STATE

OF THE

QUESTION, &c.

[Price Half-a-Crown.]

STATE

OF THE

QUESTION,

HOW FAR

IMPEACHMENTS

ARE AFFECTED BY A

DISSOLUTION OF PARLIAMENT?

It is the Power of Impeachments has hitherto preſerved the Conſtitution of this Government from the many Attempts of evil Miniſters; and 'tis to that we muſt always owe the common Safety; and therefore the Poſſibility, Suppoſition, or Reality, of a Hardſhip to a private Perſon, muſt not ſtand in Competition with the publick Safety, nor with the Rights and Liberties of all the People of England.

Vindic. of Rights of Commons, by Sir H. Mackworth—Ld. Somers's Tracts, vol. 8. p. 347.

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MDCCXCI.

ADVERTISEMENT.

THE Author of the following ſheets is fully aware, that they are offered to the Public much too late in the diſcuſſion of the ſubject to which they relate, to entitle him to the ſlighteſt claim to Originality either of Argument or Illuſtration.—If this Diſavowal was neceſſary while his work was preparing for the Preſs, it is become much more ſo ſince the publication of a "Review "of the Arguments in favour of the Con-"tinuance of Impeachments;" in which the courſe of Reaſoning, which he has adopted, has been already ſo forcibly and elegantly purſued.—The Subject however is certainly both of extent and importance enough to claim the fulleſt inveſtigation.—

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A different arrangement of the ſame materials, another view of the ſame Arguments, may have its uſe in enforcing truth, and detecting fallacy. This conſideration alone has deterred him from ſuppreſſing the reſult of his reſearches.—The candour of the Public muſt determine how far it can avail in his juſtification.

State

State of the Queſtion, &c.

THE Diſſolution of the laſt Parliament having put a ſtop to the actual continuance of the Trial of Mr. Haſtings, under an Impeachment by the Houſe of Commons, a Queſtion has ariſen as to its legal effect on the proceeding itſelf. If this be conſidered abſtractedly from the Caſe on which it ariſes, and with a reference only to its political conſequences, it muſt be the wiſh of every unprejudiced mind, that no accidental change of circumſtances, no technical objections of form, ſhould impede the courſe of Juſtice, or fruſtrate the exculpation of the accuſed. If we then turn to Hiſtory for an account of ſimilar Proceedings, we muſt be ſtruck to find, that a deciſion has been ſolemnly made by the deliberate conſent of the two Houſes of Parliament, on this very point, which

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was followed by the conviction and execution of one of the persons whom it affected; and, since the Question is still agitated, we are led to ask, Whether that Decision was justified by the ancient usage of Parliamentary Judicature, as well as by the acknowledged principles of the Constitution? What has occurred in subsequent times to affect the validity of that Determination? or, lastly, Whether it be in itself so inconsistent with technical legal reasoning, that neither authority, nor the idea of general convenience, can avail to support it?—The whole subject will, I believe, be embraced, by considering what can be urged on each of these questions in the order in which they arise.

PART

P A R T I.

THE Decision to which I have alluded is the Resolution of the House of Lords of the 19th of March, 1678-9, which adopted the Report of the Lords Committees for Privileges conceived in these terms; "That the Dissolution of the last "Parliament doth not alter the State of the Im-"peachments brought up by the Commons in "that Parliament." These Impeachments were two; the first brought up Dec. 5th, 1678, against the Lords Arundel, Powis, Bellasis, Petre, and Stafford; the second Dec. 23d, against the Earl of Danby, both agreeing in the same charges of Treason and other High Crimes and Misdemeanors, but differing in almost every other circumstance, and the latter only accompanied with Articles exhibited. The former was founded on a belief of the existence of the famous Popish Plot, into the Examination of which the House of Commons had entered with great zeal, and much prejudice, as soon as they were assembled in the preceding October. The Consideration of the impro-

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bability of ſuch a Plot, ariſing from the Deſigns attributed to it, the perſons ſuppoſed to be concerned in it, and the character and deportment of the Witneſſes who made the diſcovery; together with all the hardſhips to which the accuſed were expoſed in the ſubſequent ſtages of various proſecutions, is foreign to the ſubject of this Enquiry. —In a more popular diſcuſſion of it, theſe topics may be employed with ſome hopes of ſucceſs to influence the paſſions, and miſguide the judgement. It will be readily admitted that ſuch was the ferment of men's minds at this time, occaſioned by the apprehenſions of ſome, and the deſigns of others, as to throw a conſiderable degree of ſuſpicion on every tranſaction in which this prepoſſeſſion could operate; but on the other hand it would be unfair to contaminate with this Aſperſion any other cotemporary proceedings, which were founded on juſt and conſtitutional principles, and free from the political infection of the times—Let it be obſerved then, that the Houſe of Commons had already carried up their general Impeachment of the five Lords, which thoſe who judge leaſt favourably of their proceedings, think they were in no great haſte to proſecute; when their attention was called off from this grand object of National alarm, to an inveſtigation which excited ſimilar zeal, without the imputation of ſimilar deluſion. This was the Affair of the Earl of Danby, which was not brought before the Houſe

Houſe till Dec. 19th, in the manner that is too well known to require repetition here, and proceeded upon with ſo much diſpatch, that on the 23d, as we have ſeen, not only the Impeachment, but the Articles, were carried up to the Houſe of Peers. It will be ſufficient to obſerve upon this caſe, to diſtinguiſh it from that of the other Lords impeached, that an occaſion never preſented itſelf in which the Houſe of Commons more conſtitutionally exerted their privilege of accuſation, or in which the principles on which that privilege is founded were more juſtly felt and illuſtrated—I ſpeak not here of the form in which the Articles were framed (which * was oppoſed by ſome of the moſt eminent Lawyers) nor of the ſubſequent queſtions that aroſe in the caſe; ſtill leſs of the perſonal hardſhips of Lord Danby, who ſeems to have incurred as little blame in this tranſaction, as was poſſible for any confidential Miniſter of ſuch a Prince; but of the great end of puniſhment, example, and of the object of that example, the future ſecurity both of the crown and people. It was plain that the Intereſts of the Nation, and thoſe of its allies, had been offered to ſale, for a price, the object of which was avowed to be, to enable the King to govern, at leaſt for three years, without the controul of Parliament—The Offence was eſtabliſhed, Where was the Offender to be

* Serjeant Maynard, Serjeant Crooke, Mr. Powle.

 found?

found? the ſaving Maxim that the King can do no wrong, which in appearance exalts the Prerogative out of all bounds, but in reality affords the only rational controul to it, was not to be violated: in vain did the King interpoſe, with * a raſhneſs, that however laudable in private Friendſhip, was deſtructive of the firſt principles of the Government in which he preſided, to take upon himſelf the reſponſibility attached to the great Offices of the State; the Houſe of Commons purſued their object with firmneſs; reſolved by cruſhing the hand that executed, to deprive the head that conceived the miſchief, of the future means of carrying its deſigns into effect—With this ſpirit the Parliament broke up, Dec. 30th, not without ſome altercation between the Houſes on the ſubject of ſequeſtering Lord Danby—The new Parliament met on the 6th of March, but the Houſe of Commons being engaged in a Conteſt with the King about the choice of a Speaker, proceeded on no other Buſineſs till the 15th of March. In the mean time (on the 11th) the Lords referred it to a Committe to conſider "Whether Petitions of Appeal which were pre-"ſented to the Houſe in the laſt Parliament be "ſtill in force to be proceeded on;" and the

* ——— in me convertite ferrum;
——— mea fraus omnis, nihil ille neque auſus,
Nec potuit. VIRG.

next

next day it is farther referred to them "To con-"ſider of the State of the Impeachments brought "up in the laſt Parliament, and all the incidents "relating thereto." The Prorogation on the 13th prevented any thing being done on theſe references: they were therefore renewed when the Parliament met again on the 17th of March; and the next day Lord Eſſex reported that the Lords Committees "Upon peruſal of the Judge-"ment of this Houſe, 29th of March, 1673, "are of Opinion that in all Caſes of Appeals and "Writs of Error, they continue and are to be "proceeded on *in ſtatu quo*, as they ſtood at the "Diſſolution of the laſt Parliament without be-"ginning *de novo*—and their Lordſhips are of "Opinion that the diſſolution of the laſt Parlia-"ment doth not alter the State of the Impeach-"ments brought up by the Commons in that "Parliament"—to which Report on the next day "After ſome time ſpent in conſideration thereof, "the Houſe agreed"—and in conſequence, on the 20th, Lord Danby was ordered to put in his anſwer. From this detail it appears, that the whole of the Enquiry which led to this Adjudication, originated in the Houſe of Peers, without the ſlighteſt intervention of the Commons, who were certainly the moſt likely to be infected with the party ſpirit which has been imputed to this tranſaction: that its firſt object was the State of Petitions of Appeal; a queſtion of general im-

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port as a rule of proceeding, totally unconnected with the prevailing Diſſentions of the time; and that, if a political bias muſt be attributed to this judicial regulation, becauſe the Lords Shafteſbury and Eſſex preſided in theſe Committees, it certainly was directed more immediately againſt * Lord Danby, than the five Lords, both as the Impeachment againſt him was in a more advanced ſtate, than the other; and alſo from his anſwer being called for as ſoon as this deciſion took place. It is indeed difficult to judge how far private and particular motives may influence the diſcuſſion of any public queſtion; but it is obvious that this was a period when a deciſion on both theſe points of civil and criminal Judicature in Parliament was likely to be called for: this was the firſt Parliament, except that which ſucceeded the ſhort Convention Parliament, that had met after a diſſolution by the King ſince 1640, and as a few years before, the Effect of a prorogation on Petitions of Appeal had been conſidered, it was natural that now the Enquiry ſhould embrace the caſe of a diſſolution, which not being then foreſeen, had not been provided for. If this is a ſatisfactory account of the introduction of the Subject at this time, its

* This Idea is ſtrengthened by what was ſaid by Lord Angleſea at a Conference, Ap. 12, 1679, on the Bill of Attainder againſt Lord Danby "That *in the tranſaction of* "*this affair* there were two points gained by the Houſe of "Commons, one of which was this deciſion,

being

being extended to the queſtion of Impeachment was an obvious conſequence; and if, as has been ſhewn, the deciſion of it pointed chiefly at Lord Danby, it is not only, in a great meaſure, cleared from the ſuſpicion of influence from the popular frenzy, but, as the Lords were certainly in general not very * hoſtile to that Nobleman, it carries with it the ſtronger marks of impartiality.

Let us now ſee on what this Reſolution of the Committee, thus adopted by the Houſe, was founded: they ſtate in the firſt place that it was † "Upon peruſal of the Judgement of the Houſe, "29th of March, 1673;" and the journal of the Houſe was ready to be produced to authenticate it: to this then we muſt refer for ſuch Prece-

* The Houſe of Commons ſeem ſuſpicious of them through the whole of their proceedings—Sir T. Clarges ſaid in a debate, May the 9th, 1679: "the whole manner of the Lords "proceedings ſince the plot ſeems extraordinary, and I deſpair "of Juſtice from them"—the Commons complained of their allowing Lord Danby's pardon to be argued; and ſuffering the Biſhops to vote; and appointing an early day for the Trial of the five Lords, when they intended to proceed againſt Lord Danby, whom they ſay they had impeached firſt by Articles. Grey's Debs. Vol. 7.

† It ſeems extraordinary that Mr. Chriſtian, in his pamphlet on this ſubject, ſhould have omitted this part of the report in his Appendix of precedents, which perhaps accounts for his ſaying (p. 28, 2d Edit.) "That no precedent authority "or principle whatever is cited or referred to by this "Committee."

dents

dents as it afforded to illuſtrate the point before them. Whatever was the occaſion of that reference, it certainly had no relation to any ſubject of political difference, being confined to the caſe of private ſuits, at a time when no public proſecution was depending, which might be influenced by the determination of it. It was in theſe terms, "Whether an Appeal to this Houſe (either by "Writ of Error or by Petition) from the pro-"ceedings of any other Court, being depending "and not determined in one Seſſion of Parliament "continue in ſtatu quo unto the next Seſſion of "Parliament without renewing the Writ of Error "or Petition." It ſhould be obſerved however that when the Lords Committees make their Report, and ſtate in it the Matter they underſtood to be referred to them, there is this material inſertion in the terms of the queſtion, viz. "*Or any* "*other Buſineſs wherein their Lordſhips act as a Court* "*of Judicature and not in their legiſlative capacity.*" Thoſe who are better acquainted than I am with the forms of the Houſe, will determine, which ſtatement of the queſtion is moſt likely to be accurate, that taken down by the Clerk when the reference was made, or that returned, as it muſt have been, in writing, by the Lords who had been employed in the inveſtigation of it: it is ſufficient for the preſent purpoſe, that they who made the report ſo conſidered the queſtion, and accordingly declared their opinion generally; "That

"That buſineſſes depending in one Parliament, "or Seſſion of Parliament, have been continued "to the next Seſſion of the ſame Parliament, and "the proceedings thereupon have remained in "the ſame ſtate in which they were left when laſt "in agitation;" and that the Houſe approved of "this Report, and *ordered it accordingly*. In order to warrant the concluſion they draw, the Committee refer to precedents of a criminal as well as a civil nature, and ſome that apply to a diſſolution as well as a prorogation; which laſt were applicable *a fortiori* to the caſe before them.—What effect theſe had upon their judgement may be collected from the terms in which they convey it; for though they do not chooſe to exceed the limits of the queſtion which they underſtood to be referred to them, yet they cannot refrain from hinting an opinion as to Buſineſſes depending "*in* "*one Parliament*," as well as "*in one Seſſion of* "*Parliament*." I ſay *hinting*, becauſe it is manifeſt that the ſentence is incomplete as it ſtands, and requires to make it perfect the correlative of "*the next Parliament*," as that branch of it which relates to "*one Seſſion*" is ſupplied with that of "*the next Seſſion*."

It appears from the Precedents ſtated in this Report, that in civil caſes which were brought either originally, or by way of Appeal in Parliament, it was uſual to grant a * *Scire facias* return-

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* I omit referring to theſe caſes, becauſe Lord Hale, in his treatiſe

able *in the next Parliament* after the Record was brought in. I admit that in ancient times this term was frequently applied to expreſs the *next Seſſions*; but it cannot be denied, on the other hand, that it was at leaſt equally adapted to convey the idea annexed to it at preſent; ſo that, though every Seſſion might then be conſidered as a ſeparate Parliament (as to all purpoſes of legiſlation it is admitted to be), yet, what was more ſubſtantially diſtinct by a diſſolution, muſt ſtill be comprehended under the ſame term †. It appears further, that when the caſe was part heard, a day was given to the parties to appear in ‡ the next Seſſion, or ſometimes in the || next Parliament, when

treatiſe on the Juriſdiction of the Lords Houſe, printed by Mr. Hargrave, ſtates expreſsly; " regularly the *Scire facias* was " returnable the next Parliament, or the next Seſſion of Par- " liament;" p. 150. He adds, " But though the award was " ſuch, yet the writ was rarely, if at all, taken out till the " new Parliament ſummoned." That is, the Houſe being poſſeſſed of the cauſe by the Record being brought up, ordered the party complained of to attend the deciſion of it in the *next Parliament*. When the Writ was actually ſued out is perfectly immaterial.

† Mr. Chriſtian, who raiſes this objection, admits that three of the caſes were proceeded on in new Parliaments. p. 26.

‡ Caſe of William de Valentia, 18 Edw. I. and of John, King of Scotland, 21 Edw. I. In theſe the " *next Parliament*" ſeems to mean only the " *next Seſſion*." Report of the Committee, 21 Jac.

|| Caſe of William de Breouſe, 30 Edw. I. moſt clearly ſo.

the

the cauſe was proceeded on; that * inquiſitions were often granted to aſcertain ſome facts in diſpute, and in the mean time the buſineſs ſtood over to the next Seſſion or next Parliament.—In criminal caſes it appears that Commiſſioners were ſometimes appointed to † hear the anſwer of the accuſed, ‡ ſometimes to proceed to his trial; the conſideration of which, with every thing relative to it, was adjourned to the next Parliament.—Such were the authorities from which this Committee drew the inference above-mentioned, the principle of which is deducible from the very

* Caſe of Hugh de Lowther, 18 Edw. I.

† Caſe of the Archbiſhop of Canterbury. Mr. Chriſtian, who in his firſt edition thinks this muſt have been an adjournment only to another Seſſion, becauſe there are no Writs of Summons to the Commons to be found in Prynne's Collection applicable to this time, in his ſecond more reaſonably expreſſes his doubts about this concluſion from the poſſibility of Writs having exiſted which were loſt before the days of Mr. Prynne. A Summons to the Lords is preſerved by Dugdale, p. 222, dated 24 Feb. 1343, 17th Edw. III. for a Parliament to be held on Monday, 15 days after Eaſter, at which day it appears from the Rolls of Parliament, ſtated likewiſe in his Appendix, p. 37. the Parliament met, in which the caſe of the Archbiſhop was re-conſidered.

‡ Caſe of Hugh Faſtoff or Scaffolk.—This was at firſt queſtioned on the ſame ground as the former, but it is now admitted to be free from that objection.—It is ſaid indeed to be an original Petition in the new Parliament, which it certainly is, but the object of it ſhews that the cauſe was ſtill retained by the Lords, who are deſired to proceed in it to his acquittal.

terms

terms of the queſtion, viz. " the diſtinction be-
" tween the buſineſſes in which the Lords act as
" a Court of Judicature and thoſe which come
" before them in their legiſlative capacity."
Without this extenſion to their judicial proceed-
ings they could never have attained the ends of
Juſtice, when Parliaments ſat but for a very ſhort
time, and often not in the Metropolis, where the
ordinary Courts were uſually held.—That this
concluſion was fairly drawn as to Writs of Error
will hardly be diſputed, when it is ſeen how * Lord
Hale expreſſes himſelf on this ſubject recently
after it was thus ſettled: " What effect (ſays he)
" an adjournment by the King (which he had
" before explained to mean a prorogation) hath,
" was a buſineſs formerly of great debate; but
" now it is *by uſe* and *cuſtom*, and partly by decla-
" rative orders, ſettled. 1. As to Writs of Error
" and cauſes depending there as a ſeparate Court
" from the Commons, heretofore it was held that
" an adjournment, without ſpecial words to ad-
" journ all cauſes in *ſtatu quo*, had diſcontinued
" all ſuch proceedings in the Lords Houſe, and
" they were put to begin all again;—and thus I
" remember it was ruled in the Houſe, Bridgeman
" being Keeper. But ſince that time, upon ſearch
" of precedents, it hath been ordered and declared
" by the Lords, that no diſcontinuance ariſeth in

* Juriſdiction of Lords, p. 167.

" ſuch

" ſuch caſes by adjournment, but they are to
" proceed as they left the cauſe laſt Seſſion. *And*
" *truly it ſtands with reaſon; for theſe proceedings are*
" *in the Lords Houſe as a diſtinct Court.*" He ap-
proves, we ſee, the principle, reſts the deciſion
upon uſe and cuſtom as well as declarative orders,
admits it was always at leaſt doubted, and that
if the adjournment was ſpecial, no cauſes were ever
diſcontinued; which laſt conceſſion alone is ſuffi-
cient for many purpoſes of this argument—But
the Committee in 1678 extended this doctrine as
to Writs of Error to the caſe of a diſſolution—
They did ſo, and with great propriety. Many of
the precedents above-cited directly led them to it,
and * others are to be found that correſpond with
them;

* 30 Edw. I. William Paynell and Margaret his wife. Petition preſented in an original ſuit which was heard in the Parliament 28 Edw. I. They were ordered to be at the next Parliament to hear judgement.—They came 29 Edw. I. and a day was given them to this Parliament 30 Edw. I. when their petition was diſmiſſed.

33 Edw. I. The Priors of Durham and Goldyngham.—Similar adjournments to two ſucceſſive Parliaments.

8 Edw. II. Thomas de Ergum—Commiſſion directed to be certified to next Parliament. Hugo de Curteney—Similar caſe—Adjourned again to next Parliament.

