm, 149.

——— ——— does not lie, of lands in a colony, on the settlement of which the statutes which gave the writ were put in practice, *ib.*