rare, and when they came were rarely obeyed, as tending to delay of juſtice.

THE caſe of ſir Geoffry Stanton was upon a counterplea of a voucher, whether continuance of feiſin might be averred by a ſtranger againſt a fine, *quod vide* 13. *E.* 3. *Voucher* 119. There was diverſity of opinion among the judges, which gave ſome delay to the demandant. Upon the complaint to the king and lords by ſir Geoffry, the record was ſent for into the lords houſe in parliament. *Rot. parl.* 14. *E.* 3. * And upon this petition the anſwer was, *Aviſe eſt au counſeil, que par le ley de terre Geffry Stanton, q'eſt eſtrange al fyne, eſt receivable al averment q'il a tend, pur ceo q'il n'eſt ouſte de tel averment par le ſtatut ne par autre ley, pur que la court doit aler al judgment ſelonc ce, &c.* And thereupon a writ under the great ſeal bearing teſt 22. May 14. *E.* 3. to the juſtices of the common pleas to give judgment accordingly *ſelonc l'adviſe et agard avant dit.* But the judges notwithſtanding forbore to give judgment; and thereupon an *alias*; and that not being obeyed a mandate iſſued to the ſame effect under the privy ſeal *teſte* 17. *Junii* 14. *E.* 3. † But nothing was done by the judges thereupon; for they took not themſelves bound by ſuch anticipation or mandates. And thereupon he complained again. And the petition and tranſcript of the record being read *en plein parlement, aſſentu eſt par touts en plein parlement, et commaund par les prelates countes barons et autres du parlement, a ſir Thomas Drayton, clerk de parlement, q'il alera al juſtices de C. B. et leur dirent q'ils aillent a judgment ſelonc le plea plede devant eux ſans pluis delay; et s'ils ne puiſſent accorder pur difficulty, &c. q'ils veignent et apportent le roll et record en parlement illoeques a prender finall accord quel judgement ſe dever faire.* The chief juſtice accordingly brought in the record *en parlement; et aſſembles illoeques le chauncellor, treaſurer, juſtices del un banck*

* No. 31.—F. H.

† I do not perceive that the printed rolls of parliament include the ſubſequent proceedings in parliament on this caſe of ſir Geoffry Stanton. But ſee Cott. Abr. of Parl. Rec. 130.—F. H.

et

et del autre, barons d'exchequer, et autres de councell le roy, et en dit parlement veues et lyes le record, et en dit parlement debatus diligentment et examine. En meme parlement eſt finalment accord, that ſir Geoffry is receivable to the averment, and ought to recover ſeiſin, *par quoi en le dit parlement etoit dit al juſtices, q'ils aillent a render judgement.* [Note, till a judgment *en plein parlement* the judges would not obey the direction.] And accordingly now the judges gave judgment for the demandant, upon which judgment nevertheleſs the tenant brought a writ of error in the king's bench, *Hil.* 15. *E.* 3. *B. R. rot.* 41. *Nott.* where the matter depended long; and afterwards the plaintiff in the writ of error was nonſuit.

UPON this record theſe things are very obſervable.—1. That the judges, who are upon their oath, did not take themſelves bound by a direction of anticipation, given by the lords, approved by the *conſilium regis*, and followed with the king's writs or mandates of the great and privy ſeal, to give judgment according to this direction.—2. But when the *plenum parliamentum* conſented thereunto, then and not before they ſubmitted to it.—3. Even the *plenum parliamentum* would not govern their directions by their own judgments; but herein they firſt took the advice of the king's *conſilium legale* or *ordinarium*, the chancellor, juſtices, &c.—4. That though this judgment was given by the advice and command of both houſes of parliament and of the *conſilium regis*, yet a writ of error lay upon that judgment; for though it were a parliamentary advice expounding the law, yet it was not an act of parliament authoritatively declaring the law, for then it had been concluſive to all courts.

THIS proceeding upon Stanton's petition, and the delays and difficulties that it produced, were the occaſion of the ſtatute of 14. *E.* 3. *cap.* 5. whereby a commiſſionary court is erected, conſiſting of two biſhops, two earls, two barons, and the chancellor treaſurer and juſtices, for the remedy of delays in courts of juſtice: upon which

which theſe things are obſervable, and will be of uſe in the enſuing diſcourſe.

1. THE firſt biſhops earls and barons are named in the act; and it being an act of parliament, the nomination, or which was equivalent the conſent to theſe perſons, muſt be by the king and both houſes.

2. THAT afterwards the perſons, viz. biſhops earls and barons, were to be named by the king, and commiſſionated by a ſpecial commiſſion under the great ſeal to this employment. And indeed it is regularly true, that very oftentimes, though acts of parliament ſettle a juriſdiction; yet the exerciſe thereof is regularly to be by the king's commiſſion. *Vid.* 9. *H.* 6. 19. in the caſe of the mayor of the ſtaple.

3. THAT the deciſive power by this act ſeems to be committed as well to the judges as to thoſe lords; and they had a voice therein not only of advice, but alſo of ſuffrage. And this hath been the wiſdom of parliament in all ages; to be much, if not wholly, guided by the judges and thoſe that are knowing in the laws of the land, when matters of that kind were in debate.

4. THAT in caſe they could not conclude, then they were to ſend the tenor of the record to the next parliament there to be finally reſolved, and according to that reſolution the judges to give their judgment. The words in this act *aſſent of parliament* ſeem to take in the aſſent of both houſes or *plenum parliamentum*; for as the words *aſſent of parliament* import as much, ſo it purſues the methods uſed in Stanton's caſe, where the direction for the judgment is by the aſſent of the *plenum parliamentum*.

THIS court was uſed in 14. *E.* 3. after this act till the next parliament; and ſince commiſſions have been ſometimes granted under the

the great ſeal, which are grounded upon this act, and run to this effect, *aſſignavimus vos de aſſenſu parliamenti.* Such were thoſe of *rot. pat.* 18. *E.* 3. *m.* . *& pat.* 9. *R.* 2. *m.* 31. *dorſ.* for Thomas Lovell. But otherwiſe ſuch commiſſions have been rarely if at all granted: and the court itſelf is thereby worn out of uſe.

And this ſtatute of 14. *E.* 3. is that mentioned *rot. parl.* 1. *R.* 2. *n.* 95. 2. *R.* 2. *n.* 63.

CHAP.

CHAP. XX.

CONCERNING THE JURISDICTION OF THE LORDS HOUSE IN CAUSES IN THE SECOND INSTANCE, VIZ. AFTER JUDGMENT GIVEN IN THE ORDINARY COURTS, VIZ. WRITS OF ERROR AND APPEALS.

I NOW come to what I principally aimed at in this whole diſcourſe, viz. concerning the juriſdiction of the lords houſe in caſes of the ſecond inſtance by writs or petitions of error and appeals after judgment.

AND this will concern two ſorts of ſuits or proceedings in the ordinary courts, viz.—FIRST, upon judgments given in courts of law, where the ordinary remedy is by writ or petition in nature of a writ of error:—SECONDLY, upon decrees in courts of equity, namely, in the chancery.

I SHALL firſt diſpatch the former of theſe, and conclude with the buſineſs of appeals from decrees in equity.

IN the full examination of the former of theſe, namely, writs or petitions of error, I ſhall, as near as I can, hold this method.

1. OUT of what courts, records or judgments are or may be removed into the parliament for error.

2. INTO what court they are or may be removed, viz. whether into the full parliament, there to be determined, or into the lords houſe.

3. WHAT is preliminary and requiſite in law preliminary to the removing of records into parliament for error.

4. BY what method the ſame is to be done, whether by petition or writ.

5. How and when and in what manner the record is to be brought into parliament, and the errors are to be aſſigned.

6. WHAT proceſs is to be made againſt the defendant in ſuch writ or petition of error, and where and how to be returnable.

7. How and by whom the judgment of affirmation or reverſal is to be given, whether by the lords and commons, or whether by all the lords, or whether only by ſome, and by what advice and order they are to proceed.

8. How the judgment of affirmation or reverſal is to be executed.

9. WHAT is the effect of a prorogation or adjournment of the parliament before the final judgment of affirmation or reverſal be given.

10. AFTER this I ſhall conſider of appeals touching decrees in courts of equity.

CHAP.

CHAP. XXI.

OUT OF WHAT COURTS RECORDS MAY BE REMOVED FOR ERROR, AND WHEN.

REGULARLY when a judgment is given in ſuch a court, as hath no court immediately ſuperior to it, where its errors in judgment may according to the common law of the land be examined, but the parliament, there a writ or bill of error lies in parliament. But if by the conſtitution of the common law, it have another ſuperior court, wherein its errors may be examined, it is not to go *per ſaltum* into parliament by writ or petition of error. Particular inſtances will make the learning hereof more plain.

1. As to the parliament itſelf, if a judgment be given (ſuppoſe of attainder or of reverſal or affirmance of a judgment) by full parliament, viz. by the aſſent of the king and both houſes of parliament, this indeed may be reverſed *in pleno parliamento*; but cannot be reverſed or proceeded upon by way of error in the lords houſe alone.

THIS was the caſe of Richard Arundell, *rot. parl.* 4. *E.* 3. *n.* 13. who petitioned the king and his council in parliament (which was plainly the *upper* houſe of parliament) for the reverſal of the judgment of attainder given againſt his father; but could not be admitted, becauſe the judgment againſt his father *feuſt affirme en parlement*.