9 Edw. II. Thomas de Multom—Similar caſe. Hugo le Deſpencer—Similar caſe, with two adjournments.

2 Rich. II. The Earl of Saliſbury. An enrolment of the whole proceedings in the laſt Parliament is recited, founded upon a Petition in Error. The parties appear in this Parliament.

them; but beyond that conſideration, the principle once applied drew after it this extended conſequence.—Lord Hale's reaſon indeed ſeems ap-

ment, and after hearing pur ce que ceſt Parlement ſi eſtoit bien pres au fin quant ceſt beſoigne feuſt iſſint touchez & plez, &c. mais par aſſent du Parlement jour ent eſt donez as ditz Contes en le proſch' Parlement toutes choſes eſteant en meſme l'eſtat q'ore ſont, &c. In the Record here recited, it is ſaid of the proceedings in the firſt Parliament the Record and Proceſs was delivered to the Chief Juſtice of the King's-Bench *pur y demurrer comme en garde tan q au dit proch' Parlement.*—This Mr. Chriſtian ſays (p. 26) " proves that the Record in a Writ " of Error was not preſerved in Parliament after a diſſolu- " tion."—He forgets that the whole account of this caſe is the Record; it begins, Item eſt aſſavoir qu'il y a un certain Enroullement enroullez es Roulles du darrein Parlement, &c. that the Errors were aſſigned before the K. B. Record was ſent back; that it was mixed with others not complained of, and only given the C. J. for ſafe cuſtody; that it appears from the laſt adjournment that whether the Record complained of was left in Parliament or not, every thing remained in *ſtatu quo*; and that the conſtant practice has been, ever ſince 1678, not to leave the Record above, but only a tranſcript.—Lord Hale ſays it was ſent back becauſe the ſame Roll contained divers other matters. Juriſd. of Peers, p. 149.

2 Hen. V. The Earl of Saliſbury petitioned for the reverſal of the attainder of his father, and the Roll of Parliament being brought in, he aſſigned the Errors, and was ordered to produce evidence before the Chancellor ad effectum quod materia p̄dca eo magis maturari poterit erga prox. Parliamentum, & ſuper hoc dies datus fuit d̄cto nunc Comiti uſque ad idem prox. Parliamentum. In the next Parliament he appeared and prayed the Lords ut in loquelâ ſua ulterius . . . in formâ juris procederetur—which was done, and judgement given.

plicable

plicable chiefly to this latter caſe, for in a prorogation both Houſes breaking up together ſeems to offer no ground to conſider them as diſtinct; but on a diſſolution one of them is annihilated, and the other can only continue its judicial functions, as being a Court perfectly diſtinct and independent.—They probably could trace no diſtinction in the practice of former times, or the reaſon of the thing, between the caſe of a prorogation and diſſolution to this purpoſe; we have ſeen it urged that they were then confounded by the common name of a *Parliament*; and we ſhall find their identity inſiſted upon by * thoſe who in later times oppoſed the application of the principle to the caſe before us. In this view of the ſubject, too, the deduction was fair and obvious. It muſt not be concealed, however, and I wiſh to give the whole force to the objection, that Lord Hale, whom I have juſt referred to as giving his ſanction to the deciſion of 1673, writing before that of 1678, ſays expreſsly, " But if the Parliament be " diſſolved before Judgement affirmed or reverſed, " then the Writ of Error is wholly diſcontinued " and abated, and the Court below may iſſue pro- " ceſs and execution upon the Record remaining " with them without any formal remiſſion of the " tranſcript from the Houſe of Lords, upon a

* The Lords who proteſted in the caſe of Lord Oxford in 1717.

" ſuggeſtion

" ſuggeſtion entered thereof upon the Record be-
" fore the Judges below that the Judgement is
" neither affirmed nor reverſed."—I wiſh to add to this conceſſion (what perhaps his name alone would ſufficiently imply), that he here expreſſes the ſenſe and practice of Weſtminſter-hall on the ſubject in his time, eſtabliſhed on a reſolution of the Judges in the firſt year of Henry VII.* The Courts of Law, it is obvious, had no other cognizance of this ſubject, which related to a ſuperior juriſdiction, than what aroſe from their controul over their own proceſs, in enforcing or ſuſpending the Judgments which they had given. It is natural that they ſhould regard theſe appeals from their determinations with no very favourable eye; both from predilection for their own opinions, and from the delay which, without ſome regulation, they neceſſarily occaſioned in the diſtribution of juſtice.—Though they could not therefore prevent the Houſe of Lords from deciding ultimately, and at their own time, on all cauſes which ſhould be brought before them, yet if they diſcovered any appearance of delay, either in the conduct of the party, or which aroſe from the accidental circumſtances of the caſe, they would not reſtrain the perſon who appeared to them entitled to judge-

* See Flowerdew's Caſe, Paſch. 1 Hen. VII. 19. Y. Books. Stated expreſsly, though as it ſeems extrajudicially, in Sir Chriſtopher Haydon v. Godſalve. Cro. Jac. 341.

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ment, from enforcing it by the proper execution. This they awarded, when a ſecond Writ of Error was ſued out, the former having been * ſuperſeded or † abated without any fault of the party, or if it was made returnable in the next Seſſions of Parliament which was to be held ‡ at a very diſtant day, as || after a Term had intervened; much more therefore would they be inclined to do it after a diſſolution, when the uncertainty of the time of a new Parliament being ſummoned ſo greatly encreaſed the delay. It is plain, however, that this conduct of the Courts of Law had no influence upon the queſtion, Whether the Writ of Error abated or not by prorogation or diſſolution? becauſe they ** continued the ſame practice even after that point was eſtabliſhed by the Reſolutions of 1673 and 1678. The reaſon given by the Court of King's-Bench for bailing Lord Danby puts this in the cleareſt light; †† they ſay, " That in caſes

* Sir Chriſtopher Haydon v. Godſalve. Cro. Jac. 341.

† Crowch v. Haynes. Jones, 66. Anon. Vent. 100. contra Goſton v. Sedgwick. 2 Lev. 93. 1 Mod. 106.

‡ Worley v. Holt. 1 Vent. 31. Sid. 413.

|| Silly v. Silly. 3 Keb. 232.

** Ld. Ever and Trever. 26 Car. 2. 1 Vent. 266. 3 Keb. 416.

Sir F. Duncombe's Caſe. 29 Car. 2. 1 Mod. 285.

Peters v. Benning. 13 Will. 3. 12 Mod. 604.

Ld. Hale on Juriſdict. of Lords, p. 169.

†† Skinn. 163.

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" of Writs of Error depending in Parliament " upon a long prorogation they ceaſe to be a " Superſedeas, but the party may have Execution " in the King's Bench ..... yet the Parlia- " ment, when it meets, may go on; and if they " reverſe the Judgement, the party will be reſtored " to all that he had loſt." Having thus traced the practice of the Courts of Law, and examined the reaſon of it, we ſhall be better enabled to judge what weight is to be given to the opinion juſt cited of Lord Hale, the ground of which he immediately ſubjoins*; " for it would be an into- " lerable delay of juſtice; for no Parliament poſ- " ſibly would be ſummoned in ſeven years; and " it were very unreaſonable that the Plaintiff's " execution upon a judgement obtained ſhould be " ſo long delayed." The only objection therefore that he makes to the continuance is the circumſtance of delay, which conſideration we have ſeen regulated the deciſions of the Courts of Law on this ſubject; his concluſion therefore is the reſult of Policy, and not of Law. Suppoſe then this poſſible interval between the meetings of Parliament limited to a moderate extent, and ſuppoſe ſuch regulations adopted by the Houſe of Lords as prevent any abuſe of the right of Appeal to them, the reaſon given inſtantly fails; and we ſhall ſee nothing in the way to prevent the appli-

* P. 168.

cation

cation of that which he had before applied to the caſe of continuance after a prorogation, viz. " For " theſe proceedings are in the Lords Houſe as a " diſtinct Court."—If then the reaſon for this opinion is founded only on collateral conſiderations, is it better ſupported by precedent and authority? We have already examined ſome which ſeem to prove the contrary, and he himſelf adds * two deciſive inſtances to the number, in which the Houſe of Lords granted or continued a Superſedeas, while a Writ of Error was depending, till the next Parliament, to which they adjourned the further hearing of the cauſe. He thinks indeed that the ſtay of execution was not conſonant to

* Caſe of Dean and Chapter of Litchfield, 4 Hen. IV. n. 26. The Errors being aſſigned; ſur ces, le darrein jour de Parlement le Roi notre Signior commanda de continuer le Proceſſe de celle matire tan q'a proſchein Parlement en l'eſtat q'or eſt.—Rot. Parl. Vol. III.

Caſe of Joan Beauchamp, 11 Hen. VI. n. 40. She brought a Writ of Error, aſſigned the Errors, which were argued on both ſides, and then; pro eo quod Cur' Parliamenti prædicti ad tunc non aviſabatur ad judicium in hac parte reddend'; conſideratum fuerit quod prædicta Johanna haberet diem eſſendi coram ipſo Rege in Parliamento ſuo extunc prox' tenend' quandocunque & ubicunque infra regnum ſuum Angliæ teneri contingeret, &c. et quod executioni Judicii prædicti interim ſuperſederetur ex causâ ſupradictâ. Jamque præfata Johanna in preſenti Parliamenti quod fuit prox' Parliamentum poſt prædictum Parliamentum obtulit ſe, &c.

Rot. Parl. Vol. IV.

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law, for the reaſon above ſtated, which applies ſolely to the queſtion of delay; and does not refer to any inſtance in ſupport of his opinion: where the reaſon given therefore is partial, and a better may be aſſigned for the contrary, and the practice is adverſe, it will not ſurely be preſumptuous to diſpute the authority even of Lord Hale, or at leaſt to confine it to ſuch a view of the ſubject as he appears to have had before him.

The Committee ſtate further, "That the Diſſo-" lution doth not alter the ſtate of the Impeach-" ments brought up in the laſt Parliament;" and this is complained of as a violent and partial inference from the precedents before them, ſome of which however appear to relate to criminal proſecutions. But if they were right in their deciſion as to Writs of Error (which has received the ſanction of ſucceeding times to this day), will it be ſaid that it bore no analogy to caſes of their original, and even criminal juriſdiction, at leaſt ſo far as related to the record remaining, which was all of the cauſe that exiſted in thoſe Impeachments? The reaſon given by Lord Hale applies to one caſe as well as to the other. Suppoſe then the deciſion of the Houſe in 1717, that Impeachments were not determined by a prorogation (which has never been attributed to any partial views, and remains the law of Parliament to this day), had preceded that of 1678; might they not as well have extended it to the caſe of a diſſolution, as they did that

that of 1673? But the principles and authorities upon which that of 1717 was founded, muſt have exiſted before 1678; and, if ſo, were then equivalent to an adjudication; or, if they aroſe ſince, they muſt have been founded upon that very deciſion, which the recognition of them ſupports and eſtabliſhes.—It cannot now be known whether the Caſes cited in the Report of 1673 were the only authorities on which the Committee of 1678 relied; but it will be proper here to refer ſhortly to ſuch others as are to be found in the Records of Parliament, which though they may not apply to vindicate them from the charge of precipitancy, will tend to ſupport their deciſion, which is of more importance to the preſent queſtion.

* 4 Edw. III. Caſe of Thomas de Berkeley, who was tried and acquitted of murder in one Parliament, but judgement adjourned, and a day given him to the next, till which time he is committed. In the new Parliament he is diſcharged from his Bail; and a day is given him to the next Parliament.

† 50 Edw. III. Adam de Bury was impeached by the Commons the laſt day of the Parliament; and not appearing, his goods and chattels were put in arreſt.—In the next Parliament, 51 Edw. III.

* The Record at length may be ſeen at the end of Mr. J. Foſter's Diſcourſes, and Rot. Parl. 2. 52.

† Rot. Parl. 2. 330. 374.

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the Commons pray that he may be contained in the pardon granted that year, " *& luy & ses plegges* " *outrement quittes & descharges.*" From whence it seems, though nothing very precise appears, that his goods were attached to enforce his appearance in the next Parliament, that in the mean time he came in and gave sureties to the same effect, and that the Impeachment was considered as subsisting in the new Parliament, or there could be no occasion of this application for the discharge of him and his bail.

The same was done in the same year in the cases of John de Leycester and Wauter Sporier.

* 50 Edw. III. William Ellys was impeached, and answered, and a Commission awarded to examine into the truth of his defence. 51. Edw. III. he complains to the Parliament that though he had been acquitted upon these inquests, yet he had been imprisoned for three months and more " & " *desouth mainprise tan q cet present Parlement*"—It seems that some of the charges against him were made by private Individuals upon which he had been committed, and his Petition confounds them with the Impeachment, but the Inference is the same.

† 4. Ric. II. Sir Rauf de Ferriers was charged with High Treason: he made his defence, and it

* Rot. Parl. 2. 328. 374.
† Rot. Parl. 90. 105.

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seemed to the Lords that he was innocent, and he was discharged upon bail—5 Ric. II. In the next Parliament his sureties state, that they were bound for his appearance before the next Parliament to answer to certain matters, &c. and that since he is present to answer whoever will charge him in that matter, they pray to be discharged, not being bound for his further appearance; which is granted*.—

That this determination was not made so lightly or hastily as has been stated, may fairly be inferred from two testimonies borne to it on very public occasions by persons of considerable eminence, and intimate knowledge of the subject—On the trial of Lord Stafford Sir F. Winnington speaking of this decision, in the presence of both Houses, says, " it was so agreed at a Conference with the Com- " mons upon search of Precedents in all Ages"—When it was afterwards thought proper to reverse

* I forbear to state the case of the Duke of Suffolk, 28 Hen. VI. because the proceedings in the second Parliament seem to me to be by way of Bill of Attainder, and not in a judicial course. Lord Hollis, in his Tract on the Jurisdiction of the House of Peers, says " There are many precedents of " orders given to persons to act something in the intervals of " Parliament, and to give an account of it to the Lords at the " next ensuing Parliament;" and after citing some instances, adds " By all this it appears, that the Authority of the House " of Peers ends not with the Parliament, but their Judgment " still continues in full force and power."—P. 104.

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it, Lord Angleſea ſtated in his proteſt againſt that meaſure, " that it had been made and renewed " upon long conſideration and debate, report of " Committees of Precedents and former Reſolu- " tions"—

Certain it is, that in a time remarkable for the recorded difference of opinion in the Lords Houſe, no one ſtood forward to enter his diſſent to this Adjudication, nor even, as far as appears, to oppoſe it by his vote; yet at this period all thoſe Peers were probably in the Houſe, who to the number of 31, in the year 1680, gave their voices for the acquittal of Lord Stafford, and who therefore neither believed the ſtory of the Popiſh Plot, nor were afraid to avow their incredulity; and conſequently were perfectly free from both the deluſion and terror, which is ſuppoſed by ſome to have dictated this deciſion—In the Houſe of Commons it was taken ſo much as a matter of courſe, that no intimation is given in the debates of that day that any doubt was entertained on the ſubject.

In examining the foundation of it, we muſt not expect that Precedents ſhould be found from early times preciſely in point: it is ſufficient if the analogy can be traced, which may fairly be done from ſuch as have been referred to. The mode of proſecution itſelf being adapted only to great State delinquencies, could not, of courſe, be in frequent uſe, and as the occaſion was preſſing the Commons would be urgent in their ſuit, and the accuſed,

accuſed, from his ſtation, at hand to anſwer. In times of ſuch ſimplicity, before Eloquence was conſidered as the handmaid of Juſtice, a plain ſtory was ſoon told, and ſoon anſwered, and Judgement followed with as much expedition as in the ordinary trials at Law. In ſome caſes we have ſeen it was uſual to refer the inveſtigation of the fact to Commiſſioners, who proceeded in the intervals of Parliament; and upon whoſe report the Houſe of Lords, when reaſſembled, proceeded as upon Evidence given before themſelves—In civil cauſes, where the leſs notoriety of the caſe and the diſtance of the parties required more time to be allowed, the very form of the ſummons implied a continuance in the next Parliament, which, from other parties being found neceſſary in the courſe of the proceeding, or the intervention of more important buſineſs, was often extended to ſeveral ſubſequent ones *. Theſe caſes can only apply by analogy to

* Mr. Chriſtian takes ſome Pains to ſhew that *Petitions* preſented in one Parliament cannot be anſwered in another; by which if he means *Bills* (which are ſtill in that form) or any thing but a judicial proceeding, it has no reference to this argument:—Such, I believe, are all thoſe to which the King anſwers in his own perſon; for to the others the anſwer was given by the Lords with the King's aſſent. Impeachments by the Commons were never conſidered as petitions, though in point of form they might *aſk* for Judgement, and in civil caſes the Petition, if ſuch, was preſented by the party, and was anſwered by granting the Proceſs which brought his adverſary before the next Parliament.

criminal proceedings, and as the practice is to this day conformable to the ancient courſe the application of them is now as perfect as ever. The precedents of Impeachments themſelves that were determined in the ſame Parliament in which they began, afford no argument either way; nor thoſe, which though not brought to a concluſion, have not been proceeded upon by the new Houſe of Commons; for if it be argued that they conſidered them as abated, it is not queſtioned but that they might revive the proſecution from any period at which it can be ſuppoſed to have ceaſed; their not proceeding therefore either upon the original charge or upon a new one, only proves that from ſome motives of diſcretion, and not a ſenſe of incapacity, they deſiſted from the purpoſe of their predeceſſors. The only complete precedent in ſupport of this idea, by which the rights of the Commons can be bound, ſhort of their explicit declaration of the law, would be one, in which a new Houſe of Commons had carried up to the Lords a ſecond Impeachment of the ſame ſubſtance and effect as at firſt which had remained undetermined in the former Parliament. But it is not ſuggeſted that any ſuch is to be found: a ſimilar Inference is indeed attempted to be drawn from the caſe of Drake, in 1660, who was impeached for printing a ſeditious Book, which he confeſſed before the Lords having written *—The

* Rapin.

King

King having intimated his intention of diſſolving the Parliament in December, the Lords on the 19th of that month ordered "that if this Parliament be "diſſolved before this Houſe have time to give "Judgement, the Attorney General ſhould proceed "againſt him at law upon the ſaid offence." From this order it has been argued * that the Lords thought the Impeachment would be determined by the Diſſolution, and that they could not give Judgement in the next Parliament without a freſh trial †; and that unleſs it was at an end the Attorney General could not have proſecuted for the ſame offence in the inferior Courts. But there is much inaccuracy in this ſtatement of the objection; it aſſumes that Drake had been convicted by his pleading guilty; whereas he had only confeſſed being the Author of the Book, and had ſtill a Right, which he was probably diſpoſed to claim, to controvert the ‡ ſeditious tendency of it, which

* Mr. Chriſtian, p. 61.

† This ſeems to admit that the Record remained in force, which however appears not to be the opinion of the Author.

‡ The object of it was to prove that the long Parliament ſtill ſubſiſted: a point at leaſt of doubtful conſtitutional law. The Convention Parliament ſeem to have met upon this principle, for if they were not diſſolved by the abdication of James II. neither were the former by the death of Charles I. They even met for the purpoſe of ſummoning a new Parliament, and if they had not authority for this purpoſe, which was much doubted by the Lawyers of the Time (Vid. 1 Sid. 1.) they alone were the ſubſiſting Parliament.

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alone could make it an object of punishment. The Attorney General might therefore unquestionably proceed against him, for it would have been no * plea in abatement that he had been arraigned upon another Indictment (or as in this case Impeachment) unless he had been either acquitted or convicted—If it be said that this doctrine applies only to the case of Indictments in the same Court, and that Drake might still have pleaded to the jurisdiction of the Court below, as Fitzharris did, that plea might have been answered by shewing the order of the Lords, which amounted, whether right or wrong (and wrong it certainly was with respect to the House of Commons) to a dismissal of the Impeachment. Nor is the opinion of the Lords more fairly collected: when Parliament was once dissolved it was extremely uncertain how soon they might be assembled again, and they reasonably therefore preferred speedy Justice from the hands of the ordinary Judges, to dilatory and uncertain punishment from their own †—The Case

* Sir Wm. Withipool's Case. Cro. Car. 147.

† Others have said "Could not Imprisonment for the interval have satiated their spleen?" That they might so have imprisoned whether they thought the Dissolution abated or not, seems clear from the refusal of the King's Bench to bail Lord Danby, which the Court said did not turn on the order of 1678; but why is it to be presumed that they were actuated by spleen and not the love of Justice?

