century ago the Court would not have seen further; but now it is said the Court must look further and see the real intent of the deed; namely, that it was a mortgage.

We are all of opinion, that the answer is a good one, and that the exception to the general rule was allowed of for the advancement of agriculture and tillage.

We are also of opinion, that the Court ought to look into the substance of the deed, and to see with the same eyes as the rest of the world: it is in substance a mortgage, though in form a lease for 99 years. But we think we have good authority to say, that the wife is nevertheless bound by it, and that her subsequent acts set up this mortgage against her.

Perkins, which is a very good authority in point of law, in sect. 154, says, "It is to be known that a deed cannot have and take effect at every delivery as a deed; for if the first delivery take effect, the second delivery is void. As in case an infant, or a man in prison, makes a deed, and deliver the same as his deed, &c. and afterwards the infant, when he cometh to his full age, or the man imprisoned when he is at large, deliver again the same deed as his deed, which he delivered before **[204]** as his deed, this second delivery is void. But if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and, therefore, if after the death of her husband she being sole, deliver the same deed again unto me as her deed, the second delivery is good and effectual." The Year Books, Mich. 3 Hen. 6, 4, and Hil. 8 Hen. 6, 8, confirm the proposition laid down by Perkins; namely, that the deed is not to be re-executed or re-attested, but delivered only. Now delivery is an act in pais only.

The question then is, whether the law has laid down any precise form in which delivery must be made, or whether circumstances may not be equivalent to it without actual delivery?

Lord Coke in his Commentary on Lit. 36, says, "As a deed may be delivered to the party without words, so a deed may be delivered by words, without any act of delivery: as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, take up the said writing, it is sufficient for you, as it will serve your turn, it is a sufficient delivery."—2 Roll. Abr. 26, pl. 2.

This brings it to the single question, whether these facts amount to a delivery. Now the mortgage deed was in the hands of the mortgagee: the wife, after the death of her husband the mortgagor, surrenders possession under her own hand to Sanders and Smith, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms. This is a clear acknowledgment that the deed was hers, and that she was content, the defendants should enjoy according to the terms of the deed.

Therefore, we are all of opinion for the defendants, and that these facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed.

Per Cur. unanimously. Rule for a new trial discharged.

CAMPBELL *versus* HALL. 1774.

[S. C. Lofft, 655; see *Sottomayor* v. *De Barros*, 1879, 5 P. D. 106; *West Rand Central Gold Mining Company* v. *Rex* [1905], 2 K. B. 406.]

This case was very elaborately argued four several times; and now on this day Lord Mansfield stated the case, and delivered the unanimous opinion of the Court, as follows:

This is an action that was brought by the plaintiff James Campbell, who is a natural born subject of this kingdom, and who, upon the 3d of March 1763, purchased a plantation in the island of Grenada: and it is brought against the defendant **[205]** William Hall, who was a collector for His Majesty of a duty of four and an half per cent. upon all goods and sugars exported from the island of Grenada. And the action is brought to recover back a sum of money which was paid, as this duty of four and an half per cent., upon sugars that were exported from the island of Grenada, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received

it, not having been imposed by lawful or sufficient authority to warrant the same. It is stated by the special verdict, that that money still remains in the hands of the defendant, not paid over by him to the use of the King, but continued in his hands, and so continues with the privity and consent of His Majesty's Attorney General, for the express purpose of trying the question as to the validity of imposing this duty.

It came on to be tried at Guildhall, and of course, from the nature of the question, both sides came prepared to have a special verdict; and a special verdict was found, which states as follows.

That the island of Grenada was taken by the British arms, in open war, from the French King.

That the island of Grenada surrendered upon capitulation, and that the capitulation on which it surrendered, was by reference to the capitulation upon which the island of Martinique had before surrendered.

The special verdict then states some articles of the capitulation, and particularly the 5th article, by which it is agreed, that Grenada should continue to be governed by its present laws until His Majesty's further pleasure be known. It next states the 6th article; where, to a demand of the inhabitants of Grenada, requiring that they should be maintained in their property and effects, moveable and immoveable, of what nature soever, and that they should be preserved in their privileges, rights, honors, and exemptions; the answer is, the inhabitants, being subjects of Great Britain, will enjoy their properties and privileges in like manner as the other His Majesty's subjects in the other British Leeward Islands: so that the answer is, that they will have the consequences of their being subjects, and that they will be as much subjects as any of the other Leeward Islands.