BUT if a judgment of attainder or affirmation or reverſal be given in the lords houſe in parliament, a writ of petition of error lies at another ſeſſion in the ſame lords houſe to reverſe their own judgment; and poſſibly it may be done even the ſame ſeſſion. Many

inſtances of this nature are; as in the caſe of Alice Peres, of Holt and Burgh, of the earl of Saliſbury and others; for which ſee *rot. parl.* 2. *R.* 2. *p.* 2. *n.* 36. 37. 7. *R.* 2. *p.* 2. *n.* 20. 8. *R.* 2. *n.* 11. 2. *H.* 5. *p* 1. *n.* 13. *p.* 2. *n.* 11. 3. *H.* 5. *p.* 1. *n.* 18. 9. *H.* 5. *n.* 19.

2. If a judgment be given in the king's bench in Ireland, it is true a writ of error lies into the king's bench of England or in the parliament of Ireland; and if the judgment be affirmed or reverſed in the parliament of Ireland, no writ of error lies in the king's bench of England upon ſuch affirmance or reverſal in the parliament there, but a writ of error lies in the parliament here upon ſuch judgment given in the lords houſe of parliament in Ireland. *Rot. parl.* 8. *H.* 6. *n.* 70. the caſe of the prior of Lanthony.

3. If a judgment be given in the chancery of England upon a *ſcire facias*, upon a recognizance, or in caſe of a ſuit by privilege, error lies in the king's bench; and therefore a writ of error lies not in the lords houſe in parliament, for then it would proceed *per ſaltum*. *Vid. Dy.* 315. 18. *E.* 3. 25. *Error* 71.

But if an erroneous judgment be given in a partition, or in a traverſe or *monſtrans de droit* or petition of right, a writ of error lies immediately into parliament; becauſe theſe are in truth *placita coram conſilio regis*, whereunto the juſtices of both benches are to be called and to give their opinions; and it is not reaſonable for them to be judges in the writ of error, where they are in effect judges in the firſt inſtance. And thus I knew it ruled in the caſe of a judgment given in chancery for the king againſt Squibb upon an *aid-pryer* and *rege inconſulto* about 20. *Car.* 2. And with this agree in caſes of like nature 42. *Aſſ.* . and *rot. parl.* 2. *H.* 4. *n.* 37. 38. 39. in Baſſet's caſe in caſe of a livery.

If

If a judgment be given in the king's bench, a writ of error lies in parliament. Nay, although it be in ſuch a ſuit wherein by the ſtat. of 27. *Eliz.* he may have a writ of error in the exchequer chamber; yet he hath election to bring it in parliament if he pleaſe. But if he once make his election to bring it in the exchequer chamber, it ſeems he has concluded himſelf, and ſhall not waive it and bring a writ of error in parliament, but at beſt, if he do it, it ſhall be no *ſuperſedeas*.

If a judgment be given in the king's bench in Ireland in an *ejectione firmæ* for the complainant, and that judgment is affirmed in the king's bench of England or reverſed, a writ of error lies in the lords houſe in parliament upon that judgment given in the king's bench here. And note, that a mandate ſhall iſſue out of chancery by writ by command of the lords in parliament unto the chief juſtice of Ireland to iſſue a writ in nature of a *ſcire facias* againſt the defendants *ad audiendos errores* in the parliament of England directed to the ſheriff of the county in Ireland where the land lies. And thus it was done in the parliament of 18. *Jac. per ordinationem* 25. *Maii* 1621. in Stafford's caſe.

4. A judgment given in the exchequer is not reverſible by error in the king's bench; but was antiently done *either* * by the king's ſpecial commiſſion *rot. parl.* 21. *E.* 3. *n.* 26. *et rot. parl.* 22. *E.* 3. *n.* 25.

But yet a writ of error did lie in parliament in ſuch caſes, as it ſeems; for the commiſſions were but in nature of acts of favour. *Vide* accordingly *H.* 2. *E.* 3. *coram rege rot.* 96. in the caſe of the men of Lementon, where upon ſuch a writ of error in parliament

* The word *either* is in the original. But unleſs this was by miſtake, which is probable, the ſenſe is imperfect, and there muſt have been an omiſſion; for in the following part of the ſame ſentence, only one mode of reverſing errors of the exchequer is mentioned.—F. H.

the

the examination of the error was committed to the juſtices of the king's bench. And it ſeems alſo, that, notwithſtanding the ſtatute of 37.* *E.* 3. that gives power to the chancellor and treaſurer to examine and reform errors in judgment *in ſcaccario*, a writ of error may lie in parliament, as well as in the inſtance above given touching the king's bench. *Quære tamen*, for I have not known it done.

5. If a judgment of affirmation or reverſal be given before the commiſſioners in a writ of error out of the huſtings of London in an action, it hath been ruled, that a writ of error lies upon ſuch a judgment in parliament. And accordingly it was done in a judgment of reverſal by ſuch commiſſioners in an action of waſte by Coke againſt Forth; and the judgment of reverſal ſo given was affirmed in the lords houſe, and the tenor of the record removed by *certiorari* into chancery, and thence ſent by *mittimus* into the king's bench, upon which a *ſcire facias* there iſſued, and execution thereupon awarded about 20. *Car.* 2.

6. If a judgment be given before juſtices of aſſiſe, oyer and terminer, or in eyre, or in the court of common bench, no writ of error lies immediately from thence into parliament, till the judgment be affirmed or reverſed in the king's bench; and then upon that judgment ſo affirmed or reverſed, a writ of error lies in parliament: for the writ of error muſt not be brought in parliament *per ſaltum*, but after it hath paſſed the ordinary way and method of examination in the king's bench. And accordingly it hath been ruled in parliament. *Rot. parl.*, 8. *E.* 2. *n.* 18. & 50. *E.* 3. *n.* 48. the biſhop of Wincheſter his caſe.

* It ſhould be 31.—F. H.

CHAP.

CHAP. XXII.

CONCERNING THE COURT OF PARLIAMENT, WHEREIN RECORDS WERE REMOVED EXAMINED AND DETERMINED BY WRITS OR PETITIONS OF ERROR.

I HAVE before ſhewn the difference, between the *plenum parliamentum* (conſiſting of the king and both houſes of parliament, and ſometimes applied to both houſes only) and the *curia parliamenti*, *curia in parliamento coram nobis*, and *conſilio noſtro in parliamento*, &c. which are oftentimes intended of the upper houſe of parliament, as well as *coram prælatis proceribus et magnatibus in parliamento*.

ACCORDING to this diſtribution we ſhall find, eſpecially in antient records, two kinds of courts (if I may ſo call them) wherein errors were examined, viz. errors *in pleno parliamento*, and errors examined in the lords houſe.

TOUCHING examinations of errors *in pleno parliamento*, and the deciſion thereof by conſent of both houſes, this I call an extraordinary way; becauſe of latter ages much diſuſed. The other I call ordinary; becauſe it is that method of examining errors in parliament, that now is and for ſome ages laſt paſt hath been moſt if not altogether in uſe.

TOUCHING the former, there are many antient inſtances, where, upon petition of parties unduly attaint or their heirs, the records of the attainders were brought *in plenum parliamentum*, and errors aſſigned and judgments thereupon reverſed.

CLAUS.

CLAUS. 1. *E.* 3. *parte* 1. *m.* 21. *dorſ.* The earl of Lancaſter, being condemned for treaſon by a kind of military council without being duly arraigned, petitioned in parliament 1. *E.* 3. for the reverſal thereof; and the record is brought into parliament, and errors aſſigned, and the attainder reverſed *per dominum regem proceres et magnates et totam communitatem in parliamento*, and his poſſeſſions reſtored. This was in the parliament of 1. *E.* 3.

CLAUS. 3. *E.* 3. *parte* 1. *m.* 33. the like was done in the ſame parliament by the king lords and commons for the reverſal of the attainder of the biſhop of Hereford.

THE like was done for the biſhop of Carliſle, and for Roger Mortimer, in the parliament of 1. *E.* 3. upon the like attainders.

YET obſerve, that in theſe caſes the petition, upon which theſe records were entered, is exhibited *coram domino rege proceribus et magnatibus regni et conſilio ipſius domini regis*; and the ſtile of the roll of the record of reverſal is *placita coram domino rege et conſilio ſuo in præſentiâ ipſius regis procerum et magnatum in parliamento*: yet the judgment given as well by the *commonalty* as the king and lords.

MORTIMER earl of March was condemned for treaſon touching the death of *E.* 2. by the judgment of the lords in parliament 4. *E.* 3. Eſmon his ſon and heir petitions the king, that the record of his father's attainder *ſoit fait vener devant vous et les peres de la terre*, that the errors therein may be examined and corrected and right done. *Rot. parl.* 28. *E.* 3. *n.* 8. *par vertu de quel petition le roy fiſt vener, devant lui, et le prince, et duc de Lancaſter, prelates, countes, barons, et peres de la terre*, LES CHIVALERS DES COUNTES ET TOTES LES AUTRES COMMONS, *le record et judgment*, which is there entered. He aſſigns errors, and principally in this, that he was judged to death without being arraigned or put to anſwer, *et ſur ce, eue bone deliberation*

tion par le roy prince duc prelats countes barons, il eppeirt clerment, que judgment eſt erronious; par quoi le roy, prince, duc, prelats, et peres, par ACCORD DES CHIVALERS DES COUNTEES ET DES DITS COMMONS, *repellent et pur erronious adjudgent le record et judgment ſuſdits, et agard ent reſtitution.* And the tenor of the record is ſent into the king's bench to award *ſcire facias* and execution.