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of the Duke of Buckingham has been alleged for the same purpose: he was impeached on several Articles in the 2d of Car. I. and Parliament having been dissolved in June 1626, and a new one called in March following, no further proceedings were had upon it. In the interval, an Information was filed against him in the Star Chamber, for having administered Poison to the late King, which was one of the charges contained in the Impeachment, but which was not prosecuted to any effect. From this acquiescence of the Commons it is inferred, that they assented to the Idea of the Dissolution having determined their prosecution, as they * are supposed to have still retained their animosity against this Nobleman—To this the obvious answer before given to all such precedents occurs again; if this reasoning be just, why did they not prefer a fresh Impeachment?—Some other motives must therefore be recurred to for their forbearance, and such may fairly be collected from the History of the times: for it seems the Duke,

* It has been said, that instead of going on with their Impeachment, they addressed the King to remove him from his Councils, but I can find no authority for this in any of the Histories of the times. A petition to this effect was presented at the close of the former Parliament, with which the King was so displeased, that he determined to dissolve them: and it was repeated in a remonstrance which the Dissolution prevented them from carrying up to the Throne.—Rapin. Rushworth. Echard.

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in order to conciliate the favour of the people, had put himself * oftenfibly forward in advifing the King to fummon the new Parliament, which might very probably operate with the members of it not to purfue againft the author of their meeting the refentments of the old one—Add to this, that the objects which engaged their attention were of fuch magnitude as to fuperfede even the profecution of an obnoxious Minifter; for in this period the Petition of Right was prepared and carried, and in Auguft of this year the Duke of Buckingham efcaped the poffibility of further animadverfion by a premature death.

On the whole then it may be fafely ftated, that no † previous precedent is to be found that militates

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* "As he (the King) feared the Commons would again "attack the Duke of Buckingham, he tried to divert them "from it by a meffage delivered to the Houfe by Secretary "Coke. To which the Secretary added, "The whole Coun-"cil could bear the Duke witnefs, he was the firft mover of "calling the Parliament."—Rapin from Rufhworth.

† An argument, much relied on by Mr. Chriftian, is drawn from the form of the ancient prorogations (none of which however are to be found before the reign of Hen. VI.) in which the reafon is given "*qualiter negotia Parliamenti propter* "*ipforum negotiorum arduitatem difcuti non poterant nec finaliter* "*terminari*," or fometimes, qualiter negotia *per Communes*, &c. and he thinks the effect of this was to continue fuch matters as were left undetermined in the former feffion. But it is clear, that *negotia* in thefe cafes relates to legiflative proceedings (as in

againft the Refolution of 1678, even if it fhould be admitted that none had occurred to fupport it. In particular cafes there muft be a time when they are firft eftablifhed by practice, to fupport which it is only neceffary to fee that it is juftified by analogy, not precife fimilarity to former precedents and principles applicable to the fubject. Upon this fort of progreffive eftablifhment ftand moft of the admitted privileges of both Houfes, as well as great part of the jurifdiction of Courts of Law and almoft the whole of thofe of Equity. It is in vain to look for Authorities in point into the elder Henrys and Edwards, for much of the prefent exifting law of the Courts. The different State of civilization, of manners, of commercial and political intercourfe, precluded the exiftence of thofe cafes in which that law was eftablifhed: as they arofe in fucceffion of time the refpective Courts, as well as the Houfes of Parliament, affimilated them to their former rights and powers, and they then became Precedents and Cafes to which fucceeding times look up with refpect and acquiefcence. This queftion had never before occurred in Parliament; when it did, the Houfe of Lords looked to the practice of former times

in the latter inftance they neceffarily muft) which never were continued from Seffion to Seffion: nor does the form import fo much, for it ftates they could neither be *difcuffed* nor terminated, meaning only that the Parliament had not yet gone through all the public bufinefs that required their attendance.

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both in civil and criminal matters, and found in both traces of their continuing to a ſubſequent Parliament. Their ſurviving a prorogation afforded likewiſe a ſtrong inference to the ſame effect; for as in legiſlative proceedings each Seſſion is conſidered as a diſtinct Parliament, which was obſerved not to be the caſe in judicial buſineſs, the diſtinction applied equally to a Diſſolution; being founded on the different character and functions of the Court *of* Parliament and the Court of the Lords *in* Parliament. They could trace no deciſion that affirmed the contrary, and they thought themſelves warranted in applying that doctrine to the caſe before them. Let us next ſee how far this reſolution was conſiſtent with general principles applicable to this particular ſubject, and to that ſolely; for the propriety of it as to caſes of error has been acknowledged by the acquieſcence of ſucceeding times.

The Judicature of the Peers in Parliament is as old as the Conſtitution itſelf, and ſtrictly conformable to the feudal Genius of it: and the right of the Commons to impeach, though the commencement of it may be traced in practice, ſtands now upon equal grounds. In all other criminal proceedings, except only that of Appeal, the King is ſuppoſed to be the perſon injured in his Character of Conſervator of the Peace of the Kingdom, and though an individual may carry on the trial, he is in ſubſtance the proſecutor, and may at his pleaſure put

put a ſtop to the proceedings. The demiſe of the Crown had neceſſarily likewiſe the ſame effect, for the perſon was no more, for whom the Judgement ſhould be given. Impeachments on the other hand are preferred in the name of the Commons of England, and the form is of the eſſence of the proceeding. On this occaſion the Majeſty of the Crown gives way to the complaints of the people; and as the objects of theſe ſeveral proſecutions are different, it is of importance that they ſhould be kept diſtinct. Theſe are directed againſt perſons whom the ordinary proceſs of the Law was ſuppoſed incapable of reaching, ſuch as Miniſters and Judges; both acting under, and therefore probably ſupported by, the authority of the Crown —Criminals are therefore ſuppoſed who may have invaded the Rights of the people without having done any thing "Againſt the King, his "Crown, and Dignity;" or if the form of it, as a judicial proceeding, may ſeem to comprehend both thoſe offences, at leaſt it implies that it may be the intereſt of the people to proſecute thoſe whom it may be the wiſh of the King to protect. It follows then that it is an abſurdity inconſiſtent with the very foundation of the proceeding, that the Crown ſhould have the ſame power of controuling it, that it has over its own immediate proſecutions. I admit that this principle has not been deemed of ſufficient force to abrogate in this inſtance the King's prerogative of pardon, though

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precisely the same principle is admitted to have that effect in the case of Appeal, another anomalous proceeding in the Law of England; in other words, that our Ancestors forgot or neglected to enforce its application in the former case, and have therefore by tacit connivance through a series of ages established a practice against it, subsisting to this day, as far at least as it is not controuled by the positive law which prohibits a pardon being *pleaded* to an impeachment: but the principle remains the same, and in instances where it has not been contravened by decided usage, should still be applied to the subject, unless we are content to sacrifice that * controul which the people of this Country have long exercised, through their representatives, over undefined emergencies in the Constitution. This power of frustrating the effect of Impeachments by a Dissolution, is even more dangerous than if accomplished by means of a pardon: for that would speak its own purpose, and the adviser of such a measure must stand or fall in the eye of the public by the merits of the Object of it; but

* "And when there is occasion to debate concerning these "supreme Powers of Kings, Lords or Commons, we must not "argue like Lawyers in Westminster Hall, from the narrow "foundation of private causes of *meum* and *tuum*; but like "Statesmen and Senators from the large and noble foundation "of Government and of the general good of the King and "People." A Tract on Impeachments by Sir Humphry Mackworth in Lord Somers's Collection. 8. 322.

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the design of a dissolution could never be enquired into without encroaching upon a clear prerogative of the Crown, or if it could, would never be precisely ascertained. This prerogative thus exerted would be equally prejudicial to the liberties of the subject and the security of the Prince; it would defeat the most salutary pursuits of public justice, without leaving any one clearly responsible for the failure of it. It would enable a Minister who was accused of having abused the prerogative of the Crown to escape punishment by a repetition of that abuse. It would operate as a great means of persecution against the accused, if he happened to be obnoxious to the Administration, as well as to the House of Commons (such as a great Minister recently removed from Office) who might thus be harrassed by an endless prosecution, recommenced perhaps, and that repeatedly, even after he had made his defence, and with the unfair advantage that the disclosure of it would afford. A Dissolution employed for this purpose would often be attended with the most serious detriment to the public service, and yet would be resorted to in order to protect a favourite delinquent, whatever might be the consequence. In short, if the Commons were engaged in a just prosecution, it would be in the power of the King to defeat the object of it by frequent exertion of this prerogative; if they were disposed to persecute, he might enable them to do it by the same means, to the utter de-

 struction

ſtruction of an innocent individual. Such conſiderations as theſe are not urged as affording a ground for the deciſion in queſtion, but as ſtrengthening the concluſion deduced from precedents by the ſupport of concurrent principle. The objections raiſed againſt it on the ſcore of party violence, when allowed their full force, cannot be more fairly eſtimated than by * Mr. J. Foſter, who, on occaſion of another determination of the ſame period, has theſe expreſſions, with which I ſhall cloſe this part of our enquiry: "It muſt be admitted that precedents drawn from times of ferment and jealouſy, as theſe were, loſe much of their weight, ſince paſſion and party prejudice generally mingle in the conteſt. Yet let it be remembered, that theſe are reſolutions in which both Houſes concurred, and in which the rights of both were thought to be very nearly concerned: the Common's right of impeaching with effect, and the whole judicature of the Lords in capital Caſes."

* Diſcourſes, p. 146.

PART II.

LET us next ſee what has paſſed in ſubſequent times to affect the validity of this deciſion, which was complete, as we have ſeen, on the 19th of March, 1678-9. The next public occaſion in which it was noticed, was at a Conference between the two Houſes in the month following, in which Lord Angleſea, then Privy Seal, obſerved, that in the tranſaction of this affair, there were two great points *gained* by the Houſe of Commons; "The firſt of which was, that Impeachments made by the Commons in Parliament, continued from Seſſion to Seſſion, and Parliament to Parliament, notwithſtanding prorogation or Diſſolution." What he meant by this expreſſion appears from the Proteſt ſigned by him in 1685, and which has been before referred to; as he there juſtifies this Reſolution as founded on previous Authority, it could only be, that the Commons had in this inſtance obtained a parliamentary recognition of a precedent right. But ſuppoſing him ſo inconſiſtent with himſelf, as well as ſo unguarded in his account

count of the conduct of the Lords, as to intend to assert, that they had of their own authority made a new law upon the subject; the Commons were far from acquiescing in such an idea, and, anxious lest the expression should be so understood, immediately replied, " That they hoped their " Lordships did not think the Commons did take " it as if they had now gained any point; for that " the points which their Lordships mentioned as " gained were nothing but what was agreeable to " the ancient course and methods of Parliament."

The five Lords and Lord Danby having been committed, and Parliament dissolved, and a new one assembled Oct. 17, 1679, during a prorogation of it Lord Stafford applied to the Court of King's Bench to be bailed, which was refused; " * the Court not thinking fit in discretion to bail " him, and alleging likewise the Resolution of " 1678, though they did not rely thereon."—On the opening of the new Parliament, Oct. 1680, the King in his Speech from the Throne so far gives his sanction, if it were necessary, to the Resolution that the Impeachments were still depending, as to say " it will be necessary that the Lords in the Tower be brought to their speedy trial."—That of Lord Stafford took place soon after, and, as is well known, his conviction; the foundation of which, in point of fact, is beside the purpose of

* Raymond, 381.

our

our Enquiry; in point of Law he urged the objection to which the Resolution of 1678 was an answer; and the Lords, without a single dissenting voice, though there were found thirty-one for his acquittal, * refused to let the question be argued. The impeachment of Sir William Scroggs followed shortly after, and upon the new Parliament being assembled at Oxford, he put in his answer, and without objection petitioned for a speedy trial.—The last Parliament of Charles II. being now dissolved, Lord Danby, who was still a prisoner in the Tower on his original commitment, was brought up to the King's Bench to be bailed, but the Court refused the application. He made a similar attempt † the next year, and argued his own case at great length and with much ability. He complained of defects in the form and ground of his Commitment, and of the hardship of his case, for which there was no remedy to be found unless by the intervention of that Court—He artfully enough endeavoured to avail himself of what had been said by Sir W. Jones, when Solicitor-General,

* This has been stated as a great hardship, but seems conformable to the practice of the other Courts, not to suffer the positive Rules of their proceedings to be drawn in question. It was, besides, a mere point of form, which Lord Stafford might fairly be said to have waived by putting in his answer to the special articles, which being brought up in the new Parliament were liable to the same objection.

† Easter Term, 1682. See his Case in the State Trials.

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in the caſe of Lord Shafteſbury, when he applied to the ſame Court for his diſcharge; " That if a " great Miniſter ſhould be committed, he had the " cure of a pardon, a prorogation or a diſſolu- " tion;" which would have been a concluſive argument, at leaſt *ad hominem*, if the Caſes had been ſimilar; but he well knew that Lord Shafteſbury was committed only for a Contempt, and that it was always admitted that ſuch orders, which may be equally made by either Houſe, and conſequently not in the judicial character which belongs only to *one of them, are of force no longer than the continuance of the Seſſion.—He complained indeed that the Reſolution of 1678 was " new doctrine, and never practiſed till of late;" but his whole argument went to ſhew that the Court were at liberty to grant his application, which was only to be diſcharged upon bail, without interfering with the juriſdiction of the Lords; in the ſame manner as in civil ſuits the King's Bench awarded Execution, notwithſtanding a Writ of Error in Parliament was ſued out, whenever they found it tended to delay and vexation; and added, " for that he took it for granted that what " is done by that Court and the Courts of Chan- " cery and Exchequer, on Appeals and Writs of

* The Houſe of Commons indeed, in ſome inſtances, act as a diſtinct Court, but only, I believe, in matters relative to their own privileges, and never receive evidence upon oath.

" Error,

" Error, was underſtood not to meddle at all with " the juriſdiction nor proceedings of the Lords " in thoſe caſes, and that this was juſt the ſame, " all being alike ſubject to the final determina- " tion of the Lords, whenever they pleaſed to call " the Writ of Error, Appeal, or Impeachment, " before them, and without any prejudice to their " Lordſhips proceedings by any of thoſe acts " done by that or the other Courts in the intervals " of Parliament."—The Court ſaid it was not the order of the Lords (viz. that of 1678) that ſtood in their way of bailing him, but the ſupreme juriſdiction of the Kingdom had laid their hands on him; and ordered him to be remanded.—As his arguments ſeemed however to have made ſome impreſſion upon part of the Court, he renewed his application the *next Term, but with no better ſucceſs. The Reporter ſtates his Caſe to have been, " that he was committed by the Lords " Houſe, and there was an Impeachment by the " Commons *pending* in the Lords Houſe againſt " him"—and adds, " that it was taken clearly " by the Court that where the party is committed " by an order of the Lords, upon a prorogation " he may be bailed;" and the C. Juſtice ſaid, " if one be detained after a prorogation, an action " of falſe impriſonment lies."—That ſuch is the effect of an ordinary commitment by either Houſe

* Skin. Rep. 56.

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is admitted by Sir F. Winnington and Mr. Turner (then concerned for the Crown) in * Lord Shaftesbury's Case, and expresly laid down by Lord Holt in that of † The King v. Knollis, to which the modern practice is conformable. It appears from hence, that if the Judges did not rely in these Cases (as we are told by one of them they did not) upon the order of 1678, they must have decided upon principles that were paramount to it. It may indeed be urged, and in some sort collected from the expressions of the Court, that they did not think themselves at liberty to examine the proceedings of the supreme Jurisdiction of the Kingdom; or, as ‡ Lord Guildford held, who was consulted with the rest of the Judges on the subject, that having no power to bring down the Record, they could not be certain but that he might be attainted of treason. But it seems as if the Return to the Habeas Corpus would have shewn whether he was committed before trial or after; and the former objection applies equally to all Commitments by the Lords.—However supreme their Jurisdiction may be supposed to be, it can only exist in cases and over persons subject to their cognizance. Nothing but the continuance of their

* 1 Mod. 155.

† 1 Ld. Raym. 18. If a man be committed by Parliament, and the Parliament is prorogued, the King's Bench will grant a Habeas Corpus.

‡ North's Life of Lord Keeper Guildford, 164. 218.

authority

authority can justify the detaining any one under their orders; and in cases where that is determined by a prorogation or dissolution, the King's Bench finds no difficulty in restoring the party to his liberty. As they take notice of the acts of the Crown affecting the Parliament in one case, why should they not in another, if the effect be the same? Let us suppose that Mr. Hastings was now in custody (it is only by way of illustration that his name shall be introduced in this place), and that no Parliament was sitting, or likely to sit; would the Gentlemen of the Law, who hold that the Impeachment is determined, if they presided in the Court of King's Bench, scruple to release him, at least upon bail? The refusal therefore of the Judges of that day proceeded from a contrary opinion, and if not influenced by the authority of the Lords order must have been guided only by the reason of it. But Lord Danby was reserved for more favourable times, and renewed his application * the next year with better prospects of success. The Court had been recently filled with new Judges, and † Jefferies sat at their head, a man equally desperate in his persecution of the victims of the Court, and his protection of the culprits of the people. It was urged by Mr.

* Hil. 1683.

† Mr. North says his determining to do this business helped to raise him to the post of Chief Justice. Life, &c. p. 118.

Pollexfen, who ſeems in general to have been his Lordſhip's adviſer, that by the Diſſolution the proceeding was determined, like caſes of Writs of Error. But even this Court did not venture to adopt that idea, which ſhould have induced his diſcharge, but alleged that the Lords power of bailing was ſuſpended, and that if he was bailable, it was abſurd that no Court ſhould have the power, and they adopted Lord Danby's former argument drawn from the Court's granting execution on Writs of Error when there was a long prorogation; adding, as he had done, " that in one " caſe or the other the Parliament when it meets " may go on, and if they reverſe the Judgement " the party will be reſtored to all that he had loſt, " and ſo they may proceed to the trial of my " Lord Danby *," &c. Upon this principle they † diſcharged him on his giving bail to appear in the next Parliament, as they did likewiſe, ſoon after, the four Lords who were under a ſimilar proſecution. It might be the order of 1678 that prevented their being abſolutely diſcharged, but no notice is taken of it in anſwer to the argu-

* Skinner, 162.

† Mr. North, ſpeaking of the diſcharge, and of the hardſhip of the caſe, ſays, " If the giving it was irregular, it was " erring for Juſtice; and one would think that ſuch conſideration might purge the irregularity—But nothing hath ever " been ſaid againſt it in *publick* yet; and ſo far all is well." Life of Lord Guildford, 165.

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ments of Counſel, and any reſpect paid to it by ſuch a Court as this is a ſtrong recognition of its authenticity—We have another account given of it at a ſubſequent period by * Lord Holt, who was at this time concerned for Lord Danby, and who ſays the chief Reaſon of his being bailed was that given above; that there was no proſpect of an opportunity for him to apply to Parliament for this purpoſe—He intimates his diſapprobation of the meaſure, by obſerving that it was denied ſeveral times, until the C. J. Jefferies came in, and remarks " that his being bailed to appear in the " next Seſſion of Parliament was an Affirmance " of his Commitment, and a plain proof of the " opinion of the Court at that time, that the " Commitment was not avoided or diſcharged by " the † prorogation of the Parliament"—The next period in this long-protracted proſecution was that which terminated it on the acceſſion of James the Second—On the firſt day of the meeting of Parliament the Lords appeared in diſcharge of their Recognizance, and at the ſame time preſented petitions in different forms—

The Popiſh Lords ſtated that they had been committed upon the ſingle teſtimony of Titus Oates, who had ſince been convicted of perjury,

* In deciding Lord Saliſbury's Caſe, Carth. 132.