Then it states another article of the capitulation; viz. the 7th article, by which they demand, that they shall pay no other **[206]** duties than what they before paid to the French King; that the capitation tax shall be the same, and that the expences of the Courts of Justice, and of the administration of government, should be paid out of the King's demesne: in answer to which they are referred to the answer I have stated, as given to the foregoing article; that is, being subjects they will be entitled in like manner as the other His Majesty's subjects in the British Leeward Islands.

The next thing stated in the special verdict is, the treaty of peace signed the 10th February, 1763; and it states that part of the treaty of peace by which the island of Grenada is ceded; and some clauses which are not at all material for me to state.

The next instrument is a proclamation under the Great Seal, bearing date the 7th of October, 1763, wherein amongst other things it is said as follows:

Whereas it will greatly contribute to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are and shall become inhabitants thereof: we have thought fit to publish and declare by this our proclamation, that we have in our letters patent under our Great Seal of Great Britain, by which the said governments are constituted, given express power and direction to our governors of the said colonies respectively, that so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council summon and call general assemblies, within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces of America, which are already under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people to be summoned as aforesaid, to make, constitute, and ordain laws, statutes, and Ordinances, for the public peace, welfare, and good government of our said colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions, as are used in our other colonies.

The next instrument stated in the special verdict, is the letters patent under the Great Seal, or rather a proclamation, bearing date the 26th March, 1764; wherein, the King recites a survey and division of the ceded islands, and that he had ordered them **[207]** to be divided into allotments, as an invitation to purchasers to come in and purchase upon the terms and conditions specified in that proclamation.

The next instrument stated, is the letters patent under the Great Seal, bearing date the 9th of April, 1764. In these letters there is a commission appointing General

Melville Governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner of the other assemblies of the King's provinces in America. This instrument is dated the 9th of April, 1764. The governor arrived in Grenada on the 14th December, 1764, and before the end of the year 1765, an assembly actually met in the island of Grenada. But before the arrival of the governor at Grenada, indeed before his departure from London, there is another instrument upon the validity of which the whole question turns, which instrument contains letters patent under the Great Seal, bearing date the 20th July, 1764. Wherein, the King reciting, that whereas, in Barbadoes, and in all the British Leeward Islands, there was a duty of four and an half per cent. upon all sugars, &c. exported; and reciting in these words; that whereas it is reasonable and expedient, and of importance to our other sugar islands, that the like duty should take place in our said island of Grenada; proceeds thus: We have thought fit, and our Royal will and pleasure is, and we do hereby, by virtue of our prerogative Royal, order, direct, and appoint, that from and after the 29th day of September next ensuing the date of these presents, a duty or impost of four and a half per cent. in specie, shall be raised and paid to us, our heirs and successors, upon all dead commodities, the growth and produce of our said island of Grenada, that shall be shipped off from the same, in lieu of all customs and import duties, hitherto collected upon goods imported and exported into and out of the said island, under the authority of His Most Christian Majesty.

The special verdict then states that in fact this duty of four and an half per cent. is paid in all the British Leeward Islands, and sets forth the several Acts of Assembly relative to these duties. They are public Acts: therefore, I shall not state them; as any gentleman may have access to them; they depend upon different circumstances and occasions, but are all referable to those duties in our islands. This, with what I set out with in the opening, **[208]** is the whole of the special verdict that is material to the question.

The general question that arises out of all these facts found by the special verdict, is this; whether the letters patent under the Great Seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and half per cent. duty above mentioned, which is paid in all the British Leeward Islands?

It has been contended at the Bar, that the letters patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the King could not exercise such a legislative power over a conquered country.

The second point is, that though the King had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters patent of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

[209] The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's*

case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow subjects in the other Leeward Islands.

The only question then on this first point is, whether the King had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, whether the King had of himself that power?

It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the **[210]** treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England.

The conquest and the alteration of the laws of Ireland have been variously and learnedly discussed by lawyers and writers of great fame, at different periods of time: but no man ever said, that the change in the laws of that country was made by the Parliament of England: no man ever said the Crown could not do it. The fact in truth, after all the researches which have been made, comes out clearly to be, as it is laid down by Lord Chief Justice Vaughan, that Ireland received the laws of England, by the charters and commands of Hen. 2, King John, Hen. 3, and he adds an et cætera to take in Ed. 1, and the subsequent Kings. And he shews clearly the mistake of imagining that the charters of the 12th of John, were by the assent of a Parliament of Ireland. Whenever the first Parliament was called in Ireland, that change was introduced without the interposition of the Parliament of England; and must, therefore, be derived from the Crown.