ROT. *parl.* 28. *E.* 3. *n.* 13. Richard earl of Arundel by his petition to the king prays, that a ſtatute made 1. *E.* 3. which only recites his father's attainder *ſoit veue et examiñe devant lui et les paires de la terre*, and that he be reſtored to his father's lands. The king cauſed the record of that attainder to be ſearched; and nothing was found hereof, but that recital, and it is there entered, *quel ſtatute veue et entendue par noſtre ſeigneur le roy prelats prince de Gales duc de Lancaſter barons et paires de la terre et* CHIVALERS DES COUNTEES ET TOUTS AUTRES COMMONS *illonques aſſembles, le dit Richard dit, &c. que, &c. riens eſt compriſe ſorſque recitall de ſtatute, &c.* and *ſur ce eue bone deliberation par noſtre ſeigneur le roy prelats prince duc countes et barons avant dits, il appeirt, que Eſmon comte de Arundell fut unduement miſe a mort, pur quoi noſtre ſeigneur le roy prelats prince duc countes et barons, par aſſent des* CHIVALERS DES COUNTEES *et* DES COMMONS, *adjugent, &c. la recitation, &c. erroignes et nuls, et qu'il ſoit reſtore, &c. Nota*, the petition is to the king to bring the record before him and the peers in both theſe caſes. Yet the record is peruſed in both theſe caſes by both houſes. But yet the ſtile of the judgment varies from what it was before in 1. *E.* 3. for the judgment is entered as given by the king and lords BY THE ASSENT of the commons, whereas before it was BY the king and lords and *totam communitatem*, which though in ſubſtance the ſame, yet the variation of the ſtile ſeems to be induſtriouſly done.

ROT. *parl.* 46. *E.* 3. *m.* 2.* the proof of the age and livery made thereupon to William de Septvans is reverſed and annulled *coram*

* According to the printed roll, it ſhould be *m.* 14. b.—F. H.

domino rege prælatis proceribus et magnatibus et COMMUNITATE ANGLIÆ *in parliamento.*

OTHER inſtances of this nature in petitions of error might be given, as *rot. parl.* 21. *E.* 3. *n.* 65. 25. *E.* 3. *n.* 54. for John Matravers; *ibidem n.* 8. *et* 9. *pro comite Arundel.*

YEA, and it ſhould ſeem in ſome caſes, though the petitions of errors were to the king and lords, and the record thereupon removed into the lords houſe; yet the commons were called up, and the judgment of affirmance or reverſal and the award of execution thereupon *in pleno parliamento.* Thus it ſeems to be done in the caſe of the prior of Mountegne againſt Seymer, *rot. parl.* 17. *R.* 2. *n.* 20. *et* 8. *R.* 2. *n.* 15. which I ſhall mention more at large hereafter.

AND thus far touching the reverſal or affirmance of judgments upon petitions of error *in pleno parliamento.*

SOMEWHAT I ſhall add touching reverſall and affirmance by writ of error *in pleno parliamento,* which were not in antient times ſo uſual as petitions of that kind.

THE only precedent, that I find of this nature by writ, is that in Raſtall's Entries title *error en parlement,* which appears to be a writ of error brought as I take it in the parliament of 1. *H.* 7. upon a judgment given in the king's bench in the time of *E.* 4. The writ was to remove the record *coram nobis in parliamento, ut, inſpectis recordo et proceſſu prædictis, nos, de conſilio et adviſamento dominorum ſpiritualium et temporalium et* COMMUNITATIS *in parliamento noſtro prædicto exiſtentium, ulterius pro errore illo corrigendo fieri faciamus, quod de jure et ſecundùm legem et conſuetudinem regni Angliæ fuerit faciendum.*

THIS writ ſeems to be in that very caſe of 1. *H.* 7. 19. Howerdine's caſe; and the time of its iſſue and the firſt letters of ſome of the

the names ſeem to accord with the parties in that record: upon which caſe, notwithſtanding, the judges there agree, that the commons ought not to have a voice, but only the lords with the advice of the judges. And poſſibly there might be a new writ brought accordingly. But ſurely ſuch a writ as this, though not in the uſual form that obtained in latter ages, might iſſue; and upon ſuch a writ the commons would have been intereſted in the judgment, as well as in the caſes of the proceeding upon petition of error abovementioned, where the commons had alſo a concurrent voice, though this hath been long diſuſed.

CHAP. XXIII.

CONCERNING PETITIONS AND WRITS OF ERROR IN THE LORDS HOUSE, AND THE FORMS AND PROCEEDINGS THEREUPON.

ALTHOUGH in antient times there were petitions, and poſſibly ſome writs of error, which did intereſt the commons in point of judicature, or at leaſt conſent or diſaſſent to the judgment; yet theſe two things are to be noted:—1. That even in the antienteſt times whereof we have any memorials of record, as the times of *E.* 1. *E.* 2. and *E.* 3. the petitions and writs of error in the houſe of lords were more frequent and more frequently there determined than *in pleno parliamento.*—2. That from the beginning of Richard the ſecond's time downward to this day there are very few if any petitions or writs of error brought before both houſes or determined by them, but only in the houſe of lords, except that one inſtance in Raſtall's Entries abovementioned, which nevertheleſs is encountered by the opinion of the judges in 1. *H.* 7. 19. And this eſpecially after the beginning of the reign of *H.* 4. where the judicature of the houſe of lords was ſo liberally aſſerted by the commons, *rot. parl.* 1. *H.* 4. *n.* 79. *Les communes fierent proteſtation, &c. que come les judgements du parlement perteignent ſolment al roy et les ſeigneurs et nient al communes, ſi non pleiſt au roy de ſa grace ſpeciall leur monſtrer les dits judgements pur eaſe de eux, que nul record ſoit fait en parlement encontre les communes, que ils ſont ou ſerront parties al aſcuns judgements dones ou a donner apres en parlement. A quoi feut reſpondus par l'archeveſque de Canterbirs par commandement le roi, comment meſmes les communes ſont petitioners et demandeurs, et le roy et les ſeigneurs de tout temps ont eues et averont du droit les judgements en parlement, en manere come meſmes les communes ont monſtres, ſauve, que en ſtatutes a faire, ou en graunts des ſubſidyes, ou tiel choſes a faire pur le common profit de realme, le roy voet aver eſpecial-*

ment

ment leur adviſe et aſſent; et que cel ordre de fait ſoit tenus et gardez a touts temps avener.

AND now I ſhall proceed to ſhew the methods of proceedings in the houſe of lords in caſes of writs or petitions of error, and give the hiſtory thereof in ſucceſſion of ages.

WRITS or petitions of error or falſe judgment are of a higher nature than other kinds of civil ſuits. They are *quaſi caſus reſervati* to the king's ſpecial cognizance. And therefore by the ſtatute of Marlbredg *cap.* 20. *nullus excepto domino rege teneat placitum in curiâ ſuâ de falſo judicio in curiâ tenentium ſuorum, quia hujuſmodi placita ſpecialiter pertinent ad coronam et dignitatem domini regis.*

AND hence it is, that even in the greateſt courts of ordinary juriſdiction, the king's bench or common pleas, thoſe courts cannot, barely by virtue of their ordinary juriſdiction, without the king's writ under the great ſeal, hold plea to reverſe a judgment given in an inferior court of record; no, not ſo much as a judgment in a court baron or hundred court, though no courts of record.

AND the reaſons are theſe two principally.

1. IN reſpect of the king, all juriſdiction is mediately or immediately derived from him; and the courts of all kinds are his courts, and have that ſtile (unleſs in counties palatine where the lord hath *jura regalia*, and yet even that is derived from the crown), and conſequently judgments there given are virtually given by the king; and therefore it is not reaſonable to have them examined, but by the king's writ or commiſſion derived from him ſpecially.

2. IN reſpect of the ſubject, who having run his courſe to obtain or defend his right in the ordinary courts of juſtice, it is not reaſonable

able after his long expectation and expence to turn all about again without the ſolemnity of the king's ſpecial writ or commiſſion.

But the reaſon holds more effectually in caſes of errors brought in parliament upon theſe accounts.

1. Though the court of parliament be the higheſt court of juſtice; yet it is an extraordinary court, and the primitive and principal end is to adviſe the king *circa arduа regni*. And therefore it is not reaſon to take up their time, in matters of leſs moment and where the common buſineſs of the king and kingdom is not ſo much concerned, without the king's ſpecial command; ſuch as writs and petitions of error between party and party.

2. Many times ſuch writs or petitions of error would be brought in parliament in trivial cauſes and for delay, and without any juſt cauſe, which is fit by all reaſonable ways to be avoided.

3. The proceedings in parliament muſt neceſſarily be very dilatory and expenſive, in reſpect of the intervention of public buſineſs, and their frequent adjournment prorogations and diſſolutions. And therefore it is not reaſonable, that they ſhould be ordinarily proſecuted in parliament, unleſs in caſes of great moment, and by the more ſpecial direction or command of the king and ſometimes of his council alſo.