† This is ſubſtituted all along by miſtake in the Report for Diſſolution.

aſſerted

asserted their Innocence, and prayed to be discharged with honour—Lord Danby alleged his long Imprisonment upon an Impeachment founded on bare suggestions of Crimes, and prayed to be relieved either by *Trial* or such other ways as the Lords should judge most convenient, and that in the mean time he might be continued on bail. But the House was more indulgent than Lord Danby's modesty would allow him to hope; and as they had no design of proceeding to trial, they thought it unnecessary to detain them longer under any sort of restraint, and accordingly contented themselves with ordering them "to attend till "further order"—This might have been thought sufficient for relief of the parties in what was certainly a hard Case, leaving it to be seen whether the Commons were disposed to urge the claim which the former House of Lords had allowed; but their zeal for redress went much further; and the next day the House sat it was proposed "upon "consideration of the cases of these Lords con- "tained in their petitions* to reverse and annul the "Order of the 19th Mar. 1678-9 as to Impeach-

* Burnet says the Petitions of the Lords "were sent to the "Commons, who returned answer, that they did not *think* "*fit* to insist on the Impeachment—So upon that they were "discharged of them and set at liberty." 1. 640—But this account must be inaccurate, as there is no such transaction to be found in the journals of Parliament.

"ments,"

"ments," which, after some debate, and the previous question being moved, was carried in the Affirmative—The Protest signed on this occasion by Lord Anglesea and two other Lords shews sufficiently the precipitancy with which this step was taken and the reasons to be urged against it. It states that "it doth extrajudicially, and without a "particular cause before them, *endeavour* an alter- "ation in a judicial Rule and Order of the House, "and that it shakes and lays aside an order made "and renewed upon long Consideration, Debate, "Report of Committees, Precedents, and former "Resolutions, without permitting the same to be "read, though called for by many of the Peers, "and against weighty reasons appearing for the "same, and contrary to the practice of former "times"—How well they were founded in this latter assertion we have already seen; that it was "*extrajudicial*," and consequently in propriety of proceeding only an "*endeavour*" to subvert a positive rule, appears from the manner in which it was introduced, which was upon a Consideration of the Petitions of these Lords, none of whom disputed this order or stated any thing that could properly bring it into debate. If the House paid so little Attention as they seem to have done to the rights of the Commons, they might still have found reasons for discharging the Lords in question upon the particular hardship of their case, or even on the ground of the Demise of the Crown, which might

might be thought to determine that as well as all other criminal proceedings—They left however that part of the order unrepealed which relates to Appeals and Writs of Error, and thus avowed the partial motives which induced them to invade the other part of it—* They proceeded however no farther, and having thus laid a foundation totally diſtinct from the ground of their application for diſcharging the Lords as well as their bail, which they did a few days afterwards, they were little anxious to ſubſtitute any Rule, in the place of that which they had invaded, to guide the proceedings of ſubſequent times—This indeed could hardly have been done without more inveſtigation of the ſubject, than they were diſpoſed to give, and therefore the point was left by them, at leaſt as it was found by the Houſe in 1678; for it is abſurd to ſuppoſe that the repeal of an order can of itſelf eſtabliſh the contrary rule of practice. If the Reſolution of 1678 was well founded, it was an Affirmance of the pre-exiſting Law of Parliament, and therefore operated as a declaratory law—now the repeal of ſuch a law (for example; the 25th Edw. III. or the Bill of Rights) can not leave the

* Mr. Chriſtian admits " that if the order of 1678 had " been merely declaratory of the former law, the reverſal " would have been ineffectual and nugatory," p. 41. If therefore the former propoſition has been eſtabliſhed his concluſion will follow.

ſubject

ſubject in a worſe ſituation than he was before it was enacted—It removes the legiſlative ſanction, but the Right remains unimpaired—But the Houſe of Commons, it is ſaid, made no complaint againſt this deciſion, and thus muſt be taken to have given their ſanction to it; as far as it affected the diſcharge of the Lords in queſtion it is plain they acquieſced in it upon general principles of diſcretion, as they inſtituted no new proſecution againſt them—Even if the old Houſe of Commons had ſubſiſted, they would have acted prudently not to begin hoſtilities with the new King, by reviving theſe Impeachments—The conviction of Oates, and the change in the temper of the times, would have probably ſecured the Popiſh Lords from conviction, if indeed they ever intended to bring more than one of them to a trial: and Lord Danby's Offences, after five years impriſonment, might well be ſuffered to ſleep in the grave with the Prince who occaſioned them, and againſt whom the puniſhment of them was obliquely directed—But had the Caſes called much louder for Juſtice, the ſilence of * ſuch a Houſe of Com-

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* It is ſaid Serjeant Maynard was ſtill a member, and he was a hoſt—But is it ſeriouſly believed that becauſe he made no complaint he approved of this reſolution? he who in 1680, on Lord Stafford's Trial, had ſaid, " if there were no precedents " for the continuance of Impeachments they ought to make " one." It is remarkable that none of the following leaders of the

mons as this, ought not to have much weight in confirmation of the act of the Lords—The violent measures purſued at the cloſe of the Reign of Charles the Second *, complaints of which poured in from all quarters, had ſo changed the mode of Election, and broken the ſpirit of the people; and ſuch pains were taken in managing the Returns, that the King, whom a former Houſe had excluded from the Throne, declared there were now not above forty Members in it that he would not himſelf have choſen—we might therefore rather wonder, not that they acquieſced in ſilence, but that they did not make a formal renunciation of this moſt important right, and, with † Burnet, thank them for having done no more miſchief than they did.

The next ſtep taken by the Houſe of Lords was the introduction of a Bill for reverſing the Attainder of Lord Stafford—It appears they were under great difficulty how to frame the preamble to that

the Country party in the laſt Parliament of Charles the Second are to be found in this; Sir W. Jones, Sir F. Winnington, Sir N. Carew, Sir W. Pulteney, Sir T. Lee, Sir T. Player, Sir H. Capell, Mr. Powle, Mr. Boſcawen, Colonel Birch, Colonel Titus, Mr. Booth, Mr. Harbord, Mr. Swynſin.

* Burnet 1. 625. 639, fol. Ed.

† "And with that the Seſſion of Parliament ended; which "was no ſmall Happineſs to the Nation, ſuch a body of Men "being diſmiſſed with doing ſo little hurt."

Hiſt. 1. 641. fol. Ed.

Bill;

Bill; that is, what grounds to allege in juſtification of it; and the debate upon that point alone was * adjourned to a ſecond day. They reſolved however at laſt to reſt it ſolely upon his innocence, and that the Teſtimony on which he was convicted was falſe, without alleging any defect in point of Law; and in this form it paſſed the Houſe; not without a proteſt by ſeveral Lords, who aſſigned this defect in the preamble as the reaſon of their diſſent—The Comment upon this conduct of the Houſe is ſo obvious, that I forbear enlarging upon it, and ſhall only deprecate the urging at this day, ſuch *legal* objections to the conviction of Lord Stafford as the Houſe of Lords, *in the firſt year of James the Second*, did not venture to ſtate in public, or to tranſmit upon record to the other Houſe of Parliament.

The next caſe that occurs, is that of the Earls of Saliſbury and Peterborough, and the cotemporary one of Sir Adam Blair and others. Theſe latter were † firſt impeached by the Commons, for publiſhing King James's declaration. The former for being reconciled to the Church of Rome; and all of them at different times committed. The Parliament in which theſe proceedings were had, having been diſſolved, and a new one aſſembled, Sir Adam Blair petitioned the Houſe of Lords to be admitted

* Lords Journals, 14. 28.

† June 26th, 1689.

to Bail, which was resolved in the Affirmative; * and at the same time a day was appointed to take into Consideration whether Impeachments continue from Parliament to Parliament. It is impossible to pass over this Petition and Reference, without remarking that neither the prisoner, nor the House, entertained the least Idea that there subsisted any † positive Rule of proceeding on the subject, such as has lately been attempted to be drawn from the then recent Resolution of 1685. Nothing being done upon the day appointed, another day was ‡ soon after fixed for taking into Consideration, whether Impeachments continue in *statu quo* from Parliament to Parliament; and || also whether the Courts in Westminster Hall may proceed in the intervals of Parliaments, after Appeals or Writs of Error are depending in this House, which likewise passed off without effect. During all this time the two Lords in the Tower patiently submitted to their imprisonment, and thus afforded their testimony, as well as that of their legal Advisers, to the legality of it, which could only be under the Idea that the Impeachment against them

* Ap. 5, 1690.

† Mr. Christian says, " This question respecting the effect " of a dissolution, at that time was certainly a doubtful " point."—P. 66.

‡ Ap. 8.

|| This latter point had been before agitated (March 25th) upon a particular Case before them.

was

was still in force: nor was it till an Act of general Indemnity had * passed, that any steps were taken for their release. † Immediately upon this, during an adjournment of the House, Lord Salisbury applied to the Court of King's Bench, to be discharged, as being clearly within the Act; which being refused, ‡ because it was thought the party applying could not avail himself of it, without stating by plea, that he was not included within any of the Exceptions contained in it. It was then moved, that he should be admitted to bail, on the authority of Lord Danby's Case, in 1683; which was likewise refused, the chief reason given being " Because the Parliament was adjourned " for a very short time, and that was thought the " proper place for him to apply." The decision therefore of the Court in this case, affords little room for inference, as to the opinion then entertained on this question; but much may fairly be collected from the conduct of the party, and the illustrative declarations of the Court. The form of the application shews most clearly that the only ground of *discharge* which was supposed by the

* May 23d, 1690.

† Easter Term.

‡ Carth. 132. Mr. J. Foster alleges that this could not be the Reason, because the Act expresly provides that it may be taken advantage of on the general Issue; and thinks the ground must have been, that the Court had no cognizance of his crime, the matter lying before a higher Judicature.—P. 44.

Earl

Earl himſelf, and his adviſers, to exiſt, was that of the pardon; for, that failing, the next motion was, to be admitted to Bail; which, as the Court obſerved, would in general be an Affirmance of the Commitment; and, in this caſe, of the continuance of it to that time. Nor could the reaſon aſſigned by Mr. J. Foſter prevent this application having been made, however it might guide the diſcretion of the Court in refuſing it; for it muſt ſurely be as competent to them to diſcharge the party from ſuch a Commitment, if the proceeding on which it was founded was * totally at an end (like commitments for Contempts), as if the crime was extinguiſhed by a ſubſequent act of Pardon—But the Court, in which Lord Holt preſided, who had been Counſel for Lord Danby, and could neither be ignorant of the ground of his application to be bailed, nor of the manner in which he was finally diſcharged by the Houſe of Lords, is not ſatisfied with giving a ſingle reaſon for their conduct († if indeed that reaſon is properly ſtated by the Reporter), but obſerves upon the caſe of Lord Danby, that he was denied to be bailed by ſeveral Judges till C. J. Jefferies came in, and that

* This argument is intended to apply no farther than againſt the *determination*, as it is called, of the Impeachment.

† I cannot help ſuſpecting that the Earl of Saliſbury's name is ſubſtituted in this place for that of the E. of Shafteſbury: but in neither way is the paſſage quite correct. Carth. 132.

even

even that diſcharge upon bail to appear the next Seſſions was an Affirmance of his Commitment.—They go farther, and in oppoſition to this, which they plainly conſider as an unwarrantable act of Lord Jefferies, rely on the caſe of Lord Stafford, in which the ſame application was refuſed; and far from thinking that the hardſhips he underwent, which at the diſtance of ten years muſt be viewed without prejudice, could invalidate the effect of the legal principles eſtabliſhed in his Trial, they add this emphatical account of it: "And notwithſtanding that Parliament was diſſolved by which he was committed, yet he was continued a Priſoner, and afterwards tried *upon the ſame Impeachment*, convicted, and executed; *which fully proves* that Commitments by the Peers in Parliament are not made void by the prorogation or diſſolution of the ſame Parliament."—It is obſervable they draw only ſuch a conſequence from this caſe as was ſtrictly applicable to that before them; but, if the whole of it is cited with approbation as an exiſting authority (which no one who reads it can doubt), it follows equally, from his Trial, conviction, and execution, that "*the ſame Impeachment*" was ſtill depending, "notwithſtanding that Parliament was diſſolved" in which he had been impeached, as well as committed.—The Reſolution of 1685, which could not be unknown to the Court, though directly applicable againſt this inference, is paſt by in ſilence,

either

either as being inefficient from its negative form, or extrajudicial and invalid in point of ſubſtance.

As ſoon as the Parliament * re-aſſembled, Petitions were preſented to the Houſe of Peers by the two Lords who were ſtill Priſoners in the Tower: Lord Peterborough ſtated, that he had been confined almoſt two years, nothwithſtanding a diſſolution and ſeveral prorogations had intervened, as alſo an act of free and general pardon; Lord Saliſbury confined his claim to the latter ground only, poſſibly from the intimation he had recently received from the Judges of the King's Bench of their opinion of the invalidity of the former; and both prayed to be diſcharged—Again the Reſolution of 1685 is neglected by thoſe who were moſt intereſted to claim the benefit of it, as well as by thoſe who were the proper judges of its effect; and ſo little was the Houſe impreſſed with an idea of appealing to that, as a rule of proceeding, which muſt have led to an immediate diſcharge of the Lords in cuſtody, that they conceive the moſt probable claim which they could make to their liberty muſt ariſe from the act of pardon; upon which point they order the Judges to attend, and give their opinion: this was preſented to the Houſe a few days after, and imported, that, " if their " crimes were committed before Feb. 13, 1688, " and not in Ireland, nor beyond the ſeas, they

* Oct. 2, 1692.

" were

" were pardoned by the ſaid Act."—As this opinion gave no deciſive anſwer to the queſtion, but left the effect of the act of pardon to be collected from extrinſic circumſtances, not before the Houſe, (for, as no Articles had yet been exhibited, the date of their offences could not be aſcertained from the charge itſelf,) it is not to be wondered that nothing final was determined at this time upon their petitions. As the caſe was ſtill doubtful, the Houſe refuſed to diſcharge them, but admitted them to bail till it could receive a more deliberate conſideration.—On the ſame day a Committee was appointed " to inſpect and conſider Precedents, " Whether Impeachments continue in *ſtatu quo* " from Parliament to Parliament, and to report " their Opinion."—The manner in which this Committee conducted the enquiry, and the ſtatement which they framed of the reſult of it, deſerves particular attention, that the reader may be enabled to judge how well it is entitled to the character * of " a full and ſolemn inveſtigation of " all the preceding Caſes; and † the aſſertion, that all the Caſes " are ſtated, and not concealed." It appears, I confeſs, to me, upon the fulleſt examination that I am able to beſtow on it, that this Report contains nothing more than the heads of the ſeveral precedents; and ‡ every one of them, that

* Mr. Chriſtian, p. 43.

† Speech attributed to Mr. Harding.

‡ In the Caſe of Thomas de Berkeley they omit ſtating that a day

that has any reference to the queſtion (unleſs the ſingle caſe of Lord Stafford), ſo looſely and ſo inaccurately ſtated, that if the Houſe had proceeded upon theſe documents only, they could ſcarcely have avoided coming to the concluſion, which yet neither they, nor even the Committee itſelf did, that Impeachments were determined by a Diſſolution.—After having mutilated the ancient precedents, in the manner ſhewn below, they omit any mention of the Reference in 1678, or the Reſolution of 1685, and ſtate in general, as to modern Caſes, that " none are found to continue " from one Parliament to another, except the " Lords who were lately ſo long in the Tower." Nor are they more accurate in their ſtatement of recent occurrences, forgetting the caſe of Sir William Scroggs, whoſe Impeachment, we have ſeen,

a day was given him in the next Parliament to hear Judgement, and that he was committed in the mean time. In that of the Archbiſhop of Canterbury, no notice is taken of the arraignment being adjourned to the next Parliament, in which it is proceeded on. In thoſe of Ellys, De Bury, Leyceſter, and Spurrier, the proceedings in the ſecond Parliament are not mentioned. Hugh Farſtaff, it is ſaid, was accuſed and acquitted in A°. 51. " Sir R. Ferrers accuſed by the King; " acquitted; but put under Bail to appear before the King " any time *between that and the next Parliament*." The Reader is requeſted to compare theſe two laſt Caſes with the account of them above given; or, if he has the opportunity, with the Rolls of Parliament: from which the ſuppreſſion will be moſt apparent.

continued,

continued, as well as thoſe of the Lords in the Tower, to a ſubſequent Parliament. Whatever aſſiſtance therefore Mr. Petyt, whoſe zeal and knowledge of legal antiquities has been deſervedly extolled, might have afforded the Committee in laying before them the Records in the Tower, of which he was the Keeper, the Houſe could derive but little light from his reſearches, when ſeen through the medium of this Report.—Unlike the conduct of the former Committees of 1673 and 1678, who ſubjoin to the Report their Opinion of the Inference to be drawn from it, and by that means lay a ground for the Houſe to decide upon the queſtion before them, that part of the Reference is neglected here, ſo that no rule of practice can be eſtabliſhed by agreeing or diſagreeing to this Report. I notice this the rather, becauſe an argument has been drawn from the ſilence of the Commons on this occaſion, who, * it is ſaid, muſt have ſeen this Report *affirming* Impeachments to be at an end; whereas there will not be found in it the ſlighteſt intimation of an Opinion, unleſs what can be drawn from the manner in which the precedents are ſtated.—The Houſe proceeded immediately upon this Report, and, after hearing three of the Records read, their Reſolution is thus recorded:— " After the conſideration of which precedents, and

* Speech attributed to Mr. Harding.

 " others

"others mentioned in the debate, and reading the "Orders of Mar. 19, 1678-9, and May 22, 1685, "concerning Impeachments, and after long de- "bate thereon, and ſeveral things moved, this "Queſtion was propoſed, Whether the Lords "Saliſbury and Peterborough ſhall be now diſ- "charged from their Bail?" which, after the previous queſtion being put, was reſolved in the Affirmative; and they and their ſureties were, the ſame day, diſcharged accordingly. As this Vote followed ſo cloſely upon the Report above ſtated, the firſt impreſſion on the mind undoubtedly is, that it was the immediate Reſult of it. But many reaſons will ſoon occur to controul, and even to ſubvert, the effect of that prepoſſeſſion. It is obvious, in the firſt place, on a nearer view of the ſubject, that no direct inference can be drawn from a Reſolution collateral to the deciſion of the point ſuppoſed to be in queſtion.—The Committee were aſked by the Houſe, Whether Impeachments continue in *ſtatu quo* notwithſtanding a Diſſolution? They give no anſwer to this queſtion; and the Houſe, having none to adopt from them, ſubſtitute none in the place of it.—It may be ſaid, they paſſed over the intermediate ſteps of the propoſition, and came at once to the concluſion, which was the diſcharge of the Lords.—But, to render this argument effective, it muſt be ſhewn that this concluſion was the proper one from theſe premiſes, and that it could be drawn from no other; in both of

of which it ſeems to me to fail.—The juſt reſult from the eſtabliſhment of the general propoſition, that Impeachments in ſuch a caſe were determined, would have been, that the Impeachment of theſe Lords was no longer depending, which would have operated as a diſcharge from the Proſecution itſelf, not merely from the ſecurity which they had given to attend the order of the Houſe.—The ſecond point to be eſtabliſhed is equally unſupported, for it is moſt obvious that the diſcharge from bail might equally be the conſequence of conſiderations on the Act of Pardon, or any motive of diſcretion that can be ſuppoſed to have influenced the Houſe. For any thing that was done by this Reſolution, the Impeachment continued in full force; the Commons might have claimed their right to proceed in it, and the Houſe of Lords at a ſubſequent day might have reſolved its continuance. The form of the Queſtion thus propoſed and carried, prevents its amounting to a deciſion of any point whatever. Should the Houſe of Lords at this moment reſolve to diſcharge Mr. Haſtings from his bail, even after the reference to a Committee to ſearch for Precedents, would it be urged that ſuch a ſtep alone, however extraordinary it might appear, would amount to a refuſal to proceed in his trial; or, even if it did, that no reaſon could be alleged for it, but their opinion that the Impeachment againſt him no longer ſubſiſted? If this conviction operated on the minds of many of

of the Lords, the reſt, amounting to a majority of the Houſe, if they diſregarded the claim of the Commons, (ſtill more, if they could infer their acquieſcence from their neglect to proceed,) might concur in the ſame Reſolution from any of the various motives applicable to ſuch a caſe. But the Proteſt ſigned on the occaſion before us affords a clue, which, with the concurrent teſtimony of the hiſtory of the times, will lead us, if not to a clear apprehenſion of the effect of this Reſolution, at leaſt to the reaſon why it was not conceived in more explicit terms. The ground of Diſſent ſtated by the ſeveral Lords who proteſted is, 1. " Be-
" cauſe we conceive it is a Queſtion not at all re-
" relating to the real debate before us; but urged
" upon us, *not for the ſake only of the two Lords*
" *mentioned.*"—The obſcurity, and apparent inaccuracy, of this expreſſion, is cleared up by the account which * Biſhop Burnet gives of this whole tranſaction. He ſays, " Another debate was moved
" in the Houſe of Lords (by thoſe who intended
" to revive the old Impeachment of the Marquis
" of Caermarthen), Whether Impeachments con-
" tinued from Parliament to Parliament, or whe-
" ther they were not extinguiſhed by an Act of
" Grace?.....The thing was well laid, and
" fourteen leading men had undertaken to manage
" the matter againſt him; in which the Earl of

* Hiſt. 2. 68.