Mr. Barrington is well warranted in saying that the Statute of Wales, 12 Ed. 1st, is certainly no more than regulations made by the King in his Council, for the Government of Wales, which the preamble says was then totally subdued. Though, for various political purposes, he feigned Wales to be a feoff of his Crown; yet he governed it as a conquest. For Ed. 1st never pretended that he could, without the assent of Parliament, make laws to bind any part of the realm.

Berwick, after the conquest of it, was governed by charters from the Crown without the interposition of Parliament, till the reign of Jac. 1st.

All the alterations in the laws of Gascony, Guienne, and Calais, must have been under the King's authority; because all the Acts of Parliament relative to them are extant. For they were in the reign of Edward 3d, and all the Acts of Parliament of that time are extant. There are some Acts of Parliament relative to each of these conquests that I have named, but none for any change of their laws, and particularly with re-**[211]**-gard to Calais, which is alluded to as if their laws were considered as given by the Crown.

Besides the garrison, there are inhabitants, property, and trade in Gibraltar: ever since that conquest the King has made orders and regulations suitable to those who live, &c. or trade, or enjoy property in a garrison town.

The Attorney General alluded to a variety of instances, and several very lately, in which the King had exercised legislation in Minorca: there, there are many inhabitants, much property, and trade. If it is said, that the King does it as coming in the place of the King of Spain, because their old constitution remains, the same argument holds here. For before the 7th October 1763, the original constitution of Grenada continued, and the King stood in place of their former Sovereign.

After the conquest of New York, in which most of the old Dutch inhabitants remained, King Charles 2d changed the form of their constitution and political Government; by granting it to the Duke of York, to hold of his Crown, under all the regulations contained in the letters patent.

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster-Hall; it never was questioned in Parliament. Coke's report of the arguments and resolutions of the Judges in *Calvin's case*, lays it down as clear. If a King (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdon; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament.* It is plain he alludes to his own country, because he alludes to a country where there is a Parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an Act of Parliament."

[212] They considered the distinction in law as clear, and an indisputable consequence of the island being in the one State or in the other. Whether it remained a conquest, or was made a colony they did not examine. I have upon former occasions traced the constitution of Jamaica, as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the island so late as the restoration; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no Spanish names among the white inhabitants, there were among the negroes. King Charles 2d by proclamation invited settlers there, he made grants of lands: he appointed at first a governor and council only: afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the King, has arisen in the same manner; not from grants, but from commissions to call assemblies; and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his Crown; like the cases of the island of St. Helena and St. John, mentioned by Mr. Attorney General.

A maxim of constitutional law as declared by all the Judges in *Calvin's case*, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters patent of the 20th July, 1764, the King had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763.

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* 7 Rep. 17 b.

See what it is that the King there says, with what view, and how he engages himself and pledges his word.

"For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circum-**[213]**-stances of the colony will admit), to call an assembly to enact laws," &c. With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, &c. more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasors: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the King, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by Courts of Justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the King.

Therefore, though the abolishing the duties of the French King and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the King's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last Act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "It can only **[214]** now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff.

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1923 ?

ELDRIDGE *versus* KNOTT AND OTHERS. 1774. Mere length of time, short of the period fixed by the Stat. of Limitations, and unaccompanied with any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent.

[Referred to, *Bryant* v. *Foot*, 1868, L. R. 3 Q. B. 516; *Dalton* v. *Angus*, 6 App. Cas. 783.]

Upon shewing cause why a new trial should not be granted in this case, Mr. Justice Ashhurst reported from Baron Eyre as follows: This was an action of trespass for breaking and entering the plaintiff's house, and destroying his goods. Plea not guilty. Verdict for the plaintiff.

The defendants were bailiffs of Dennis Rolle, Esq; lord of the manor of East Suderly and Lockerly in the county of Wilts; and the trespass complained of, was for taking a distress for quit-rents due to the lord, in right of this manor. Upon evidence it appeared, that till the year 1736, a quit rent had been regularly paid to the respective lords of this manor, for the tenement in question. That in the year 1738, a demand was made and refused; since which time there had been no further demand, nor had any payment been made, till within these few years, from the year 1736 to the time of the present action. That in 1736, an action was tried between the lord of the manor, and the owner of the tenement in question, for cutting down