4. The ſuits for error in parliament are for the moſt part upon judgments given in the higheſt court of ordinary juſtice, viz. the king's bench, where the proceeding is *coram ipſo rege*, and the diſcuſſion of cauſes by judges of great learning and experience. And therefore it is not reaſonable, that judgments, which are in effect given more eſpecially by the king than in other courts, ſhould

ſhould be examined and drawn into a ſecond examination without the king's ſpecial command or commiſſion.

AND upon theſe reaſons, though in the ordinary courts of juſtice the writ of error is *breve de curſu*, and grantable in chancery of courſe; yet to remove a record for error into parliament, whether it be by petition or writ, it is not to be granted without a petition to the king and a bill ſigned to that effect, as ſhall be ſhewn; for ſuch petitions to the king were to be preliminary before any ſuch writ or removal of a record into parliament, to the end that the king might adviſe with his council,—whether the writ of error lies or not; or if it lies, whether it muſt be according to the nature of the cauſe *in pleno parliamento*, or in the lords houſe; whether the caſe be of that moment or weight as to be brought into parliament; and whether there be probable cauſe of error, or it be only for delay.

THESE and the like were the reaſons why always parliamentary petitions were made to the king, and ſometimes to the king and his council, and ſometimes to the king and nobles, before any record was to be removed in parliament for error, or ſo much as a writ of error iſſued for that purpoſe, as ſhall be ſhewed more at large.

THIS being therefore premiſed, we are to know, that there are and have been two methods of removing records into parliament, or into the lords houſe in parliament, by way of error.

I. BY petition to the king, or to the king and his council in parliament, or to the king and lords in parliament, ſetting forth the cauſe of complaint; and praying that the record may be removed into *plenum parliamentum*, or into the lords houſe in parliament, to examine the errors, and do right to the party. And thereupon if the

the petition were indorſed, that it be done, the chief juſtice was commanded by order of the king, and ſometimes of the king and lords, and ſometimes of the lords, to bring the record into parliament; and thereupon the party aſſigning his errors, a *ſcire facias* iſſued to the ſheriff under the great ſeal, to give notice to the defendant *ad audiendos errores*, returnable moſt commonly the next parliament.

And this petition thus indorſed was in nature of a ſpecial commiſſion to the parliament to proceed in examination of the errors; for the petition and indorſement were both of record and filed of record, and moſt commonly entered upon the parliament roll.

And this certainly was the moſt uſual courſe of removing the record; for, the chief juſtice being ordinarily preſent in parliament, and having ſuch a command *ore tenus* or by order, there was no need of a ſpecial writ of error to command him.

And this I take to be the reaſon, why in the Regiſter, though there be a precedent of a *ſcire facias ad audiendum errorem in parliamento*, there is no precedent of any writ of error in parliament. For they were not ſo much in uſe as petitions only in ancient time; though ſometimes they iſſued, eſpecially where the chief juſtice was not preſent to remove the record, for then it was neceſſary he ſhould be commanded by writ to do it.

II. The ſecond method to remove the record into parliament was by writ of error directed to the judge, that had the cuſtody of the record, to bring it into parliament. And this hath been the method generally uſed, eſpecially ſince the time of *E.* 3. and is much more ſecure for the judge that brings up the record, and more regular than the other way of petition. And of this more at large hereafter.

These

THESE then being the two methods ancient and modern for removing records for error into parliament, I ſhall in the next Chapter give the narrative touching the various forms of petitionary bills of error in parliament, which will be equally applicable to writs of error, where they were uſed, as ſometimes though not always was practiſed, in ancient times as well as modern times.

CHAP. XXIV.

CONCERNING THE ANCIENT FORMS OF PETITIONS FOR REMOVAL OF RECORDS INTO PARLIAMENT FOR ERROR.

THE petitions for examining of errors in parliament, or in the lords houſe in parliament, were in the moſt ancient times only to the king, or to the king and his council, or to the king and his council in parliament. And thus it was conſtantly uſed till ſome time after the beginning of the reign of *R.* 2. But after that time, though that form was ſometimes uſed; yet commonly the ſtile of petitions of error was *al roy et al nobles*, or *nobles ſeigneurs en parlement*; as *rot. parl.* 16. *R.* 2. *n.* 18. in the caſe of Shepey; *ibid. n.* 19. in the caſe of Baſſel; 1. *H.* 4. *n.* 19. in the caſe of Hexy; 2. *H.* 4. *n.* 37. in the caſe of Holt; *ibid. n.* 39. in the caſe of Baſſett; *rot. parl.* 6. *H.* 4. *n.* 61. in the caſe of Deyncourt; 1. *H.* 5. *n.* 19. in the caſe of Gunwardby; 3. *H.* 5. *n.* 19. in the caſe of Colerman; and 8. *H.* 6. *n.* 70. in the caſe of the prior of Lanthony.

Now touching the matter of ſuch petitions, it was for the removal of the record, to the end that the errors may be examined. And theſe petitions, as in reference to the removal of the record, were of four kinds.—I. To remove the record in parliament, to the end the errors may be examined *in pleno parliamento*. Such were thoſe, which I have at large declared *ſupra* CHAP. XXI. and therefore I ſhall ſay no more thereof here.—II. Such as were to remove the record *coram rege et conſilio*, or *coram rege et conſilio in parliamento*.—III. Such as were to remove the record *coram prælatis magnatibus et proceribus in parliamento*.—IV. Such as were to remove the

the record *coram prælatis et magnatibus*, but yet with a ſpecial reſtriction of the examination of the errors to ſome ſelect lords and others appointed by the king.

II *. As to the ſecond of theſe, viz. to return the record *coram nobis et conſilio*, which ſometimes is ſo in the petition, ſometimes in the indorſement of the petition, and moſt ordinarily in the *ſcire facias ad audiendum errores*; it is to be obſerved, as I have before noted, the *conſilium ordinarium* had no power or juriſdiction to examine errors and reverſe judgments, unleſs they were embodied in the parliament: *quod vide* 39. *E.* 3. 14.—But when the parliament was ſitting, the *conſilium ordinarium* was concerned in petitions of error: but how far we ſhall ſee hereafter.—And thus muſt thoſe records of reverſals *coram rege et conſilio* be neceſſarily intended, not of reverſals by the king's *ordinarium conſilium*, out of parliament, but by the king and his council in parliament. *Rot. parl.* 18. *E.* 1. Ryley p. 57. the petition of error by the abbot of Weſtminſter; *ibid.* p. 62. upon the petition of Peter Mantar; *ibid.* 144. upon the ſuit before the *auditores querelarum* in Scotland; *ibid.* 168. 172. of a judgment before juſtices itinerant: though I muſt confeſs, ſometimes *coram rege et conſilio* is intended in the king's bench in thoſe ancient times. Ryley 174. 183. in the caſe of error upon an outlawry againſt Stutevill.

The ancient form of writs and petitions of error and *ſcire facias* thereupon granted run many times thus, viz. to have the record or to appear *coram nobis et conſilio in parliamento, ut inſpectis, &c. de adviſamento conſilii noſtri fieri faciamus, quod de jure et ſecundum conſuetudinem regni noſtri Angliæ fuerit faciendum.* This was the ancient form of error in the parliament; which continued in uſe moſt commonly till about the beginning of *R.* 2.

* The reaſon for omitting the firſt head is given before, page 138.——F. H.

AND upon this writ theſe things are obſervable:

1. THAT writs of error did not lie *coram conſilio* unleſs it were in parliament, as I have obſerved upon the book of 39. *E.* 3. 14.

2. THAT by this writ or form of removing of records *coram conſilio in parliamento* the records were to be removed into the upper houſe of parliament.

3. THAT by this writ and form of removing of records and to proceed *de adviſamento conſilii* it ſeems to me, that in ancient times, as of *E.* 1. *E.* 2. and the beginning of *E.* 3. the *conſilium legale*, viz. chancellor, juſtices, &c. were not barely aſſiſtants, but had a voice of ſuffrage as well as of advice in the affirming or reverſing of judgments, &c. though in proceſs of time the grandeur of the lords got in effect the whole juriſdiction from the *conſilium ordinarium*, and left them only as aſſiſtants and adviſers, which ſeems thus to obtain about the beginning of *R.* 2.

4. THAT yet even in theſe ancient times the *conſilium ordinarium* was not only that which was intended by the words *de adviſamento conſilii noſtri*, but it alſo included the lords in parliament; for the words *conſilium noſtrum in parliamento* moſt ordinarily intended the whole upper houſe of parliament in writs of error, and moſt commonly in other judicial proceedings in parliament.

5. THAT when by the power and grandeur of the lords they obtained as it were the whole juriſdiction, and the *conſilium ordinarium* became but in nature of aſſiſtants, &c. the words *coram conſilio* and *de adviſamento conſilii* with the addition of thoſe words *in parliamento* were applicable and uſually applied to the lords in parliament.

Now for inſtances to make good theſe collections.