" Shrewſbury

" Shrewſbury had the chief hand, *as he himſelf*
" *told me*.....But a diſcovery was at this time
" made that was of great conſequence; and it
" was managed chiefly by his means; ſo that put
" an end to the deſigns againſt him for the pre-
" ſent."—We ſee then at once the perſon pointed out, for whoſe ſake, as well as that of the two Lords, this queſtion was urged upon the Houſe; and though I am far from relying on the accuracy of this Hiſtorian for a minute detail either of facts or motives, yet thus much ſeems fairly to be collected, from what paſſed within his own knowledge, that a certain number of leading men, with Lord Shrewſbury at their head, conceived themſelves not precluded from urging the continuance of Impeachments by any deciſion of the Houſe then exiſting, and that this intended attack on the Marquis of Carmarthen was not put an end to by this, or any deciſion of the Lords, but ſtopped for the preſent in conſequence of the diſcovery he had made of Lord Preſton's negotiations. The courſe of proceeding then in the Houſe of Lords ſeems to have been, that the reference to the Committee was ſuggeſted by this party againſt Lord Carmarthen, but that his intereſt prevailed ſo much in that Committee, of which he himſelf was a member, that the Report was drawn up in the manner we have ſeen; that yet, in the reſult, the two parties were ſo balanced in the Houſe, that, " after long debate, and ſeveral things

things moved," a queſtion was propoſed, ſuch as we have ſeen, which ſerved to releaſe the Lords from their bail, without deciding any thing upon the point in controverſy. The Queſtion which is complained of in the Proteſt as being " not at all " relating to the real debate," muſt be that which was put, viz. the diſcharge of the two Lords; which is objected to, as not deciding the point of continuance of the Impeachment, upon which the debate had chiefly turned; and introduced with a view to protect Lord Carmarthen by preventing the Houſe from coming to a Reſolution, which in its conſequences might have affected him. This conſtruction will account for the conduct of the Committee, who declined ſtating any opinion, as they were directed by the Houſe; as well as for the previous queſtion having been moved for, by thoſe who, with the proteſting Lords, wiſhed for an explicit adjudication of the abſtract propoſition. When it is ſaid, that this reaſon of the Proteſt objects only to the introduction of the queſtion of continuance of Impeachments, and not to the deciſion upon it, the whole point in diſpute is aſſumed; for, if the conſiderations above advanced have any weight, there was not only no deciſion intended upon this queſtion, but the ground of the Proteſt reſts upon that very circumſtance.—That the proteſting Lords neither aſſented to the idea of Impeachments being diſcontinued by a diſſolution, nor thought that ſuch a determination had

had been made by the Houſe, may be demonſtrated both from their general character, and from their conduct on this occaſion. The majority of theſe Lords were not only ſtrenuous ſupporters of the popular principles on which the Government of that day had been formed, and was ſupported, but * ſix out of eight who ſigned this Proteſt had on a recent occaſion expreſſed their opinions almoſt upon this very point. † It had been propoſed to add, as a Rider to the Bill of Rights, " that all par- " dons upon an Impeachment of the Houſe of " Commons ſhould be declared null and void, " except it be with conſent of both Houſes of " Parliament;" which being rejected, a Proteſt was ſigned by the Lords above mentioned, every reaſon of which applies as ſtrongly to the queſtion under conſideration—‡ They allege, that Impeachments would be rendered altogether ineffectual, if the King had this power; that it would cauſe a failure of Juſtice; that the Government becomes precarious, when there is wanting a ſufficient power to puniſh evil Miniſters of State; that the King can only pardon ſuch offences as are againſt himſelf, therefore not an Impeachment, becauſe all

* The Lords Bolton, Stamford, Bath, Granville, Herbert, and Macclesfield.—Lord Stamford was beſides the only ſurviving Peer who had ſigned the Proteſt in 1685.

† 23 Nov. 1689.

‡ The whole Proteſt is too long to be inſerted in this place; the ſubſtance of it only is given above.

the Commons of England have an Intereſt in it, and it is at their ſuit; that it is inconſiſtent with the Government of England to veſt a Power any where that may obſtruct the public Juſtice.—— Whatever be the propriety of theſe reaſons, it is not credible that they ſhould be advanced by thoſe who thought differently on the ſubject of a diſſolution; or that thoſe who revived the pretenſions of the Commons of 1678, which had been negatived by the Lords who received Lord Danby's plea of pardon, ſhould, in oppoſition to the more reaſonable claims ſanctioned by the order and practice of the Lords, ſet up the contrary Reſolution, made in *the firſt year of James the Second.*—If then they did not acquieſce in the notion of an Impeachment being determined by a diſſolution, the argument deduced from their ſilence upon that head may be turned againſt thoſe who advance it, and it will appear moſt manifeſt, that they did not complain of ſuch a deciſion for the ſingle Reaſon, becauſe they knew it had not been made—Nor is this all; for the ſecond Reaſon of their Proteſt ſtates, "that they ought to have examined Pre-"cedents of Pardons to ſee how far an Impeach-"ment was concerned, or whether it could be "pardoned * without particular mention in an

* This ſeems to have been the ground upon which Lord Carmarthen's Impeachment was conceived by the party againſt him, and probably by theſe Lords, not to be affected by the Act of Pardon.

"Act

"Act of Grace," &c.—which enquiry could only be at all neceſſary under a ſuppoſition that the Impeachment was ſtill depending.

A further inference, that this order of diſcharge was not clearly deducible from the queſtion referred to the Committee, ariſes from an order which was made * a ſhort time afterwards, "That a day be "appointed for the explanation of the Votes "made 13th Oct. for diſcharging the Earls of "Saliſbury and Peterborough."—As nothing was done upon it, however, we muſt ſtill remain ignorant of the preciſe object of this enquiry, collecting only thus much from it; that it was then apprehended an inference might be drawn from this Vote, which did not fairly reſult from it; and as the moſt obvious deduction from it was (as has been admitted), that it proceeded upon the conſideration of the queſtion referred to the Committee, it is moſt likely that that was the inference intended to be obviated.—If this motion was brought forward by the enemies of Lord Carmarthen, the progreſs of the enquiry might perhaps be ſtopped in conſequence of the merit he had about this time acquired by his detection of the deſigns of Lord Preſton; but this proceeds upon conjecture which it would be unfair to purſue any farther.—The two Lords having thus been releaſed from their bail on the 13th of October, it might be expected

* 12 Nov. 1691.

that Sir Adam Blaire, and the reſt, the Impeachment againſt whom had likewiſe been exhibited in the laſt Parliament, would have loſt no time in availing themſelves of a Reſolution applicable to their Relief, if it had been underſtood to import ſuch a determination as is ſuppoſed. Yet it is not till Dec. 2, that he petitions the Houſe to be diſcharged, and then without referring to any regulation on the ſubject by which his caſe could be governed, but reſting ſolely, as it ſeems, on the length of time ſince he had been admitted to bail: all that appears of his petition is, "That he, "being by order of this Houſe, in April laſt, "admitted to bail, *has ever ſince*, in all dutiful "obedience, according to his recognizance, at-"tended the pleaſure of this Houſe;" and, upon this, praying to be diſcharged, and his bail; which the Houſe, without debate, ordered accordingly. Whatever were the grounds of his diſcharge, it is ſufficient to repel any inference that can be drawn from his caſe, ſingly conſidered, on the preſent occaſion, that none are ſtated; that the circumſtance of delay alone in the proſecution by the Commons was a ſufficient juſtification of it (though in ſtrict propriety they ought to have been * apprized of ſuch a ſtep being intended), and was

* This, however, was frequently omitted; as in Drake's caſe; in that of the Lords Saliſbury and Peterborough, in which it is made one reaſon for the Proteſt; in that of the Duke

was not likely to be diſregarded by the Houſe of Peers, in which a great debate had ariſen, when the Impeachment was firſt brought up, whether they ſhould receive it, as being againſt a Commoner for High Treaſon; and not leſs than twenty-one Lords proteſted againſt the Reſolution to admit it.—But whatever may be collected from the caſe of * Sir Adam Blaire, as to his own diſcharge, with reſpect to that of Lords Saliſbury and Peterborough, in which view we were conſidering it; the reaſoning above ſtated ſeems forcible to invalidate the concluſion which ſeems moſt obviouſly to reſult from it.—An additional, and no ſlight inference, is drawn to the ſame effect, from the manner in which Mr. J. Foſter conſiders this caſe, which he takes occaſion to mention in two different parts of his valuable work: in † the firſt he is ſpeaking of Acts of Pardon; in the ‡ ſecond of the appointment of a Lord High Steward; and after ſtating it at length, and referring to the Lords Journals for the facts, he reſts the diſcharge of Lord Saliſbury entirely on the Act of Pardon.—Having

Duke of Leeds, and of the other Lords diſcharged from their Impeachments at the ſame time.

* It is obſervable that his caſe was conſidered as of ſo little importance, that it is not cited in the long and minute Report of the Committee in 1717.

† Foſter, p. 45.

‡ Ibid. p. 151.

ſtated

ſtated that the King's Bench refuſed his application to be diſcharged, on the ground of the pardon, and that they referred him to the Houſe of Lords for redreſs, he adds, " and there he afterwards had *the full benefit of the act*, without being " put to plead it; for on the 2d Oct. 1690," &c. (relating the proceedings in the Lords Houſe to his diſcharge); and he repeats the ſame ſtatement with no material variation on the ſecond occaſion which has been mentioned.—Is it to be believed that, while he examined the Journals, the only ſource from whence he could be ſuppoſed to have drawn the accurate account which he gives of the ſeveral ſtages of the proceeding (even if he had not expreſsly referred to them), he paſſed over, without notice, the reference to the Committee, which preceded the debate and reſolution which he mentions? If not, with a full knowledge of every thing now before us, perhaps aſſiſted by a more recent memory of the tranſaction itſelf, he attributes the deciſion to the effect of the pardon only. But I am content to waive the authority of Mr. J. Foſter in point of hiſtorical correctneſs, if I am allowed to retain it in that of legal reaſoning; ſuppoſe him ignorant of what *had* been decided by the Houſe of Lords, though he ventures to aſſert it, it is ſufficient for the argument, if, from all that appears, that which he ſtates *might have been* ſo decided—It will at leaſt be thought rather a hardy

a hardy aſſertion, in oppoſition to this reſpectable name, *that " it was impoſſible, in point of law, " that the Lords could give the Earls the benefit " of the Act, and diſcharge them, without putting " them upon their trial;" the reaſon for which is given; that " the exceptions were ſuch, that no " Judge or Court whatever could take notice of " it, but upon a trial, *or upon hearing what the " Proſecutor had to anſwer to it*:—To this general poſition, as firſt laid down, may be oppoſed, the qualifying exception at the end of the paſſage above cited, which admits in terms, that if the Proſecutor aſſents, the party may be diſcharged without trial; ſtill more the conduct of the Houſe of Lords, who conſulted the Judges on the effect of the Act of Pardon, with a view no doubt of acting upon their opinion, before any trial was inſtituted; and, laſtly, the expreſs declaration of Mr. J. Foſter, who ſays the Lords had the benefit of the Act of Pardon, though they certainly were never put upon their trial.—But what does the whole of this amount to? They might be diſcharged *in point of law*, without trial, by conſent of the proſecutors; they were, *in point of fact*, without aſking their conſent; and upon the ſame occaſion Mr. J. Foſter has ſaid, " † *It will not be material to inquire whether the Houſe did right in diſ- " charging* the Earl without giving the Commons

* Mr. Chriſtian, p. 45.
† P. 151.

" an

" an opportunity of being heard, ſince *in fact*," &c. This very objection is raiſed at the time, by the proteſting Lords, in their third reaſon; but the ſtronger grounds there were for urging this defect, the more it is apparent that the caſe was ſuch as to make it neceſſary to have purſued a contrary line of conduct.

On the whole of this proceeding, which I have examined more at large, becauſe it ſeems to me the only precedent on which much reliance can be placed by thoſe who reaſon differently upon this ſubject, it is ſufficient if it has been ſhewn, that the deciſion, in point of form, amounts * to no poſitive rule; and that, in fact, it either did, or might, conſiſtently with every thing that appears, have proceeded upon ground collateral to the point in queſtion: the caſes which follow will concur in eſtabliſhing this concluſion.

The next occurrence is the Impeachment of the Duke of Leeds, which took place Apr. 27, 1695; to which he immediately put in his anſwer; and a few days after the Lords reminded the Commons of the Impeachment, and deſired them to proceed, which in a conference they declined, on account of a material witneſs having withdrawn ſince the

* It is ſo conſidered by Mr. Ralph in his Hiſtory. He ſays; it appears " That the main drift of all, that is to ſay, the de-" ſign againſt the Marquis of Carmarthen, was *evaded* by the " following queſtion, viz. Whether the Lords ſhould be now " diſcharged from their Bail?" 2. 252.

com-

commencement of the proſecution.—The Duke complained very much of this delay in a * ſpeech which he delivered, the ſame day, upon a Money Bill; and ſaid, that " it was in the power of a " tinker to accuſe *at the end of a Seſſion*, and " one might lie under it without remedy."—He preſſed the Houſe, that, if the Commons did not reply, the Impeachment might be diſcharged; for if it were not, *he might lie under the reproach of it all his life*; and he concluded with making a motion to that effect; of which, however, no notice was taken.—After three diſſolutions had taken place, in the year 1701 the attention of the Houſe ſeems to have been called again to this caſe, in which the Commons had not yet been able to proceed, from the ſame want of evidence, by the circumſtance of ſeveral other Impeachments, which had been recently brought up againſt the Lords Portland and Halifax, being reduced, by differences between the Houſes, to the ſame ſtate of ceſſation: and the following Order was then made: " The Houſe of Commons having impeached " Thomas, Duke of Leeds, of high crimes and " miſdemeanours, on the 27th Apr. 1695, and " on 29th of ſaid Apr. exhibited Articles againſt " him, to which he anſwered; but *the Commons* " *not proſecuting*, it is ordered, That the ſaid Im-" peachment, and the Articles exhibited againſt

* Chandler's Debates, May 3, 1695.

" him,

" him, ſhall be, and they are hereby, diſmiſſed." The obvious inference from this proceeding is, unleſs the good ſenſe and decorum of the ſupreme Court of Judicature in this Kingdom is to be * laughed out of its uſual weight and reſpectability, that the Houſe of Lords conceived the ſubject was before them upon which they acted; and that the reaſon for their ſo acting muſt be allowed to be that aſſigned, at leaſt till ſome probable cauſe be ſhewn to induce a contrary ſuſpicion.—But they are ſuppoſed to have diſmiſſed this Impeachment *now* becauſe the Commons had not proſecuted it *ſix years before*; that is, the proceeding being " *totally terminated and extinct*" by the diſſolution, Oct. 11, 1695, the Lords in 1701 declare the Impeachment to be † *then diſmiſſed* by their order, becauſe the proſecutors had not been ſufficiently active *while it was depending* in the Parliament in which it was preferred.—The fact aſſumed, too, unluckily is here as unfounded, as the reaſoning is

* Mr. Chriſtian aſks every *candid* man to believe, " that " the Lords, from their zeal to reſiſt (and perhaps to *inſult*) " the Houſe of Commons, added the Duke of Leeds to the " liſt, merely *that he might make a figure upon paper*, though " they were convinced in fact *he was a perfect ſhadow and non-* " *entity*." The abſtract notion of Impeachment ſeems here perſonified in the character of the Duke of Leeds, who had been ſo long involved in this kind of proſecution, and ſuch is the rage for Diſſolution, that his perſonal exiſtence is ſuppoſed to have ceaſed to preſerve the allegory.

† *Shall be, and they are hereby*."

perverſe.

perverſe.—I have before mentioned the ſpeech and motion of the Duke ſoon after he had put in his anſwer; which received, as it was entitled to, no other notice than an ejaculation of aſtoniſhment (as it ſhould ſeem) from ſome Lords who cried out, " Well moved!" I ſhould have added, that on that very day (which was within a week after the Impeachment was firſt brought up) the Parliament was prorogued, and ſat no more before the Diſſolution.—Did the Lords then complain that the Commons were dilatory in not proceeding in the proſecution three days only after the anſwer was put in, or did they acquieſce in the propriety of their delay when they addreſſed the King to iſſue his Proclamation for apprehending the Witneſs who had diſappeared, who was no other than the Duke's own ſervant, and when they agreed to except out of the Act of Pardon which paſſed that day " all perſons who have been or ſhall be " impeached in Parliament during this Seſſion"? After this detail it will ſcarcely be thought extraordinary (which is made another comment upon this caſe) that the Lords, who were urging the hardſhip of delaying the Impeachments againſt the Earl of Portland and the other Whig Lords, * did not inſinuate that the Duke of Leeds had any great reaſon to complain.—They properly diſmiſſed a

* Mr. Chriſtian, p. 54.

charge which there was now no probability of being eſtabliſhed; but as it was from the want of evidence * known to exiſt, and in the power of the party accuſed, that it failed, they were neither in haſte to adopt this meaſure, nor induced to it by any motives of compaſſion or indulgence †.

I ſhould now, in the chronological order which has been adopted, proceed to conſider the Impeachment of the Earl of Oxford, which is the next parliamentary authority; but I cannot paſs over the recognition of the principle, which I have endeavoured to ſupport, delivered in the mean time by ſo eminent a lawyer as Lord Holt.—It is, I

* The Proclamation ſtated, " That it appeared upon oath, " before a Committee of both Houſes, that Mr. Robart was " able to give evidence and make proof of the diſpoſal and " application of part of the ſaid money; and that to avoid " juſtice and the manifeſtation of the truth, and to render all " juſt and proper methods of proſecution ineffectual, he hath " withdrawn," &c.

† Burnet ſays; " But his ſervant, whoſe teſtimony only " could have cleared that point, diſappearing, the ſuſpicion " ſtuck ſtill on him..... Yet this whole diſcovery was let fall, " and it was believed too many of all ſides were concerned in " it; for by a common conſent it was never revived." 2. 147. Mr. Ralph's comment upon this is conceived in ſtronger terms than I choose to insert here. Hiſt. 2. 560.—The Biſhop, who at that time ſat in the Houſe, ſays afterwards, when ſpeaking of the diſmiſſal of the Impeachment of the Lords Portland and Halifax, " And becauſe the Commons *had never inſiſted on their* " *proſecution* of the Duke of Leeds, *which they had begun* ſome " years before, they likewiſe acquitted him." Hiſt. 2. 280.

admit,

admit, preſerved in a Collection of Caſes of no great credit for their accuracy in the Courts of Law, and the opinion itſelf is only delivered as an illuſtration, not with the authority of an adjudication, of the Caſe in queſtion; but it is probable it might have been advanced on ſuch an occaſion, as being of ſimilar import to the declaration of the ſame Judge in Lord Saliſbury's Caſe, and the intrinſic Evidence of the Report itſelf will certainly not avail to invalidate it.—* A Writ of Error had been ſued out *ad prox. Seſſ. Parliamenti* (that is, returnable at a certain day in the next Seſſions), before which time the Parliament was diſſolved, and a day fixed for the meeting of a new one—Two queſtions aroſe; 1. the conſtant one in Courts of Law upon this ſubject, Whether this Writ were a *Superſedeas* to the Execution; there not being, in this caſe, the delay of a Term? 2. Whether it was not ſo defective in point of form that it could not be a Warrant to carry up the Record to the new Parliament?—" It was " agreed on," ſays the Reporter, " that the Court " can take no notice of any extrajudicial deter- " mination or order of the Lords. And *per Holt*, " If an Impeachment be in one Parliament, and " ſome proceedings thereon, and then the Parlia- " ment is diſſolved, and a new one called, there " may be a Continuance upon the Impeachment."

* Peters v. Benning, 13 Will. 3. 1701. 12 Mod. 604.

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This, to be ſure, is ſufficiently explicit; but a ſhort way * is propoſed of deſtroying its effect, by inſerting, ſomewhere or other in the ſentence, a negative particle.—Nor would I object even to this violent and flaſhing kind of criticiſm, if the whole tenor of the caſe fairly led to ſuch a concluſion; but, as the objections to it ſeem founded at leaſt in miſtake, I muſt ſtill believe it probable that ſuch might have been the expreſſions of Lord Holt.—The Report is obviouſly compoſed of ſhort Notes, printed much as they were taken, without being dilated into a regular chain of argument, or ſufficiently diſtributed amongſt the different perſons who might have delivered them.—If they are accurate, all that is related paſſed in Court, but much may be omitted to fill up the chaſms; and it does not appear how much is properly to be attributed to the Bench, or how much is only the argument of Counſel.—Till this is aſcertained, contradiction muſt be expected; but the credit of what is attributed to Lord Holt, by name, will not be impeached unleſs he is expreſsly made to contradict himſelf.—This indeed is done; but it is by the Commentator, and not by the Reporter; for it is ſaid, that, having laid down the doctrine above cited, he quoted the caſe of James and Bertly, "*in which*," Mr. Chriſtian adds, "*a Writ* "*of Error was determined by a prorogation.*"—This

* Mr. Chriſtian.

would

would indeed have been a contradiction, not only to what Lord Holt had juſt ſaid, but to the acknowledged law upon the ſubject ever ſince 1673; but in truth the caſe was only cited to prove, and amounted to no more than, that, as a term intervened between the *teſte* and *return* of the Writ, the party might *ſue out execution*; which Lord Holt adds he remembered had been ruled in Kelyng and Hale's time, and which might equally be done whether the Writ was determined or not.—What follows, being introduced with the expreſſion "*and it was ſaid*," ſeems rather to have been the arguments advanced, and caſes cited, at the Bar; and therefore not neceſſary to be reconciled: they have, however, this mark of authenticity, that all the authorities are fairly and accurately given.—It is another miſtake "that the whole tenor of "the caſe is to prove that Writs of Error abate "by a diſſolution," and a ſtrange application of the Reſolution firſt laid down; as if it was meant to ſhew "that in the year 1701 the Courts of "King's Bench were not bound by the extra-"judicial order of the Lords in 1678."—As to the former, it is again forgot that what is ſuppoſed to be the tenor of this caſe, is urged, if at all, againſt the eſtabliſhed law founded upon that very order of 1678, and that the point before the Court was collateral to that deciſion.—The very queſtion, as ſtated, implies that in general the Writ of Error does not abate by a diſſolution; if

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it did, what doubt could arise upon the effect of it?—As to the latter, by what intuitive sagacity is this general Resolution, of not being bound by any extrajudicial order of the Lords, known to apply solely, or at all, to that of 1678, by which the Courts had ever since the making of it been governed; or with what propriety can that be called extrajudicial, by which all the Appellant Judicature of the Lords House is regulated, and which was well described by the Lords who protested in 1685 as a judicial rule and order of the House in the highest point of their power and judicature?—If I was to hazard a conjecture upon the import of this Resolution, I should think it referred to some order of the Lords, relative to the practice of the Courts of Law as to granting execution during the pendency of Writs of Error; which was the point before the Court, and which might be considered by the Judges as extrajudicial in the Lords. * Several such orders appear to have been made, in particular cases, in the year 1690, when the practice seems to have commenced; at which time a general question was proposed, "Whether any proceedings may be had in West-"minster-hall, in the intervals of Parliament, "after Appeals or Writs of Error depending in "this House?"—The Reader will judge, then, whether any thing has been fairly urged to affect

* Lords Journals, Ap. 3. May 16, 1690.

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the probability of Lord Holt's having so expressed himself on this occasion: if not, his authority is not only of general weight, but (when it is remembered that he was one of the Judges consulted in the Case of Lords Salisbury and Peterborough, and consequently not likely to be ignorant of the ground of their discharge) of particular application to the inference we have drawn from that decision.

We are now arrived at the termination of what (I fear) may have seemed a tedious investigation, in the case of the Earl of Oxford; who having been impeached in the year 1715, and committed, after several prorogations of the same Parliament, presented his petition to the Lords, May 22, 1717. He stated, in this, the proceedings on the Impeachment, and the several prorogations, and that he had remained a prisoner since July 9, 1715; and prayed the Lords to consider the circumstances of his case, assured that it was not their intention that his confinement should be indefinite.—A Committee was immediately appointed to search for such precedents as relate to the continuance of Impeachments from Session to Session, or from Parliament to Parliament, and to report.—This they did accordingly, a few days afterwards, and produced a very full statement of such precedents as they thought it necessary to refer to.—They begin their researches, however, no earlier than 1660.—In that year they find the case of Drake,

 which

which has been before adverted to, and ſoon after that of Lord Mordaunt, in which they obſerve the Parliament was prorogued, and no further proceeding on that Impeachment after the Prorogation; they ſhould have added, that he received * a pardon during this prorogation.—The caſe of Sir W. Penn, which follows, is the only one in this Report where an Impeachment was dropped after a prorogation, without any particular reaſon occurring; and even in that, conſidering how wide the offence was ſuppoſed to ſpread, and the † length of time that elapſed before Parliament ſat again, it may well be preſumed to have been abandoned on other grounds, than thoſe of a ſenſe of incapacity to proceed. In that of Mr. Seymour, in 1680, a Diſſolution intervened; as did likewiſe in that of Longueville and others, in 1698. Amongſt the Indictments which are mentioned, all are proceeded upon to Judgement in the ſame Seſſion, except that againſt Lord Stamford, which was preferred in the laſt Seſſion of the ſingle Parliament of James the Second.

The only remaining Caſes in this Report are thoſe which are relied upon in the preſent inſtance, all of them turning upon the effect of a diſſolution.—Upon ſuch a foundation ſtood the propo-

* This is ſtated by Lord Danby when he applied to be bailed.—Lords Journals, 2. 744.

† Near a year and a half.

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ſition ſubmitted, on reading this report, to the Houſe; that the Impeachment in queſtion was determined by the intervening prorogation. As there was nothing contained in it, that could juſtify this concluſion, but what was drawn from caſes of a diſſolution; the vote propoſed muſt have proceeded upon the idea that a prorogation had the ſame effect.—If the Houſe adopted this notion, and it is highly probable they did, for the Proteſt lays down the principle as admitted, the deciſion which negatived the reſolution propoſed, eſtabliſhed the ſame point in the caſe of a diſſolution—if they thought a diſtinction exiſted between the two caſes, their opinion upon that which was ſubmitted to them has no neceſſary reference to the other, which was not under their conſideration. —In this Majority were found the Lords Harcourt and Trevor, both eminent in the profeſſion of the Law, and both well diſpoſed to the cauſe of Lord Oxford. Others of his Friends, either of leſs experience or warmer attachment to his intereſt, proteſted againſt this determination with a zeal which may account for, though it will hardly excuſe, the inaccuracy of their ſtatement. They aſſert in this, as a ground for their diſſent; 1. That there ſeems to be no difference in law between a diſſolution and a prorogation. 2. That both have had the ſame effect in conſtant practice as to determination both of judicial and legiſlative proceedings.—I ſhall not here controvert the firſt of

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theſe propoſitions; becauſe, if it has any effect upon the preſent queſtion, the truth of it tends to ſupport the Idea of continuance, by adding to the precedents all thoſe relative to a prorogation only, the deciſion of this very caſe, and the admitted duration of the preſent Impeachment.—But the ſecond is ſo manifeſtly unfounded, that it would be allowing an improper degree of credit to this Proteſt not to advert to it.—When it is ſo confidently aſſerted, that both prorogation and diſſolution have in conſtant practice determined the judicial proceedings of the Houſe, the Reader muſt be inclined to ſuſpect that he has been here amuſed with a viſionary deduction of facts and principles ſo plainly repugnant to ſuch an idea.—Without recurring to the caſes of * Impeachments, which yet no candid perſon will rely on, as affording a clear rule of practice contrary to that which I have endeavoured to deduce from them; in Appeals and Writs of Error, the practice, at leaſt for forty-four years preceding, was at that time, and has continued to the preſent, directly the reverſe of what they ſuppoſe, and is even excepted out of their own favourite reſolution in 1685.—The diſtinction between the judicial and legiſlative character of

* The Duke of Leeds, we have ſeen, deſired the Lords to reſolve that the impeachment againſt him ſhould be diſcharged unleſs the Commons proceeded on it that Seſſion: which was refuſed.

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the Houſe had been long felt, and acted upon, and has been traced in the foregoing pages, at leaſt as far as the reference to the Committee in 1673, and ſupported by the authority of Lord Hale.

Having laid this broad foundation, which wanted nothing but correctneſs in point of fact to make it ſolid, what are they anxious to ſupport with it? A fabric patched up in haſte to ſerve a preſent purpoſe, and compoſed of ſuch wretched materials, that it had long ſince ſtood a monument only of Ruin. This was the Reſolution of 1685; which they think, "may be weakened by the preſent vote," and to which they are ſo partial as to aſſert, "that it was founded upon the law and "practice of Parliament in all Ages, without one "Precedent to the contrary, except in caſes which "happened after the order 1678, which was reverſed and annulled in 1685, and in purſuance "thereof the Earl of Saliſbury was diſcharged in "1690." Here again one would be led to ſuppoſe, that this famous Reſolution was the ſtanding law of the Court, that it had eſtabliſhed by a poſitive regulation ſome great land-mark of Juſtice, founded, as they ſtate it to be, on a deliberate inveſtigation of the previous law and practice of Parliament, and ſupported by the clear recognition of ſucceeding times. We have ſeen on the contrary that it was merely negative, extrajudicial, haſtily conceived, and partially directed, and that

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ſo far from being regarded, if in its nature it could be, as a permanent rule, that no ſimilar caſe had ſince ariſen including even that then under conſideration, in which the ſame Enquiry did not begin afreſh.—It would be to repeat what has been advanced above, to controvert here the aſſertions reſpecting the grounds of that Reſolution (to which may be oppoſed the not leſs confident declaration of the Lords who proteſted in 1685) or of its application to the diſcharge of Lord Saliſbury; enough has been ſeen of the inaccuracy of this proteſt to prevent our taking any of its poſitions for granted: in general indeed the object of conſidering theſe recorded opinions of particular Peers, is not ſo much with a view of drawing concluſions of fact from the liberty allowed them of aſſerting what they conceive to be true; but to diſcover from their conduct and mode of oppoſition to the ſenſe of the Houſe, what had *there* been debated, and what aſſumed, or taken for granted. The Proteſt before us has been thought of much conſequence on this account; for it has been ſaid to be * "*manifeſt* from it that it *muſt* "*have been* the decided and unanimous opinion "of the Houſe of Lords, that the Impeachment "would have abated by a Diſſolution."—This indeed is going farther in the uſe to be made of ſuch proteſts, than I ſhould have ventured, con-

* Mr. Chriſtian p. 58.

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ceiving, that, whatever probable inference can be drawn from the preſumptive right reaſoning and good faith of the noble perſons concerned, as to the opinions held by their opponents in debate, no poſſible mode of reaſoning, no aſſertion of ſpeculative facts, can make it *manifeſt* what other people may have thought, or even expreſſed, upon the ſame ſubject.—But waiving this ſtrictneſs (which is indeed ſoon after deſerted by the Author himſelf, who, when he repeats his aſſertion, introduces this qualification, "that it is *manifeſt in the* "*opinion of the diſſenting Lords*") let us take it thus reduced to the point it ſhould be, and ſee how it is ſupported. The ſingle ground aſſigned for this inference is thus given; "*for it is here* "*aſſumed as a firſt and incontrovertible principle*"—is that then ſufficient to prove its truth; if it be, we ſhall ſoon find that it will prove too much; for this is not the only principle that is aſſumed; the firſt is, that a prorogation is equivalent to a diſſolution; which it is admitted may be * falſe, and muſt be ſo proved, to invalidate the force of this

* It may be ſaid they could not infer the Houſe of Lords to have thought ſo, though they themſelves aſſume it, becauſe 87 to 45 voted againſt it; but the Houſe was not called upon to vote on the parts of this ſyllogiſm, as this ſuppoſes; they only negatived the propoſition, that the Impeachment was determined by the prorogation; which they would have done *à fortiori* if they held it not affected by a diſſolution.

precedent.

precedent.—But in another way likewiſe it proves too much; if it be *manifeſt* that what the proteſting Lords aſſume, they muſt have thought to be the opinion of the Houſe; *the whole* that they aſſume, at leaſt in this one propoſition, muſt be ſubject to that inference: What then is this propoſition? * That a diſſolution of Parliament has *in conſtant practice* had the effect to determine both judicial and legiſlative proceedings; which, in its extended latitude, is impoſſible to have been the opinion of the Houſe, becauſe notoriouſly contrary to the fact, which, whatever the principle might have been, is the only thing referred to.—This reaſoning however, faulty as it ſeems, is ſupported by an illuſtration, which, it is thought, puts it out of the reach of cavil, eſpecially as being drawn from a ſcience, where the deductions are expected to be correct, and the aſſumptions ſo ſimple as to be intuitively true.—It is urged that "if I were ignorant of every propoſition of Euclid, *and convinced that every one of his concluſions were falſe*;" yet I ſhould conclude that "he was convinced that what he aſſerted as the foundation of his whole ſyſtem, was aſſented to by every man of a clear underſtanding in his time."—Though there is

* To ſtate this propoſition fairly it muſt be detached from the other, which in the conſtruction of the original is mixed with it: as it ſtands indeed no ſuch propoſition is actually aſſerted, though, I admit, it may be inferred from the context.

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much advantage in appealing to a name proverbial for accurate reaſoning, to illuſtrate the deductions of ordinary men, and to a ſelf-evident axiom as a parallel to a complicated notion of law; yet there is enough conceded in this ſtatement to prevent its impoſing longer than at the firſt glance.—If I am unacquainted with the Author of ſuch a ſyſtem, be it of morals or mechanicks, of politics or religion, all I can infer from his aſſuming any propoſition as his baſis, is, (if I give him credit for integrity) that he himſelf believes it to be true; what other people may think of it, ſtill more what thoſe of a clear underſtanding may, according to his conception, I can only gueſs from an opinion which I have not yet formed of his judgment and accuracy, his plain ſenſe, or his love of ſingularity.—But if I went further, and was "convinced that every one of his concluſions were falſe," I ſhould no longer doubt, that he who reaſoned ſo perverſely upon his own principles, deduced his fundamental axioms as ill from the general ſenſe of mankind; and it is rather a curious limitation to human extravagance, that having attributed abſurdity to two branches of a ſyllogiſm, it follows of courſe that the third muſt be true.—Change but the name then, and the ſubject of this alluſion, and it will ſoon appear how little it will ſupport the concluſion drawn from it; in every ſpeculation tenets may be found, on which the whole is founded, contrary to truth, as well as the common ſenſe of

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Mankind. All men are born equal, ſays one; another aſſerts, they are from their difference in natural faculties neceſſarily ſubordinate one to another, or perhaps ſome delivered by divine appointment to be governed by others—the Earth is the centre of the Univerſe, may be aſſumed again, as well as the preſent contrary perſuaſion—there is one God and Mahomet is his prophet, muſt be the language of a ſtaunch Muſſelman, though he wrote in the midſt of this Metropolis; and upon every one of theſe, a ſyſtem may be, and has been built; of the truth of which therefore we may fairly ſuppoſe the Author of each was ſtrongly perſuaded, but which in ſome inſtances he muſt know was not the prevailing opinion of Mankind, or if he thought ſo in others, either he or his opponent muſt have been miſtaken, becauſe their aſſertions are directly contradictory—If we are not precluded then by this mode of mathematical demonſtration from drawing our own inference from the expreſſions of this Proteſt, let us ſee whether they import any thing like what it is aſſerted they muſt. Had theſe Lords been convinced that nothing was intended to affect their favourite Reſolution of the firſt of James the Second, nay, that it had juſt received the recognition of the Houſe, even in eſtabliſhing this limitation to it, would they have been ſo apprehenſive of its being weakened by the preſent determination; or if they had thought that it might be affected by it in conſequence

quence of the analogy which they inſiſt upon, but which it is alledged could not have been the Idea of the majority, would they not have made the beſt poſſible uſe of their right to proteſt, by connecting with the vote that explanation of it, which the truth of the tranſaction enabled them to give? —They would ſurely have ſaid; it has indeed been admitted in debate, that an Impeachment is determined by a diſſolution, and therefore the precedent of 1685 is not meant to be diſputed; but as we think a prorogation has in all caſes the ſame effect, this deciſion ſhould have conformed to that. —Thus their reaſoning would have been as complete as it now ſtands, and the danger would have been avoided, which is made the chief ſubject of their complaint.—It is even highly probable, and they would have done prudently, that they would have forborn ſtarting the point of ſimilarity between diſſolution and prorogation, from which they drew an inference againſt their own doctrine, which had not been done by the Houſe.—It appears beſides, from the anxiety with which they ſupport that precedent, by urging the grounds on which it ſtood, and the practice which had ſince obtained to confirm it, that they thought its Authority was in more danger of being ſhaken, than was poſſible, if it had been ſo recently recognized as is ſuppoſed.—Admitted truths do not require ſo much ſupport from arguments; and where a

principle is once firmly eſtabliſhed in practice, it is not very uſual to develope, whenever it is referred to, the hiſtory of its introduction, or the reaſonableneſs of its application.—If in the preſent inſtance theſe were to be deduced, why ſhould the concluſion and reſult of all this be omitted, and after aſſerting "that it was founded on the "law and practice of Parliament in all ages, and "that in purſuance thereof Lord Saliſbury had "been diſcharged," would they not have added, "and which is admitted even by thoſe who have "come to the preſent Reſolution to be the exiſt-"ing Law of Parliament to this day"?—An aſſertion which, if true, being within their own knowledge, and confirmed by the tacit acquieſcence of the other Peers, would have proved abundantly more than their reference to the practice of remote times, in which they might be miſtaken, or of which at beſt they had no peculiar means of information.

We have now conſidered, as was propoſed, every thing that has occurred on this queſtion, ſince the Reſolution in 1678; and the fair reſult of the examination, with reference to the caſe, as it ſtands before the Houſe of Peers, ſeems to be; that though that order no longer ſubſiſts in point of form, yet being founded on ancient practice, and eſtabliſhed principles, and uncontrolled by the genuine deciſions of ſubſequent times, it ſtill exiſts

iſts in ſubſtance confirmed, and not impeached, by the moſt unſuſpected authorities.—I confine this view of the caſe to its preſent ſituation, becauſe the Lords, who are the Judges, may conſider the whole regulation of the point as excluſively of their cognizance, and reſort only to their own Journals for information on the ſubject.—With reſpect to the Houſe of Commons; when it is conſidered, that this is * the only precedent that paſſed with their concurrence, and which was attended with poſitive effect, they muſt have deſerted a great conſtitutional ground, on which they once ſtood, and which they never conſented to abandon, if they had determined otherwiſe than they did, unleſs it could have been proved to them, as was attempted by ſeveral Gentlemen of the Long Robe,

* Sir H. Mackworth, in the Tract before cited, ſays; But here we muſt obſerve a difference between Facts and Precedents. When either Houſe hath actually paſſed a Vote, or done a thing, which never came to be conſidered by the other Houſe, nor ever was debated and agreed to, at any conference, or otherwiſe, betwixt the two Houſes, that is called a Fact, but cannot be inſiſted on as a Precedent to bind the other Houſe. But when a matter comes in queſtion betwixt the two Houſes, and is ſolemnly debated and conſidered, and afterwards agreed to by both Houſes, that is eſteemed a Precedent, and ought (with great ſubmiſſion) to be binding and concluſive to both Houſes; and no ancient Precedents are uſually cited againſt the latter, in which all the former Precedents are ſuppoſed to have been conſidered.

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that the decision involved in it such technical absurdity, and general inconvenience, as no authority could sanction, no precedent could support.—We are next to consider the arguments which have been urged on this head.