IN

In the parliament of 21. *E.* 1. Ryley 140. the judgment againſt the archbiſhop of York is, *propter quod per comites barones et juſticiarios et omnes alios de* CONSILIO *domini regis unanimiter ordinatum eſt.* —And the like *ibidem* 165. in the caſe of the prior of Bermondſey, *et ſuper hoc in pleno conſilio habito tractatu, &c.* Here the lords, as well as the juſtices, and theſe as well as thoſe, come under the name or ſtile of *conſilium regis.*

Again, *rot. parl.* 1. *R.* 2. *n.* 29. & 2. *R.* 2. *part.* 2. *n.* 19, 20. the petition of error by the earl of Saliſbury againſt Mortimer is, that the king would command the record to be brought *devant vous et votre tres ſage councell en ce preſent parlement*, and proceſs againſt Mortimer to hear the errors. Thereupon it is commanded *par les prelats et ſeigneurs peres de parlement* to Cavendiſh the chief juſtice to bring the record, which was accordingly brought into the lords houſe; and after errors aſſigned a *ſcire facias* iſſued againſt Mortimer to appear in the next parliament *ad audiendum errores*, which recites the petition, *et quòd nos, ſupplicationi prædicti comitis annuentes, recordum et proceſſum prædictos tam coram nobis quàm prælatis et magnatibus in dicto parliamento venire fecimus*; and it is thereby commanded to the ſheriff of Salop to ſummon defendant, *quòd ſit in proximo parliamento, ubicunque tunc fuerit, auditurus recordum et proceſſum, et ulterius facturus et recepturus quod tunc ibidem conſiderari contingeret, &c.* Here *coram rege et conſilio in parliamento* in one part of the record is *coram nobis prælatis et magnatibus* in another part of the record: and yet all this tranſacted in the lords houſe and by the lords in parliament.

And thus *conſilium in parliamento* is applicable to the lords in parliament and to their juriſdiction. So as to the word *curia noſtra in parliamento* and *curia noſtra parliamenti*, though in ſome records it is applicable to both houſes, yet it is moſt ordinarily in theſe called applicable to the lords in parliament and the lords houſe in parliament.—*Rot. parl.* 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe, the

the *ſcire facias* is, *quòd ſit coram nobis in parliamento, &c. ad faciendum & recipiendum quod curia noſtra conſideraverit.*—*Rot. parl.* 17. *R.* 2. *n.* 13. & 14. 1. *H.* 5. *n.* 19. 3. *H.* 5. *n.* 19. it is, *ad faciendum et recipiendum quod curia noſtra parliamenti conſideraverit.* And in the Regiſter 17. the *ſcire facias* is, *quòd ſit coram nobis et conſilio noſtro in parliamento, &c. et ulterius ad faciendum et recipiendum quod curia noſtra parliamenti conſideraverit.* In all theſe and infinitè more it appears, that proceſs in and upon writs or petitions of error *coram nobis in parliamento*, or *coram nobis et conſilio in parliamento*, or *facere quod tunc et ibidem contigerit ordinari*, or *quod curia noſtra conſideraverit*, or *quod curia noſtra parliamenti conſideraverit*, or *quod de adviſamento conſilii noſtri in parliamento ordinari contigerit*, are but ſo many expreſſions of the lords in parliament or lords houſe in parliament in caſe of proceſs upon writs or petitions of error.

And thus far touching writs or petitions to remove records according to the ancient form, which was ſometimes *coram nobis in parliamento*, ſometimes *coram nobis et conſilio in parliamento*, and ſometimes *in curiam parliamenti, &c.*

III. The next form was more explicit, viz. to remove records *coram nobis prælatis et proceribus in parliamento*, and ſometimes *coram nobis in parliamento*, but to proceed *de adviſamento prælatorum magnatum et procerum in parliamento*, expreſly limiting it to the lords in parliament; and though it were ſometimes the form in the time of *R.* 2. yet after the beginning of *H.* 4. it became the uſual ſtile expreſly to mention the prelates and lords.

And this, it ſeems, obtained upon two reaſons.—1. Becauſe the lords were intent as much as poſſible to exclude the commons from a concurrent judicature in ſuch caſes, which poſſibly was not ſo well obviated by the general words of *parliamentum* or *curia noſtra par-*

parliamenti, which by conſtruction might poſſibly extend to both houſes.—2. Becauſe they were intent alſo to exclude the *conſilium ordinarium* from a concurrent voice in theſe caſes, and to bring them to be only aſſiſtants; which was better effected by making the petition or proceſs *coram prælatis proceribus et magnatibus in parliamento*, than by the words *coram nobis et conſilio in parliamento*, which poſſibly by a liberal conſtruction might intitle the *conſilium ordinarium* to a voice in judicature.

THE inſtances of theſe variations and various forms in petitions, writs, and proceſs upon error, will be given hereafter in the ſeveral kings reigns.

IV. THE next kind of forms in proceſs upon errors in parliament was, where, although the records were removed into the lords houſe by writs or bills of error, yet the diſcuſſion of the errors was committed by the king to a ſelect number, ſometimes of lords and judges, ſometimes of judges only. But of this more at large in its proper place hereafter.

CHAP.

CHAP. XXV.

CONCERNING REMOVAL OF RECORDS INTO THE LORDS HOUSE BY WRIT OF ERROR.

IN the former Chapter I have given an account, that there are two ways of removing of a record into the parliament for error, viz.—by petition, which was the more antient and more uſual in antient times;—or by writ, which hath been the common courſe of latter ages to bring or remove a record for error into the lords houſe in parliament.

IN reſpect to the latter, I ſhall conſider theſe things.—1. How the uſual form of the writ runs. 2. How it is to be obtained. 3. When it is to be ſued, and how made returnable.

1. As to the form of the writ, it uſually runs thus. *Rex capitali juſticiario, &c. quia in recordo et proceſſu et redditione judicii loquelæ, &c. ad grave damnum prædicti I. S. ſicut ex querelâ ſuâ accepimus, nos, errorem, ſi quis fuerit, debito modo corrigi, et partibus prædictis celerem juſtitiam in hâc parte fieri, volentes, vobis præcipimus, quòd, ſi judicium inde redditum ſit, tunc recordum et proceſſum prædicta, cum omnibus ea tangentibus, nobis in præſens parliamentum* (if the parliament be ſitting) or *nobis in parliamentum noſtrum apud Weſtmonaſterium die, &c. proximè tenendum* (if the parliament be not ſitting but only ſummoned or under prorogation) *ſub ſigillo noſtro diſtinctè et apertè ſine dilatione mittatis, et hoc breve; ut, inſpectis recordo et proceſſu prædictis, ulterius inde de aſſenſu dominorum ſpiritualium et temporalium in eodem parliamento exiſtentium pro errore illo corrigendo fieri faciemus, quod de jure et ſecundùm legem et conſuetudinem regni noſtri Angliæ fuerit faciendum. Teſte, &c.*

THIS

THIS is the form of the writ, as it is now uſed, in writs of error in the lords houſe. Whereby it appears, that it much differs from the form of the writ in Raſtal's Entries mentioned before, and likewiſe from thoſe writs, which were antiently, *ita quòd de adviſamento conſilii noſtri in parliamento*, or *de adviſamento conſilii noſtri parliamenti*. But it expreſsly limits it, *ita quòd de aſſenſu dominorum ſpiritualium et temporalium fieri faciamus*, &c. When the alterations were made, or by whom, cannot eaſily be found without ſearch of all the antient writs of error, many whereof were long ſince loſt or miſlaid.

2. As to the manner of its obtaining, it is true, a writ of error in parliament is *breve de curſu* as to ſome purpoſes, and therefore made by the curſitor; but yet for the reaſons given in CHAP. XXIII. it ought not to paſs the ſeal without a petition or bill to the king, and that bill ſigned by him. And the writ itſelf was antiently, and ſtill ought to be *per regem*, or *per warrantum domini regis*; and this appears expreſsly by the books of 22. *E.* 3. 3. 1. *H.* 7. 19. Flourdew's caſe; and *Dy.* 375. and by the conſtant indorſement of theſe writs, viz. *per regem*.

AND this courſe antiently obtained till the long parliament; where, by reaſon of the king's abſence, he that then exerciſed the office of attorney general did grant his warrant to the curſitor for the making of writs of error returnable in parliament, and the writ was indorſed *per warrantum attornati domini regis generalis*. And upon that account it hath been alſo ſo practiſed ſince the king's reſtoration, which is an error and ought to be reformed.

3. As to the time of iſſuing it, although out of parliament time, yea though a parliament be not ſummoned, the king may upon a petition grant a warrant for a writ of error to be iſſued. Yet it ſeems the writ ought not to iſſue till a parliament ſummoned; becauſe it can have no certain return, as it ought to have, for the chief juſtice to bring the record. And beſides it would be to no purpoſe; for if

a writ of error were brought to remove the record *in proximum parliamentum* before a parliament ſummoned, though this might be warrant enough for the chief juſtice upon the firſt day of the next parliament to bring up the record, upon which the errors may be aſſigned, and a *ſcire facias* iſſue againſt the defendant, and thereupon proceeding may be to examine the errors; yet this writ of error would be no *ſuperſedeas* to the king's bench to iſſue execution before the parliament; becauſe there is no certain time when it ſhall be returned, inaſmuch as it is uncertain, whether and when a parliament ſhall be ſummoned; and it may be ſo long before a parliament be ſummoned, that it would give an exceſſive delay to juſtice, if it ſhould in the mean time ſuperſede execution.

CHAP.

CHAP. XXVI.

CONCERNING THE METHOD OF REMOVING THE RECORD INTO PARLIAMENT, AND THE PROCEEDING THEREUPON.

I HAVE in the former Chapters laid down the warrant for removing of a record for error into the lords houſe in parliament, viz. either by petition to the king, or to the king and his council, or to the king and the lords ſitting the parliament, and the king's anſwer thereupon that it be done; or by petition to the king for a writ of error, and a bill ſigned thereupon, and a writ iſſued upon ſuch bill ſigned.

THESE are in nature of commiſſions from the king for the examination in parliament of errors in the king's bench or chancery, or ſuch other courts, as are as it were immediately next below the lords houſe in parliament, or upon judgments given in the houſe of lords itſelf.

BUT becauſe ſuits of error in parliament are for the moſt part upon judgments given in the king's bench, and the method uſed in parliament upon ſuch judgments doth in effect *mutatis mutandis* ſquare with error in parliament out of other courts, I ſhall keep myſelf principally to ſuch inſtances as concern error upon judgments given in the king's bench.

IF the warrant for the examination of the errors be upon original petition in the parliament, and not by writ of error, the entry is, *quâ quidem petitione lectâ et auditâ, præceptum eſt I. C. capitali juſticiario*; ſometimes *per dominum regem* only, as in the caſe of Mortimer, *rot. parl.* 28. *E.* 3. *n.* 8. of the earl of Lancaſter, *clauſ.* 1. *E.* 3. *part.* 1. *m.* 21. *dorſ.*; ſometimes, but rarely, *per prælatos proceres et*

magnates only, *rot. parl.* 1. *R.* 2. *n.* 28. in the caſe of the earl of Saliſbury againſt Mortimer; but moſt ordinarily *per dominum regem et dominos in parliamento, rot. parl.* 8. *R.* 2. *n.* 15. in the caſe of the prior of Mountegne; ſometimes *per dominum regem ex aſſenſu dominorum in parliamento, rot. parl.* 1. *H.* 5. *n.* 19. the caſe of Gunwardby; ſometimes generally *præceptum eſt*; and ſometimes *ex aſſenſu parliamenti præceptum eſt*, to the chief juſtice to bring the record preſently into parliament.

THIS being done, then the errors are to be aſſigned: though many times antiently the errors were aſſigned in the petition, and a *ſcire facias* thereupon granted. But this was irregular; and therefore when in the parliament of 18. *R.* 2. there was a judgment given for the prior of Newport-Pagnell reverſed in parliament, the prior brought a petition of error again in the lords houſe, and aſſigned for error, that the *ſcire facias* iſſued before the record of the firſt judgment brought into parliament. *Rot. parl.* 2. *H.* 4. *n.* 43. and *rot. parl.* 4. *H.* 4. *n.* 26.

WHEN the chief juſtice brought up the record, the record was read, and in antient time entered of record in the rolls of parliament. And then the party complaining aſſigned his errors in writing, and thereupon had a *ſcire facias* to warn the defendant in the error to appear in the next parliament or next ſeſſion of parliament *ad audiendum errores* directed to the ſheriff of the county where the land lay, if it was for land, &c.

AND here ſome things are inquirable for the better diſcovery of the antient practice.—(1.) What was done with the record.—(2.) What and in what manner the *ſcire facias* iſſued.

(1.) As to the firſt of theſe there have been three methods.—1. The chief juſtice by the command or order *ut ſupra* brought the record into parliament, whereupon the plaintiff aſſigned his errors; and

and thereupon a *ſcire facias* awarded againſt the defendant returnable the next ſeſſion of parliament; and it was then commanded to the chief juſtice to have the record again in parliament at the return of the *ſcire facias*, that ſo they might proceed upon the errors; and in the mean time the record was carried back after the errors aſſigned and *ſcire facias* awarded, becauſe the ſame roll concerned divers other matters. Thus it was done *rot. parl.* 1. *R.* 2. *n.* 29. in the earl of Saliſbury's caſe; 1. *R.* 2. *part.* 2. *n.* 31. in the ſame caſe; 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe; and 16. *R.* 2. *n.* 18. in Shepey's caſe.—2. Sometimes the chief juſtice upon the petition brought in the record, and the record thereof was entered again of record by the clerk of the parliament; and then they might proceed without a ſecond bringing up of the record by the chief juſtice. Thus it was done *rot. parl.* 28. *E.* 3. *n.* 8. in the caſe of Mortimer.—3. But in the time of *H.* 4. that courſe was ſettled, which hath obtained to this day as well upon writs as petitions of error, viz. when the chief juſtice was commanded either by petition of error or by writ of error to bring the record into parliament either *indilatè* or at a day certain, he brought up the roll and a tranſcript of the record, and left the tranſcript and roll with the clerk of the parliament to be examined, and then the ſame day or ſome ſhort time after the rolls themſelves were carried back into the treaſury. And this hath obtained to this day. In the parliament of 18. *Jac.* when the chief juſtice of the king's bench was made ſpeaker of the lords houſe by commiſſion on the ſuſpenſion of the lord keeper, yet it was reſolved 14. *Maii* 1621. in that parliament, that upon a writ of error he ſhould bring in the record as chief juſtice.

(2.) As to the *ſcire facias*, when the party hath aſſigned his errors, he prays a *ſcire facias*: which, as hath been ſhewed, is entered ſometimes to be commanded by the king alone; ſometimes by the peers alone, as 1. *R.* 2. *n.* 29. in the caſe of the earl of Saliſbury; but moſt commonly by the king and lords, or by the king with the aſſent

aſſent of the lords or advice of the lords, *rot. parl.* 2. *R.* 2. *part.* 2. *n.* 31. In Catermaine's caſe, *rot. parl.* 1. *H.* 5. *n.* 19. it is ſaid to be *ex aſſenſu parliamenti*; yet it was only by the king and lords.

In this matter two things are conſiderable.—1. The form of the writ.—2. The time of its return.

1. The form of the writ of *ſcire facias* hath in ſome circumſtances differed in ſeveral ages. Sometimes, *quòd ſit coram nobis in parliamento, &c. tali die ad audiendum recordum et proceſſum et errores prædictos, et ulterius facturus et recepturus, quod per legem terræ conſideratum fuerit in hâc parte*, *rot. parl.* 16. *R.* 2. *n.* 18. in Shepey's caſe. Sometimes, *ad faciendum et recipiendum, quod curia parliamenti conſideraverit*, 1. *H.* 5. *n.* 19.;—*quod per legem terræ in curiâ parliamenti contigerit adjudicari*, 3. *H.* 5. *n.* 19. Catermaine's caſe;—*Regiſtr.* 17. *quod curia noſtra conſideraverit in hâc parte*, *rot. parl.* 8. *R.* 2. *n.* 15. in the prior of Mountegne's caſe;—*facturus et recepturus quod tunc et ibidem conſiderari contigerit*, *rot. parl.* 2. *R.* 2. *par.* 2. *n.* 19.;—and *ad faciendum et recipiendum quod nos de aſſenſu dominorum ſpiritualium et temporalium in eodem parliamento duxerimus ordinandum*, as in the modern *ſcire facias* upon writs of error in latter ages.

2. As to the *teſte* of the *ſcire facias* and the return thereof, regularly the *ſcire facias ad audiendum errores* was returnable the next parliament or the next ſeſſion of parliament. But though the award was ſuch, yet the writ was rarely if at all taken out till the new parliament ſummoned; for till the ſummons iſſued for the parliament or a certain day given by prorogation, it was uncertain, whether or when the parliament would be held. This appears partly by the *Regiſter* 17. but more fully *rot. parl.* 2. *R.* 2. *part.* 1. *n.* 19. 8. *R.* 2. *n.* 15. and 2. *H.* 5. *part.* 2. *n.* 11.

But where the king's intereſt was only concerned, as to reverſe a judgment for the king or an attainder, there went out no *ſcire facias ad*

ad audiendum errores; becauſe the king is always preſent in court and cannot be made party by a *ſcire facias*. *Rot. parl.* 10. *H.* 6. *n.* 52. Jane Beachamp's caſe. *Vid. rot. parl.* 2. *H.* 4. *n.* 37. 39. for Holt and Burgh and Burly to reverſe attainders in 11. *R.* 2. and 1. *H.* 4. *n.* 90. for Thomas Haxey.

THE ordinary return of the *ſcire facias* was *ad proximum parliamentum*; for their ſeſſions were ſhort and uncertain; and if it ſhould be returnable at a day certain (as it muſt) in the ſame ſeſſion, the ſeſſion might end before the return of the writ. But in caſes where no *ſcire facias* was to iſſue, as where the king was party, the errors were oftentimes examined the ſame parliament wherein the petition of error was exhibited.

BUT in the late king's parliaments that antient courſe was altered; for they made writs of error returnable *in præſens parliamentum*, and gave notice by orders from day to day to the defendant. And this courſe holds now in uſe, the old way of *ſcire facias* returnable the next parliament being laid aſide: yet without any law at all to warrant it; for the record cannot be reverſed or affirmed without making the defendant party by writ, unleſs he appear *gratis* without a *ſcire facias*, and plead to the errors. This is now the common courſe, and the defendant commonly appears upon orders of the houſe without any *ſcire facias*, and pleads to the errors *gratis*; which therefore being done *gratis* ſupplied the defect of a regular proceſs, which yet the defendant may inſiſt upon if he will.