PART

PART III.

It may be thought by some that I concede a good deal, in supposing it possible for such legal objections to exist against a position which has been stated, without reprehension, by such eminent sages of the law as Lord C. J. Holt and * Lord C. B. Comyns; yet unless this shall appear, and the two former grounds have been successfully established, nothing will remain to invalidate the conclusion.—These objections are of various kinds, and urged in different ways; yet I hope not to omit any that are in the least material, or to state them less forcibly than I ought.

* I am content to urge this authority no farther, convinced there is much propriety in what Mr. Christian has observed upon it, p. 70. but I can see no reason for supposing that Serjeant Hawkins was better read in the Journals of Parliament than C. B. Comyns, or that his work was designed for Judges, while that of the latter was intended only for students and practisers.

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It may be ſaid, that this is a Trial in the High Court of Parliament, of which the Houſe of Commons form a part, and that by their Diſſolution the Court is diſſolved.—To this it might be ſufficient to anſwer, that the objection applies equally to all judicial proceedings, civil or criminal, original or appellant; contrary both to the ancient caſes, and the preſent practice in the latter of theſe.—The Judicature in Parliament was always exerciſed in the Houſe of Lords alone, though the Judgement purports to be that of the King in Parliament, juſt as the ſtile of the Court of King's Bench ſuppoſes him to be preſent, though he actually preſides in neither.—Indeed, if this were otherwiſe, it would hardly be conſiſtent with Juſtice that the Houſe of Commons ſhould impeach, and thus become both accuſers and Judges: and the authority of Lord Hale is alone concluſive upon the ſubject, who calls the Houſe of Peers a diſtinct Court, and whoſe treatiſe on the ſubject is entitled, "Of the Juriſdiction of the Lords "Houſe of Parliament."—Taking this then to be the Court, it is urged by others, * as "a great "principle, that by a Diſſolution the Writ, or "Commiſſion, by which the Court ſat, and exer-"ciſed juriſdiction, is at an end."—This objection ſuppoſes, or rather artfully takes it for granted, that the Writ of Summons is the only Commiſſion

* Mr. Chriſtian, 160.

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by which the Lords ſit; which in fact is true only as applied to the time and place of their ſitting.—They meet at Weſtminſter, or Oxford, at ſuch a day, by virtue of the King's writ, and ſit no longer than he pleaſes; but while aſſembled, they exerciſe their functions in conſequence of precedent and permanent rights*.—The Commiſſion of the ancient Peers is their being born ſuch, the ſame Commiſſion under which the King himſelf exerciſes all his prerogatives, when the death of his predeceſſor makes way for his native rights being called into action.—New Peers are now chiefly created by Patent, by which they are expreſsly entitled to a † "*ſeat, place*, and *voice*," in Parliament.—All this it may be ſaid is true of ſuch as

* Lord Hale ſtates it as having been ſaid in ſupport of the Lords Juriſdiction as oppoſed to that of the Judges appointed by the King, and then removeable at his pleaſure; "Whereas "the Lords are *judices nati*, fixed, perpetual; and though "their honours be derived from the Crown, yet being once ſo "derived, are hereditary in their blood;" to which he makes no objection that invalidates the inference here drawn from it. Tract. p. 179. Foſter, p. 141. Vide Addenda.

† Yet Mr. Chriſtian, in contradiction to this expreſs grant, as well as to the law as admitted by Lord Hale (ſee laſt note), aſſerts, that a Peer "has no inherent legiſlative or judicial "capacity annexed to his perſon; and till he has received his "Writ of Summons, or *commiſſion*, he has no *right* either to "a *voice* or *ſeat* in Parliament"—confounding thus the rights of the Peerage with the power and occaſion of exerciſing them.

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are created by Patent, as Dukes, Marquiſſes, and Viſcounts, always were; and perhaps might be allowed to apply to the ancient Earls and Barons, who ſat in right of territorial poſſeſſions; but that when the King creates a Baron by Writ, which he may ſtill do, the Peer has no other title to any of his privileges but what is derived from his Summons to Parliament.—I ſhall not content myſelf with obſerving, in anſwer to this, that there are none ſuch in the preſent Houſe of Peers, but ſhall go a little further, to ſhew that if ſuch were to be now created, they would ſtand on the ſame footing as Barons by tenure.—It appears then that about the time of King John a diſtinction took place between the *Barones majores*, and the reſt, who held of the King *in capite*; and it is provided by Magna Charta, that the former of theſe ſhall be ſpecially ſummoned to attend all Parliaments; and upon this reſts the right of the Peers to their Writ of Summons. Mr. Selden thinks it probable, that ſoon after this period a law paſſed, which is not now extant, by which all were excluded from coming to the Parliament (i. e. to what is now the Houſe of Lords) but ſuch as had ſpecial ſummons, and that all who had ſuch ſummons ſhould be admitted without further proof of title; which, he ſays, deſtroyed Baronies by tenure, and conſtituted thoſe by writ. Camden, who advances the ſame fact, differs only as to the manner of its being introduced; which he inclines to think took place

place in the reign of Henry the Third, relying on the authority of an ancient writer, who ſays, that he *ſtatuit & ordinavit quod omnes illi Comites & Barones regni Angliæ, quibus Rex dignatus eſt brevia ſummonitionis dirigere venirent ad Parliamentum ſuum, & non alii.* It is clear then, from either of theſe accounts, more expreſsly from the latter, that the Writ preſuppoſed a Right by Tenure, of which it then became the only evidence; and though it afterwards changed its application, and was directed to thoſe who had no ſuch title to it, yet the legal import of it was ſtill the ſame, as is further apparent from the conſequences which followed it: for though in form it was merely *pro hac vice*, and without any expreſſions of grant, or that implied a permanent duration, yet * if the perſon ſummoned took his ſeat under it, he acquired thereby an inheritance in the dignity by operation of law, which could only be the conſequence of conſidering it as a † recognition of a previous right.—‡ Some indeed have thought that two Writs, and the ſitting in two Parliaments, were neceſſary to evince an hereditary Barony; which, if true, proves ſtill more deciſively that the Writ alone is not the

* Co. Litt. 16. B.

† This is further proved by the only modern inſtances in which it has been uſed to call up the eldeſt Sons of Peers in the life-time of their Father, and by one of his Baronies.

‡ Whitelocke apud Blackſt. Comm. 1. 400.

Commiſſion, but the preſumptive evidence of a pre-exiſtent right.—That this is the real ſtate of the caſe is put beyond all doubt by the Writs of Summons to the Judges, and other aſſiſtants to the Houſe of Lords, which were * ſometimes conceived in the ſame terms as thoſe of the Peers, and † generally ſo little varying from them, as by no means of themſelves to mark the different lines of their duty and function, which muſt therefore have been diſcriminated by other conſiderations implied but not expreſſed.

By whatever mode then the Peers are inveſted with their Dignity, it is permanent in Right, and more like the moſt durable power of the Judges of the Courts of Weſtminſter-hall, as they are now conſtituted, than thoſe of any perſons who act under temporary Commiſſions.—They agree in

* 22 Edw. III.

† The general form conſtantly uſed from Hen. IV. after reciting the King's intention of calling a Parliament at ſuch a time and place, as in the ſummons to the Peers, goes on, *vobis mandamus firmiter injungentes* (inſtead of *in fide & dilectione* or *in fide & ligeantiâ) quod omnibus aliis prætermiſſis dictis die & loco perſonaliter interſitis nobiſcum & cum cæteris de Concilio noſtro ſuper dictis negotiis tractaturi veſtrumque conſilium impenſuri.*—The Summons to the Peers have it *nobiſcum & cum cæteris Prælatis Magnatibus & Proceribus*, &c. In ſome, in the recital of the perſons to compoſe the Parliament, that of the Peers is " *& ibidem nobiſcum & cum cæteris Prælatis*"—that of the Judges has added to it " *ac cæteris de Concilio noſtro.*" 1 Edw. III.—which is ſometimes ſubſtituted for the other expreſſion. Vide Dugd. Sum.

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deriving each their authority, at firſt, from an implied reference to preſcriptive uſage, and not from poſitive aſſignment of the limits of their reſpective duties.—The Writ by which a Peer is ſummoned, merely calls him to treat, at a particular time and place, with the *reſt* of the Prelates, &c. by which he is entitled to an inheritance in the dignity, and acquires a right to the ſame ſummons in all future Parliaments.—The appointment of the Judges is derived from the expreſſions * " *conſtituimus vos* " *unum Juſticiariorum ad placita coram nobis tenenda,*" or " *de communi banco.*" The Courts of Law are open only in Term time, as the Court of the Lords in Parliament is only while that is ſitting; but though cuſtom has preſcribed more *preciſely* the duration of the former, or perhaps, more accurately ſpeaking, the original conſtitution has been preſerved more uniformly in one inſtance than the other (except where altered by poſitive laws), as being unconnected with ſtate convenience or neceſſity; yet it ſeems as if both, being originally derived from the Crown, were equally ſubject to the controul of it.—The meetings and prorogations of Parliament were always clearly ſo; and in times of public ſickneſs, or other particular occaſions, the Term † has been adjourned to another

* The Judges hold their offices by Patent, the Chief Juſtice of the King's Bench by Writ, in which is ſubſtituted " *Juſti-* " *ciarium noſtrum capitalem.*" 4 Inſt.

† Frequent inſtances of this are to be found. In 1 Car. I. two

other time and place by the ordinary exercise of the same authority.—As the inherent privileges of the Peers, as to the right of Judicature, resemble, though they far exceed in permanency, those of the Judges, it can hardly be supposed what similarity can be traced between them and those derived from Commissions granted for particular purposes, and confined to particular places.—Such are those under which the Judges exercise all their functions on the Circuits, and at the Old-Bailey; which, though they may seem to have acquired a kind of establishment from their ordinary use, rest entirely in the will of the Crown, as to persons, times, and places, to which they relate; and in form convey only a limited authority, which must be strictly pursued.—Far from bestowing, like the Patents of the Peers and Judges, by the mere title, the several Rights and Powers belonging to each, these are so confined in their operation, that no less than five of them are required to give the ordinary authority exercised on every Circuit.—Those adduced as similar, on the present occasion, are the Commissions of *Oyer and Terminer*, and of Gaol Delivery; by the former, power is given to certain persons to *enquire* of certain crimes in particular

two Proclamations appear to have issued for this purpose, by which Writs of Adjournment were ordered to be directed to the Judges "*to whom such Writs have usually been directed*;"—the last of them to adjourn the Term to Reading. Rym. Fœd. 18.

ticular counties, and to *hear* and *determine* the same; by the latter, to deliver a particular gaol of all the prisoners who shall be found therein at a certain time; both conceived in such limited and appropriate terms, that one gives no authority but where the whole proceeding is before the same Commissioners, who cannot therefore try upon an Indictment not found before themselves; the other, though more general in this respect, yet extends not beyond persons who are found in the precise situation described.

If such then be the fair account of the Constitution and Permanency of the House of Peers as a Court of Judicature, there is no room for the application of those arguments which are derived from the effect of the demise of the Crown on any Commissions granted by it, or of the issuing a new Commission upon one before subsisting.—The inheritable nature of their functions distinguishes them from any other emanation of the Prerogative; and as the Writ which calls them together is not the Commission under which they act when assembled, so neither does another summons by Writ to the same individual bear any analogy to a new Commission which might be granted to different persons.

The most material of the technical objections made to the continuance of the Impeachment is that which I have never seen distinctly stated, but which arises from the actual State of this Proceeding,

ceeding, independent of the general grounds of argument as applied to others of a ſimilar kind: I mean the topic of Diſcontinuance, ariſing from the party being put without day.—Before I advert to this objection, it is impoſſible not to lament, that, if it ſhould be thought to have any weight, it owes its origin not to the inherent nature of the ſubject itſelf, but to the accidental, or, if I might ſo ſay, the inadvertent, conduct of the Houſe of Peers. I thus ſtate it, becauſe, when accurately conſidered, it will appear to be founded entirely on the manner in which the Impeachment was adjourned, or continued, the laſt day of the Trial in the former Parliament, perhaps on the omiſſion to notice the day to which it was ſo adjourned.—Now it can never be preſumed, and the inveſtigation carrying on at this moment precludes the idea, that the Houſe of Lords, if they adverted to the queſtion at all, conſidered it as a clear and ſettled point, that the Diſſolution, which muſt neceſſarily in the courſe of things intervene before the Trial could be finiſhed, would prevent the continuance of the Impeachment.—If they did not, and do not at this time, it will certainly be matter of very ſerious concern, and to none more than to the Noble Perſons themſelves, that by a clerical error of their own Court they are precluded from the agitation of this great Conſtitutional queſtion.—In urging this conſideration thus far, I hope I ſhall not be underſtood as imputing to any one, much

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leſs to the exalted Character who has preſided with ſuch unexampled patience and impartiality at this Trial, the ſmalleſt degree of blame in this tranſaction; I am very well aware that it would have been extremely difficult, if not impoſſible, ſo to have framed the form of Adjournment to avoid determining againſt the continuance of the Impeachment, as not to have made it deciſive of the contrary; which, without previous conſideration, would have been equally exceptionable.—Viewing it then only as an unfortunate accident, if attended with any conſequences, both to the proſecutors, the accuſed, the public, and poſterity; and to which therefore more effect will not be given than it ſhall be found neceſſarily to demand; let us proceed to enquire on what the objection is founded.—All legal proceedings are ſuppoſed to be carried on in the preſence of the parties concerned, and at the times and places at which they have notice to attend.—As ſcarcely any ſuit, either civil or criminal, can be determined at once, it is neceſſary that it ſhould often be adjourned, or, as it is termed, *continued*, by appointing the parties another time and place, at which they are to be preſent to attend the further proceedings of the Court.—This is ſo eſſential to connect the different ſtages of the ſuit, and the judgement to be given, with the complaint on which it is founded, or the authority on which it proceeds, that, if omitted on the records of the Court, or if any extrinſic cir-

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cumſtance ſhould happen to prevent the poſſibility of the party defendant appearing, or the Court itſelf in fact attending at the time and place aſſigned, he is ſaid to be put without day, and the whole proceeding is diſcontinued.—The order in the preſent caſe, on which the objection is founded, ſtands thus on the Lords Journals, 9 June, 1790: "Ordered, That this Houſe do proceed further "on the Trial of Warren Haſtings, Eſq; on the "firſt Tueſday in the next Seſſion of Parliament, "at ten of the clock, in Weſtminſter-hall."—It is become unneceſſary to enquire whether "the "next Seſſion" could by any fair conſtruction be taken to extend to the "next Parliament," becauſe, even allowing that it could, it is apparent that that day paſſed off without any proceedings on the Trial, and without any further adjournment of it to another. It has been added to this objection, as if thought not of itſelf ſufficient, that Mr. Haſtings is perfectly at large, and not amenable by any exiſting obligation to the juſtice of the Lords; and that, conſequently, their proceeding without an object before them would be nugatory and abſurd.—But whatever obſervations may ariſe on the order above mentioned, none ſuch are applicable to the Recognizance by which Mr. Haſtings and his Surety are bound, and which puts him exactly in the ſame ſituation as if he was actually impriſoned.—The condition of this is in theſe words: "That if the ſaid Warren Haſtings ſhall "appear

"appear perſonally *before the Lords in Parliament*, "*from day to day*, until the further order of this "Houſe, then to be void," &c. The Party then, it ſhould ſeem, is ſtill before the Court, but the Impeachment, it is ſaid, is diſcontinued. The legal doctrine applicable to this ſubject is ſo little in common uſe, that it is with the utmoſt diffidence that I venture to diſcuſs it; but as I ſhall advance nothing but what is founded on eſtabliſhed authority, the application only can be faulty, and will eaſily be corrected by the judicious Reader.—The objection here made involves two points; * 1. That the proceeding is miſcontinued by giving the party an illegal day; 2. That ſuppoſing it otherwiſe, † it is put without day, by the Court not ſitting on the day to which it was continued.—Giving then the full effect to the whole of this objection, what is the conſequence? Not, as has been inaccurately urged, that the whole proceeding is abated, for the original Record is not neceſſarily affected by it. In the latter of theſe caſes, which is the ſtrongeſt, as where the Juſtices were prevented by death from coming at the day, ‡ a general Re-ſummons or Re-attachment revived the original Record; and, ſtill more, a ‖ ſpecial one *revived the whole proceedings*.

* Hawk. B. 2. c. 27. §. 89.

† Ibid. §. 106.

‡ Ibid. §. 106.

‖ The form of this may be ſeen in 7 Rep. 29. B. The ſame is applicable to a diſcontinuance by the death of the King. Com. Digeſt. Abatement. H. 38.

With respect to the former case, it should seem that where the process is erroneous, and the Defendant appears, he shall be compelled to answer; "for," as * Mr. Hawkins observes, "the end of Process "is to compel an appearance; and that end be-"ing served, and a legal charge appearing against "the Defendant, no way discontinued, the Law "will not so far regard a slip in the process, as to "let the Defendant out of Court, in order only "to have him brought in again in better form:" and he adds, "and in criminal cases this could "not be but of the utmost ill consequence, by "giving the Defendant, who is actually in the "power of the Court, an opportunity of escaping." It should further be suggested to the consideration of those interested in the decision, how far such an Error may be amended; which is hinted at by the † same Author: as, certainly, even discontinuance of process may be by consent of the parties.—In applying this doctrine to the case before us, it will not, I presume, be expected, that the ancient Writs, to which I have alluded, should be recurred to by this superior Court; but that whatever effect they were calculated to produce, may here be attained by some occasional process of a less technical form.—On the latter case, let it be examined, how far the daily appearance of the Defendant, to which he is bound by his Recogni-

* Hawk. §. 107.
† Ibid. §. 109.

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zance, amounts to a waiver of errors in the process; or how far they may be rectified by the Court itself.—The analogy, I confess, appears to me sufficient for the purpose; and I shall, for my own part, rejoice, if such an expedient can be found to prevent the operation of an objection which is collateral to the main subject of discussion, and whether strictly right or wrong, can only tend to frustrate the general purposes of Justice.

The remaining Objections, which I am to consider, are derived chiefly *ab inconvenienti*, and therefore are not aimed at the foundation of this proceeding, but at the particular stages or partial views of it.

The first of these, which I shall notice, will not perhaps be seriously urged again, and is indeed given up by * one of the Advocates for the determination of Impeachments: I mean that drawn from the addition of the sixteen Scots Peers to the new Parliament.—It would indeed be absurd to suppose that the Union with Scotland should, without any express provision, make any alteration in the Rights of the People of England, or the Constitution of Parliamentary Judicature.—Suppose the Order of 1678 to have been in force at that period, would the effect of it have been altered by the accession of these Peers? If it be asserted that it would, how happens it that it still subsists in

* Mr. Christian.

that

that part which relates to Appeals and Writs of Error? And as to the other part, relative to Impeachments, if it is ſupported by principles and precedents, the effect will be the ſame, whether the Order had been made or not. But taking it upon general grounds, this change is, probably, not greater than is conſtantly taking place, in ſuch a body, by creation and ſucceſſion. Had a trial been going on when twelve Peers were introduced in one day, or had it continued through many years, as it might formerly, when, though the Parliament was of long continuance, a very ſhort time was left for buſineſs, by a number of intervening prorogations; would either the former caſe, or the number of changes incident to ſuch a duration, have altered the law of the proceedings? Such inconveniences as thoſe are inſeparable from ſuch a Court, but they are not peculiar to it. When the Judges held their ſeats during the pleaſure of the Crown, it might often happen that a whole Court was changed during the pendency of a ſuit; but * it has been held, that if all the Judges of a Court ſhould die, or be removed, after the party had recovered before them, their ſucceſſors might award execution. It may indeed be ſaid that in ſuch a caſe the whole appeared upon the Record, and that therefore the new Court could be under

* Yearly Books, 15 Hen. VII. Paſch. 5. admitted by the whole Court.

no

no difficulty in proceeding: but the ſame obſervation will apply to many inſtances of Impeachments as far as relates to their continuing at leaſt to ſome extent: ſuch was that of Lord Stafford, where the whole trial was to commence, and even the anſwer to be put in, after the diſſolution; and that of Drake, where the whole evidence was finiſhed by his admitting the publication.