AND thus far touching the proceſs and proceedings in writs of error preliminary to the diſcuſſion and determination thereof.

CHAP.

CHAP. XXVII.

CONCERNING THE JUDGES OR PERSONS BY WHOM THE JUDGMENT OF AFFIRMATION OR REVERSAL IS GIVEN IN PARLIAMENT.

THE defendants appearing *gratis* or by proceſs, and pleading to the errors *in nullo erratum*, the next thing conſiderable is, how or by whom the judgment is given.

Now upon a writ of error—either the whole determination of the caſe ſtands upon the matter, as it appears upon the record:—or there intervenes a matter of fact to be firſt ſettled before the errors upon the record can be examined or determined; which commonly is in two kinds or caſes; 1. where the error aſſigned is an error in fact, as nonage, coverture, &c. 2. where a matter of fact is pleaded in bar or abatement of ſuch writ of error, or a matter triable by the country ariſeth upon ſuch a plea; as where a releaſe is pleaded and denied, or a fine is pleaded and *nient compriſe* is replied to it.

I SHALL begin with this latter conſideration; namely, where matter of fact is aſſigned for error or ariſes upon pleading.

I NEVER knew an error in fact aſſigned upon a writ of error in parliament; neither indeed is it needful it ſhould; for the king's bench, being the uſual court out of which records are removed by writs of error into parliament, may reverſe their own judgments before themſelves for errors in fact; and ſo there needs no writ of error in parliament upon ſuch occaſion.

BUT ſuppoſe, that a writ of error be brought in parliament for all this, and an error in fact be aſſigned and put in iſſue; or ſuppoſe a releaſe be pleaded and put in iſſue; how ſhall it be tried?

I CONFESS

I CONFESS I never knew ſuch a caſe happen. But if it ſhould ſo happen, I think the regular way is to ſend it into the king's bench to be tried, as where an iſſue is joined in chancery. Only there may be this difference, that whereas upon an iſſue joined in chancery and ſent into the king's bench to be tried, the king's bench finally gives judgment without remanding it to the chancery; yet poſſibly the record being ſent out of parliament is to be remitted thither with the verdict, that the judgment of affirmance or reverſal may be given in the lords houſe. And although poſſibly, where the iſſue upon an error in fact is found for the plaintiff or defendant, or for the defendant upon a plea of releaſe, there is no inconvenience, if the judgment be given in the king's bench; yet if the iſſue upon the releaſe be found for the plaintiff, it ſeems neceſſary the record ſhould be remitted; becauſe the judgment cannot be reverſed notwithſtanding ſuch verdict, till the errors upon the record be examined, which is proper to be done only in parliament.

BUT now let us reſume the former conſideration, where *in nullo erratum* is pleaded to the errors aſſigned of record, how and in what manner and by whom is the judgment given either of affirmance or reverſal.

THERE are four parties, whom this inquiry may concern, viz. the king, the lords, the commons, and the judges of *conſilium regis*, or ſuch of them as are ſpecially deputed thereunto.

I. IN all judgments of affirmance or reverſal in parliament the king is actually or virtually a party to the judgment; for there is ſcarce one entry of twenty, but the judgment is entered, *conſideratum eſt per dominum regem ex aſſenſu magnatum, &c.* or *per magnates, &c. ex aſſenſu domini regis*, as ſhall appear by the numerous inſtances, which I ſhall have occaſion to mention in the enſuing Chapters. But

yet I do not think it neceſſary, that the king ſhould be actually preſent or pronounce the judgment. For inaſmuch as before is ſhewed, whether the reverſal be by writ or upon petition, the king's aſſent is requiſite to the removing of the record in parliament, and ought firſt to be given and endorſed upon the bill ſigned. This doth ſufficiently commiſſionate the lords in parliament, or thoſe others to whom that buſineſs is committed, to proceed in virtue of the king's authority. And ſo the king is virtually conſenting to the judgment by them given; which is in law as effectual, as if he were actually preſent and joined in the judgment or pronounced it himſelf in perſon with conſent of the lords, &c. and warrants the entry to be *per dominum regem* or *ex aſſenſu domini regis*, as if he were actually preſent. How far the king, after ſuch removal of a record by his conſent, may either retract his aſſent or have a negative voice, I ſhall not here examine. But it ſeems to me, that he can no more deny the affirmance or reverſal of ſuch a judgment, than he can ſuſpend a judgment of affirmance or reverſal in the king's bench by the ordinary judges of that court, though the pleas be there held *coram rege*; for he hath committed the ordinary juriſdiction in ſuch caſes to his ordinary judges.

II. If a writ or petition of error be before both houſes of parliament, as in the caſes of the earls of Lancaſter and March and the biſhop of Hereford *ſupra* Chap. XXII. there both houſes of parliament are to be conſenters to the reverſal or affirmance, or nothing is effected; for by the king's commiſſion both houſes are made as it were *judices ordinarii*; and if both houſes conſent not, nothing can be done. But as hath been ſaid, ſuch bills or writs of error, though uſed ſometimes (and yet but rarely) in antient times, have been very long out of uſe.

III. If

III. If a bill or writ of error be made returnable before the lords in parliament according to the uſual form of writs of error now in uſe, the judgment at this day is authoritatively given by the lords houſe; the entries whereof, as ſhall be ſhewn, are various, ſometimes *per curiam* or *in curiâ parliamenti*, ſometimes *per magnates et proceres &c.* And this ordinarily done at this day by majority of votes; which yet notwithſtanding hath been found a great inconvenience. For though the lords ſpiritual be learned men in their way; and though the temporal lords are uſually of a noble extraction and generous education, and poſſibly well acquainted with the methods of government; yet it is impoſſible they ſhould be ſkilled in judicial proceedings and matters of law, which requires great ſtudy and experience to fit perſons thereunto. And beſides many of them are young and unacquainted with buſineſs, eſpecially of this nature; many of them may be abſent, and commit their proxies to others. So that certainly it is a great inconvenience, that mens eſtates and intereſts, and the judgments of learned judges given with great deliberation and advice, ſhould be ſubject to be ſhaken, and it may be overthrown, by, it may be, one ſingle content or not content. Whatever the extraction of men be, yet they are not born with the knowledge of the municipal laws of a kingdom, nor can be ſuppoſed to be inſpired with the knowledge of the law by the acqueſt or deſcent of a title of honour.

And this was well known and obſerved by the king and nobility and wiſe councillors of antient times. And therefore there were proviſional remedies for this inconvenience in the judicatory in the houſe of lords.

1. It ſhould ſeem, that in antient times theſe proceedings, eſpecially in writs of error, in parliament were for the moſt part if not altogether tranſacted by the *conſilium regis ordinarium*, the chancellor, treaſurer, juſtices, barons of the exchequer, and thoſe whoſe education and experience rendered them more fit for ſuch employment; and rarely did theſe matters come into the houſe of lords for their

deciſion, unleſs it were in caſes of great moment concernment and example.

2. When they came to the houſe of lords upon ſuch an account, it ſeems, that antiently even the *conſilium regis ordinarium*, the chancellor treaſurer and juſtices, had not only a voice of advice, but alſo of ſuffrage: as appears by what hath been before delivered, and by the inſtance of the ſtatute of 14. *E.* 3. that erected a court for remedying delays in judicial proceedings, conſiſting of lords ſpiritual, lords temporal, chancellor treaſurer and judges, wherein the judges had a coordinate voice as well as the lords, as appears by the ſtatute itſelf: and as likewiſe appears by the compoſure and power of the *auditores querelarum* appointed by the king in parliament; which conſiſted as well of the chancellor treaſurer and juſtices, as of lords, and their power not only preparative to the houſe of lords but deciſive, as appears before in this tract.

3. But yet further it is moſt evident beyond all diſpute, that though the record either by writ or petition were removed into the lords houſe, and virtually and interpretatively the judgment of affirmation or reverſal was theirs; yet the actual deciſion and determination (in antient times even after the decay of the power of the *conſilium regis)* was given by a ſelect number of lords and judges, nominated by the king in parliament, or at leaſt by the king with the advice of the lords.

This appears by the Year Book of 22. *E.* 3. 3. upon a petition of error by Hadelow and his wife in parliament upon a judgment given in the king's bench. The words of the book are,—Nota *que petition fuit ſue al roy devant ceo que le breif fuit graunt. Pur que le roll, en que le proceſſe et jugement furent, fuit port en parlement par ſir William Thorpe. Sur que le roy aſſigne counts et barons et oveſque eux les juſtices, &c. de terminer les dites beſoignes. Et devant ceo que riens fuit fait, le parlement fuit fini, et les deputyes demeurrent, mes le roy*

roy meme fuit ale; devant queux fuit dit, que le jugement ne poet eſtre revers ſi non en parlement; et depuis que ceo eſt fini, ULTERIUS *en ceſte beſoigne* NIHIL AGENDUM.