An objection of as little weight has been urged from the ſuppoſed incapacity of the Lords to impriſon during a Diſſolution, upon which this dilemma is framed; that, if ſo, they muſt proceed without a criminal before them; if not, they may impriſon for an indefinite time. The anſwer in the preſent caſe is ſufficiently given by the Recognizance above ſtated: but independently of that, it ſeems perfectly clear, from the ſeveral caſes before cited, that the * King's Bench will not diſcharge

* Mr. Hawkins ſays, B. 2. c. 15. §. 74. "Yet it ſeems to "have been taken for granted, in the Lord Stafford's caſe, "that the Court of King's Bench may, in their diſcretion, "bail a Lord upon an Impeachment of High Treaſon, which "in that caſe they refuſed to do, not as a matter out of their "power, but as a thing they were not bound to do, and im-"proper in conſideration of the whole circumſtances.—But it "is obſervable, that it doth not clearly appear, from either "of the above-mentioned Reports, whether any Parliament "were ſitting, at the time of the motions for ſuch diſcharge "and bailment, or not; but it is certainly moſt likely to pre-"vail, in ſuch a motion, when no Parliament is ſitting, nor "likely ſoon to ſit."——The Reader will apply this paſſage to the

charge from a Commitment by the Houſe of Peers, or an Impeachment, after a Diſſolution; and if they bail, it muſt be to appear at the next Parliament. The ſame argument would ſhew that they could not proceed even after a prorogation, becauſe in the interval they could have no controul over their priſoner. But beyond this, admitting they had no criminal before them, it affords no proof that the proceeding was abated; it might undoubtedly be inconvenient, but probably not more ſo than the beginning *de novo*, which yet Juſtice would require them to do.

Taking it then that the Record at leaſt remains, which appears to me under this head incontrovertible, though even that was diſputed by the *Reſolution of 1685, for the trial had not then commenced; it is ſtill objected, that the proceedings do not continue *in ſtatu quo*:—the arguments in ſupport of which, as they are deduced from ſuppoſed circumſtances of inconvenience, may be anſwered by oppoſite ones of convenience and policy, and invalidated by thoſe from analogy to admitted parts of the ſame proceeding.—Theſe are

the former part of this Eſſay, and compare it with that cited by Mr. Chriſtian from the ſame writer, to ſhew his opinion that all proceedings were determined by a diſſolution.

* Mr. J. Foſter, ſpeaking of the attainder of the Duke of Monmouth, 1 Jac. II. adds; "but that was a time of great "heat and violence, and few things then done ought to be "drawn into example." Diſc. 44.

ſuppoſed

ſuppoſed to affect both the Lords and Commons, and we muſt conſider them diſtinctly.—The latter, it is ſaid, can neither know how to proceed with the trial, nor to demand Judgement when it is over. With reſpect to the difficulty of proceeding, they have a great advantage who reaſon upon the preſent trial, which has continued much longer than any preceding, or probably any that may ſucceed. If the objection is good, it ſhould apply to all caſes: but let us turn to thoſe of Lord Danby, of Drake, and of Sacheverell, and let the criminal writings be proved in a former Parliament, would the new Houſe of Commons have any difficulty in arguing the guilty tendency of them in the next? If the charges are ſuppoſed to be many, each is, as it were, a diſtinct cauſe; and they may as well begin a new one, as vote it over again, ſuppoſing that all but the Record abated, and Juſtice required that the proceeding ſhould not be dropped.—Even in the worſt caſe, that of being diſſolved when in the midſt of a charge, they may abandon that which they are not able to complete, and demand judgement upon the reſt; or, ſhould that be thought too material to be deſerted, they may apply to the Lords for ſuch an account of what has paſſed, as they themſelves muſt be provided with, if they mean to form a fair judgement upon any proceeding that has run to great length, or been interrupted by long intervals of prorogation, as well as diſſolution.—Even Courts of Law, that are to de-

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cide great queſtions, either of civil or criminal juriſdiction, are often obliged to have recourſe to means of information not to be claſſed under any head of legal Evidence; the Report, as it is called, of a Judge, conſiſting only of the Notes which he took at the Trial, generally reviewed by himſelf afterward, is the foundation of all the proceedings in caſes of New Trials, as well as of the Judgement of the Court, whenever it is diſcretional, in Miſdemeanors: much more then may ſuch be referred to in this caſe by thoſe to whom the Judgement does not belong: their function is much more like that of the King in exerciſing his prerogative of pardon, who always proceeds on the ſame kind of evidence, laid before him by the Recorder, or other Judge.—Upon this perhaps there might be two opinions; ſome perſons might think, that unleſs there was upon the face of the proceedings ſomething harſh and unjuſt, ſome perſecution of party, or ſome apprehenſion of violence in the Houſe of Peers, they were bound in juſtice to their Country to carry on the Proſecution, ſo as to enable the Lords to paſs ſome ſort of Judgement, in the ſame manner as an Attorney-General would probably do a proſecution commenced by his predeceſſor, if he had a good opinion of his judgement and integrity; or as he would carry into effect a Vote of the Houſe of Commons to that purpoſe, even after a Diſſolution: others might think themſelves bound to be as

as well informed of the caſe, before they became proſecutors, as if they were themſelves Judges; which ſeems to be the idea of ſome eloquent and tender-hearted Gentlemen: are they aware then that this is impoſſible; that though compared in ſome reſpects to a Grand Jury, they differ from it in not proceeding in the ordinary way upon oath, which the Houſe has no power to adminiſter; that this difficulty muſt always ſtand in the way, whether the queſtion be to continue or commence an Impeachment: they muſt therefore be content with ſuch reaſonable means of information as juſtify ordinary men in inſtituting legal enquiries, without requiring ſuch evidence as can only be originally procured by a Court of Juſtice.—In the preſent caſe there is happily no real difficulty on that head, and in the courſe adopted any that might be apparent only is avoided.—But giving the utmoſt weight to this objection, the Houſe of Commons might as well call to their bar all the Witneſſes who have been examined before the Lords, to ſatisfy their conſciences whether any thing has been proved which could juſtify them in proceeding to demand Judgement, as they could to enable them to re-commence the proſecution.—All this applies chiefly to the conſideration of the propriety of proceeding at all; for with reſpect to the mode of carrying on the Impeachment, that muſt be learned from the documents of which the former Houſe, and former Managers, were poſ-

ſeſſed.—Some of thoſe who conducted the proſecution before may ſtill be Members of the Houſe, and may be able to inform thoſe who are now joined with them, as to the plan which they had adopted; the documents will ſtill be open to them, not as Evidence, which is not now the point in queſtion, but as Briefs prepared by Agents and Attornies, to enable the Counſel who conduct a cauſe to produce the neceſſary Witneſſes in the moſt convenient order.—The public proſecutor in this inſtance is in no worſe ſituation than many individuals in very important private concerns, who are frequently deprived of their legal adviſers, and ſupport, in the courſe of a long litigation, either by death or promotion to a judicial function, at the very time when they are moſt in want of their immediate aſſiſtance. Great part beſides of the inconvenience now complained of muſt occur in the midſt of ſuch a long proceeding, which nothing extrinſic can prevent the poſſibility of laſting, at leaſt, ſeven years, under the preſent Conſtitution of Parliament.—Suppoſe, at the end of the firſt or ſecond year, it ſhould be moved in the Houſe of Commons to proceed no further; ſuppoſe it aſſerted that nothing had in all this time been proved; that the hardſhip of delay exceeded the puniſhment due to the imputed guilt: what ground of information is propoſed to be laid to enable the Houſe to decide upon ſuch a queſtion? Will it be ſaid, none ſuch can ariſe? The conſequence

quence then is, that the Houſe has delegated to the Managers an uncontroulable power of harraſſing an individual, at leaſt as long as a Parliament can legally endure. The moſt ſurely that can be required in ſuch a caſe is, that their conduct ſhould be entitled to ſuch a degree of confidence as not to be impeached upon allegation without proof.—I waive the conſideration how far ſuch Members as came into the Houſe ſince the Impeachment was voted are implicated in this confidence, or how far the Managers may be ſuppoſed anſwerable for the Evidence not appearing upon the Trial with the ſame force that it might on the previous inveſtigation, and the poſſibility of their coming forwad themſelves for directions whether they ſhall, under all the circumſtances, proceed or not; the caſe firſt put is ſufficient for the purpoſe, as it ſuppoſes proof to be called for, as a ground of procedure; if it cannot be had, injuſtice may be done, which in all enlightened Tribunals is as ſtrong a principle, as that Juſtice may fail; if it can, I am content to take any mode of obtaining it, that can be ſuggeſted; and, when I have it, to apply it to the preſent ſuppoſed emergency.

But without adverting to theſe poſſible caſes, let us confine our enquiries to ſuch Objections as more immediately occur in the preſent ſtate of the Impeachment in queſtion.—The next difficulty ſuppoſed lies in the way of the new Houſe of Commons demanding Judgement of the Lords, either

either where they reſt only upon the proofs adduced in the former Parliament, and thus directly put the accuſed on his defence; or where even that is complete, and nothing remains to be added on either ſide. In the latter caſe, we may ſuppoſe even the Verdict taken, and then aſk, What embarraſſment, either of conſcience or diſcretion, could prevent the Houſe of Commons from demanding Judgment?—The method of doing this is thus deſcribed by Lord Hale, as practiſed in five inſtances, in the reign of James the Firſt; from which I preſume the preſent would not much vary, and by which it appears how merely formal the intervention of the Commons becomes in this part of the proceeding:—" The Lords," he ſays, " privately agreed touching the cenſure, whether " guilty or not; and if guilty, they proceeded to " the particulars of their cenſure..... And when " the Lords were agreed of their judgement, they " ſent to the Houſe of Commons to acquaint " them they were ready for Judgement: where- " upon the Houſe of Commons came up to the " Lords Houſe, with their Speaker, and demanded " Judgement againſt the perſon impeached," &c. If in a caſe like this a new Houſe of Commons ſhould be at a loſs to proceed, another conſequence would follow from the effect of a Diſſolution, not generally foreſeen; for if, being foiled in this proceeding, they were to bring up a freſh Impeachment for the ſame facts, if legal analogies are to be

be preſerved, the accuſed might put in a plea of *autrefois convict*, which would, without Judgement having paſſed, be a ſufficient anſwer to the ſecond charge; and thus the Diſſolution would not only delay, as we have hitherto ſuppoſed, but inevitably defeat, the purpoſes of Juſtice.—Still further, would any ſcruple be retained, if the Verdict of the Peers, as well as the Judgement, remained to be taken; in which caſe an additional motive occurs for proceeding, in the opportunity afforded the accuſed of receiving his acquittal, if innocent. Indeed, the whole turn of this argument unfairly ſuppoſes that the party under proſecution muſt be guilty, and that the Commons muſt be ſatisfied with his guilt, before they can with propriety aſk the Lords, Whether he is guilty or innocent?—the former of which is contrary to the humane policy of our Law; the latter derogatory from the honour and juſtice of the Lords.——Let us next take it, as nearer the preſent caſe, that the defence alone remained to be received in a new Parliament; do the motives of conſcience and duty operate to preclude that juſtification? The abſence of Members of the Houſe of Commons during the proceeding is too trifling a ground of argument to require much notice; if it was their duty to attend, they muſt be preſumed to have done ſo; but this in truth is not always poſſible, as in the caſe where the Trial takes place at the bar of the Houſe of Peers: it applies, beſides, equally, as many of theſe

theſe objections have been ſeen to do, to the queſtion of demanding Judgement at any period whatever of the proſecution.

The other part of this objection, and which is the laſt that I ſhall notice, reſpects the difficulties ſuppoſed to ſtand in the way of the Lords themſelves in proceeding on ſo protracted a proſecution.—But though the Judgement reſts with them, and therefore the embarraſſments, if any, are of a more ſerious nature, yet this topic ſeems much weaker than when applied to the Houſe of Commons; for if, as has been ſhewn, and indeed muſt be aſſumed before this objection takes place, they ſtill continue the ſame Court, notwithſtanding their ſitting is interrupted by a Diſſolution, the whole is reſolved into the ſingle circumſtance of duration. What then is to be done, if a Trial before them ſhould extend through the greater part of the continuance of one Parliament? Is it expected that they ſhould bear in their memory, like a common Jury, who yet have the aſſiſtance of a repetition of the Evidence from the Notes of the Judge, every thing that has been given in proof, at different periods, through the courſe of ſeveral years? Are they bound, individually, to a conſtant, uninterrupted attendance; which certainly, I believe, in the preſent inſtance, not one Peer has been able to beſtow on the Trial? They muſt then neceſſarily refer to the Evidence, as reduced to writing by their authority; without the intention of making which

which uſe of it, it is not eaſy to conceive for what end it has been ſo regularly preſerved and printed. It may be ſaid to this, that the criminal Law of England allows of no ſuch mode of receiving Evidence; which though not ſtrictly true (for there are caſes in which declarations upon oath of a Witneſs ſince dead, authenticated by a Magiſtrate, are allowed in proof) may yet in general be admitted: but neither is the Court itſelf founded upon principles analogous to thoſe of other Tribunals.—It is abſurd in ſpeculation, that any man ſhould be born a Legiſlator and a Judge; or brought into the exerciſe of this latter function, in an inſtant, out of profeſſions foreign to the knowledge, or ſtudy, of that Law, upon abſtruſe queſtions in which, he is to decide in the laſt reſort.—This conſideration indeed ſeems to have ſtruck * Lord Hale ſo forcibly, that he urges it as an objection to their being the Court of ultimate Appeal, which yet they unqueſtionably are.—It is not eaſily reconcilable to general principles, that this Honour, devolving on them by inheritance, or creation, ſhould enable them to give their voice in deciſion of a cauſe, which was heard before they became Judges—That they ſhould be able to delegate their vote and conſcience by proxy to another, which whether uſual now in their judicial proceedings, certainly was ſo anciently, when they

* Tract. 200.

ſent a Deputy to attend the Houſe for them, and ſtill is in their legiſlative functions, which is a caſe equally anomalous—That they ſhould decide, upon Honour, both law and fact, while all other Courts and Juries are bound by the ſanction of an oath.—All theſe objections are reſolved into ſuperior principles of convenience and policy.—Their inherent Nobility makes them independent, as Judges are become only in modern times—Their high rank not only ſecures them the moſt liberal Education, but by attracting the public Reſpect calls upon them for the qualities that deſerve it—And in noble minds the extent of the truſt repoſed in them, awakens a proportionate zeal and caution not to abuſe it.—In judicial matters they have the power to command the advice of all the exiſting Wiſdom of the time; and a well-informed underſtanding, called into action either on ſuch ſubjects, or diſcuſſions of fact, by a high ſenſe of hereditary Dignity, and conſciouſneſs of important Duty, will not often err, or be forward in exerciſing the privilege of judging, where it cannot obtain ſufficient means of information.—It is indeed liable to abuſe, as well as all other inſtitutions, both by the natural imperfections of the individuals, and by the exerciſe of the prerogative of the Crown in new creations.—It is enough for us to ſay, ſuch *is* the Law and Conſtitution of Parliament, and it is not to

* Seld. Baronag. cap. 1.

be preſumed that the Peers themſelves will give up theſe privileges, by acting upon the ground of their inconvenience, or abſurdity.—If then they are ſatisfied with their own capacity to judge, and not alarmed by the difficulties of this particular caſe, which would have been nearly the ſame at the end of the laſt Parliament, will they take into the account the ſuppoſed difficulties of the Commons, who themſelves don't feel them, and who declare themſelves ready to proceed on their part? In this view the caſe ſtands much ſtronger in the Houſe of Peers—The principle is the ſame, and to be collected out of their own Journals.—Their practice after prorogation eſtabliſhes a diſtinction between legiſlative and judicial functions, as well as that in Caſes of Error and Appeal, which may well warrant this concluſion; and it ſtrengthens their privileges, by making their Houſe as a Court quite diſtinct from the other.—It has always appeared to me unreaſonable to inſinuate that they are inclined to make a ſeparate cauſe of this point, in oppoſition to the other Houſe—Can it be preſumed that they, as a Houſe, are intereſted in the delay or ſuppreſſion of Juſtice?—Don't let it be ſaid (though it has in former times), that as Impeachments are moſt likely to affect their own body in capital caſes, they will not aſſiſt to eſtabliſh any thing that ſhall promote the object of ſuch trials.—It is not now a queſtion, Whether they ſhall deprive themſelves of the benefit of a

 pardon,

pardon, ſo as to ſtop proſecution; though even that they had the wiſdom and magnanimity to give up; nor whether they ſhall abandon their own right of judgement on themſelves; but whether their Juſtice ſhall be diſappointed of its object, their time waſted by fruitleſs inveſtigation, and their culprit harraſſed by endleſs repetition of trial, in which his innocence will be ſure of puniſhment, and his guilt very probably be enabled to eſcape. It cannot be ſuppoſed they will take into the conſideration of this great abſtract queſtion any ſuppoſed conſequences of it on the preſent Trial, or determine on the general rights of the ſubject by any reference to their own feelings and ſenſe of private convenience. As they will not be influenced by the wiſhes of the proſecutors, great as their name is, or thoſe of the accuſed, whom they muſt preſume anxious to enter on his defence; ſo neither will they, by any hope of diminiſhing their own labours, by making them ſo enormous, that the humanity of the proſecutors will rather abandon what they think the cauſe of Juſtice, than inſiſt upon a repetition of them.

The preſent occaſion ſeems peculiarly calculated to induce a fair, diſpaſſionate deciſion of a great conſtitutional queſtion.—The precedents of former times, relative to characters of diſtinction are too much tinctured with party-ſpirit to afford a clear rule of inference; and thoſe relative to inferior perſons have often failed of ultimate deciſion.—

It

It is the happineſs of the preſent day, that the oppoſite currents of political opinion flow in one channel over this ground:—The queſtion then will be conſidered, in all its ſtages, with deliberation and candour;—the determination, if that of both Houſes ſhould be the ſame, will be ſtamped with indiſputable authority.

It has been the object of the foregoing ſheets to ſhew, that ſuch a Reſolution is founded not only in great Conſtitutional Wiſdom, but ſupported by the Authority of former times, ſometimes darkly working through the unformed Chaos of our Government, and ſometimes blazing forth with decided principle, and well-regulated oppoſition to the encroachments of Power; that no objections are raiſed to it that ought to impede its operation, being chiefly ſuch as ariſe from the nature of the proceeding itſelf, and not from this arrangement of it. They whoſe province it is to decide upon this great queſtion will doubtleſs examine it with candour, and, if they find themſelves ſupported by precedent, and uncontrouled by technical objection, will not be blinded by any partial views of the merits of the caſe before them from ſeeing on what ground it was placed by their Anceſtors, and where their Poſterity will expect to find it.—PROINDE ITURI IN ACIEM ET MAJORES VESTROS ET POSTEROS COGITATE*.

* Galgacus apud Tacit.

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ADDENDA.

THE following paſſage from Mr. J. Foſter, referred to in p. 105. being applicable to ſeveral other parts of this treatiſe, is here inſerted: he gives it as the reſult not only of his own opinion, but of that of many other Judges.

" Every proceeding in the Houſe of Peers
" acting in its judicial capacity, whether upon
" Writ of Error, Impeachment, or Indictment
" removed thither by *Certiorari*, is in judgment of
" Law a proceeding before the King in Parlia-
" ment; and therefore the Houſe in all thoſe caſes
" may not improperly be ſtiled, the Court of our
" Lord the King in Parliament.

" This Court is founded upon immemorial
" uſage, upon the law and cuſtom of Parliament,
" and is part of the original ſyſtem of our Con-
" ſtituion.

" It

" It is open for all the purpoſes of judicature
" during the continuance of the Parliament: it
" openeth at the beginning and ſhutteth at the
" end of every ſeſſion; juſt as the Court of
" King's Bench, which is likewiſe in judgment
" of law holden before the King himſelf, openeth
" and ſhutteth with the Term.

" The authority of this Court, or, if I may
" uſe the expreſſion, its conſtant activity for the
" ends of publick juſtice, independent of any
" ſpecial powers derived from the Crown, is not
" doubted in the caſe of Writs of Error from
" thoſe Courts of Law whence error lieth in
" Parliament, and of Impeachments for miſde-
" meanors."

FOST. REP. p. 141.

FINIS.

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