HIL. 2. *E.* 3. *rot.* 96. *coram rege.* Diverſe of the inhabitants of Lemington brought a petition of error of a judgment given for the king againſt the mayor bailies and men of Lemington in the exchequer 17. *E.* 2. The record and proceſs were removed into parliament, and ſent *ſub pede ſigilli* by *mittimus* to the juſtices of the king's bench by the king's mandate, *quòd viſis et examinatis recordo et proceſſu et petitione prædictis, vocatiſque coram eis evocandis, et auditis hinc inde rationibus partium, ulterius ad errores prædictos, ſi qui fuerint, fieri facerent, quod de jure foret faciendum.* And now upon complaint by the petitioners of delay in the judges, a writ iſſued to the juſtices of the king's bench to proceed to the determination of the errors: whereupon the juſtices of the king's bench affirm the judgment, and accordingly gave judgment of affirmation, and execution is made in the king's bench.

ROT. *parl.* 7. *R.* 2.* *n.* 20. *et ſequentibus* in the caſe of the petition of error by the prior of Mountegne againſt Richard Seymor, directed to the king and lords in parliament, he prays, *que ordonne ſoit en ce parlement, que certains gents de councell le roy ſoient aſſignes, devant queux le record ſoit envoy; et q'ils eient poiar par force de cette ordinaunce pur examiner les erreurs*; and to warn Seymor to appear before them *ad audiendum errores*; *et que eux poient corriger et redreſſer les erreurs.* And thereupon *par aſſent de parlement* a *ſcire facias* was ordered to iſſue againſt Seymor, *d'eſtre al prochein parlement ubicunque*, and that the record be then brought into parliament, and that no protection be allowed. And accordingly *rot. parl.* 8. *R.* 2. *n.* 15. the *ſcire facias* was returned, and the errors examined, *et videtur curiæ parliamenti, quòd erraverunt.* The judgment was reverſed, *et in pleno parliamento præceptum eſt cancellario, quòd faciat executionem.*

* The roll meant to be referred to is *part.* 2. of the 7. *R.* 2.——F. H.

THIS

THIS ſhould ſeem to be a proceeding *in pleno parliamento*, though the record were removed to the lords houſe and the petition was to the king and lords. So that, although the deſire of the prior to have the errors examined by ſome perſons of the council thereunto aſſigned was not obſerved, but the proceeding was altogether in the parliament; yet this prayer of his makes it appear, that it was the uſual courſe in writs of error in parliament to have the errors examined by ſome ſelect perſons of the king's council thereunto appointed by the king, or at leaſt by the king and lords or with their aſſent conſonant to the book of 22. *E.* 3.

AND poſſibly if this courſe were held, it would be not only a great diſpatch of buſineſs of this nature; but alſo would avoid thoſe many inconveniencies, which ariſe by determining of errors and matters in law by the majority of voices, where it may be, that one fifth part of them that give the judgment are wholly ſtrangers to the courſe of law and of judicial proceeding.

IT is true, the courſe abovementioned is now grown much out of uſe, and the lords give the judgment themſelves. But yet even therein ſince the time that the whole deciſion of errors have been practiſed in the houſe of lords by their votes, the judges have been always conſulted withal, and their opinion held ſo ſacred, that the lords have ever conformed their judgments thereunto, unleſs in caſes where all the judges were parties to the former judgment, as in the caſe of ſhip money.

THIS appears by very many inſtances, ſome whereof are given before, CHAP. *. In the book of 1. *H.* 7. 19. *quam cito billa ſic indorſata fuerit, et breve de errore et tranſcriptum prædicta in parliamento deliberentur, clericus parliamenti habebit cuſtodiam inde, et per dominos tantùm, et non per communitatem, aſſignabitur ſeneſcallus, qui cum dominis ſpiritualibus et temporalibus* PER CONSILIUM JUSTICIARIORUM

* See before, CHAP. IX. and page 59.—F. H.

ARIORUM *procedent ad errorem corrigendum.* And therefore when after errors aſſigned the plaintiff being in execution deſired to be bailed, it is anſwered *per adviſamentum omnium juſticiariorum*, that it could not be; for then if the parliament were diſſolved before judgment, the party ſhould be at large and the plaintiff below without remedy.

AND he, that conſiders the great reverence that hath been in all caſes of law given to the reſolution and opinion of the judges by the lords in parliament, and how conformable regularly the judgment of the lords hath been to the opinion and advice of the judges upon matters in law tranſacted in the houſe of lords, and how the ſtatute of 14. *E.* 3. joins the advice of the judges to the lords and biſhops commiſſionated for redreſſing delays in judgment, will find, that though for many years laſt paſt they have had only voices of advice and aſſiſtance not authoritative or deciſive; yet their opinions have been always the rules, whereby the lords do or ſhould proceed in matters of law, eſpecially between party and party; unleſs the caſes be ſo momentous, that they are not fit for the determination of judges; as in queſtions touching the right of ſucceſſion of the crown, *rot. parl.* 39. *H.* 6. * or the privileges of parliament, *rot. parl.* 31. *H.* 6. † or the great caſes that concern the liberties and rights of the ſubjects in general, as in the caſe of ſhip money and ſome others of like univerſal nature.

* *Rot. parl.* 39. *H.* 6. *n.* 12.—F. H.

† *Rot. parl.* 31, 32, *H.* 6. *n.* 26.—F. H.

CHAP.

CHAP. XXVIII.

CONCERNING THE MANNER OF EXECUTION OF JUDGMENTS OF AFFIRMATION OR REVERSAL UPON WRITS OR PETITIONS OF ERROR IN THE LORDS HOUSE.

IF the judgment were affirmed or reverſed in parliament, the ancienteſt courſe for the execution of ſuch judgment was by remanding the record into the court where that judgment was given, viz. into the king's bench, with a mandate to the juſtices to iſſue execution accordingly, which was accordingly there done. *Vid. accordant T.* 31. *E.* 1. *coram rege rot.* . And accordingly in the reverſal of the attainder of Mortimer earl of March, which was done by the king lords and commons, *rot. parl.* 28. *E.* 3. *n.* 8. the record of the reverſal and reſtitution was ſent by writ under the great ſeal into the king's bench, with a command to iſſue writs of *ſcire facias* to the ter-tenants for the earl's reſtitution to his lands, which was accordingly done in the king's bench.

BUT in after times they uſed ſometimes another method of executing their judgments of affirmation or reverſal, but eſpecially of the latter, viz. becauſe the chancellor or keeper of the great ſeal was conſtantly with this ſeal attending in parliament, the houſe of lords by their order uſually commanded the chancellor to make execution of the judgment by writ under the great ſeal; which it ſeems was returnable in chancery, becauſe the parliament might be diſſolved or adjourned before the writ could be executed or returned.

THUS *rot. parl.* 8. *R.* 2. *n.* 15. the prior of Mountegne recovered a rent in the common bench; that judgment was reverſed in the king's

king's bench; and again the judgment of reverſal was reverſed in parliament, and that the prior ſhould have reſtitution of his annuity and of the arrears. And thereupon it is commanded to the chancellor *in pleno parliamento*, that he iſſue a writ under the great ſeal to the ſheriff of Somerſet, where the lands charged lay, *quòd tam de ſeiſinâ et reſtitutione, quàm de exitibus perceptis, ſecundùm legem et conſuetudinem regni, plenam executionem fieri faciat.*

Rot. *parl.* 2. *H.* 4. *n.* 27 upon the reverſal of a judgment given in parliament againſt Burgh and Holt, a writ of reſtitution iſſued under the great ſeal to the ſheriff of Somerſet, where the lands lay.

But at this day, if a writ of error be brought in parliament upon a judgment in the king's bench, if the writ abate by death, a record is made of it in the lords houſe, and by judgment the writ is there abated, and the judgment of abatement is entered upon the tranſcript left in the lords houſe, and the ſame is remanded into the king's bench to proceed according to law. *H.* 22. *Car.* 1. *B. R. rot.* 696. Trowl and Methurſt.

So if the judgment be affirmed by the lords, the judgment of affirmation is entered upon the tranſcript, and a *remittitur* entered thereupon, and the record delivered back to the king's bench to proceed with execution. *T.* 26. *Car.* 2. *rot.* 807.

And ſo if the judgment be reverſed by the lords, the judgment of reverſal is entered upon the tranſcript with a *remittitur* in this form. *Et ſuper inde recordum & proceſſus per curiam parliamenti coram domino rege coram dicto domino rege ubicunque, &c. remittuntur; et in eâdem curiâ coram dicto domino rege jam reſident. M.* 24. *Car.* 2. *B. R. rot.* 237. Streter's caſe.

And it ſeems, that although as to ſome purpoſes the record was removed from the king's bench into the parliament; yet really the record remains as to many purpoſes in the king's bench; and after ſuch a *remittitur* the court of king's bench proceeds upon the original record before them, and enters the reverſal and *remittitur* upon that record.

Therefore if the parliament be diſſolved before any judgment of affirmance or reverſal, upon a ſuggeſtion thereof upon the roll in the king's bench, the court of king's bench ſhall proceed upon the record before them, though there be no *remittitur* of the tranſcript out of the parliament into the king's bench.

A judgment is given for the defendant in the huſtings of London in an action of waſte, where it ſhould have been given for the plaintiff. That judgment is reverſed by writ of error before commiſſioners at Saint Martin le Grand according to the caſe. Error was thereupon brought in parliament, and the laſt judgment affirmed. The parliament is adjourned before any execution made. The plaintiff, to have his execution, removed the tenor of the record of the affirmation into chancery by *certiorari* directed to the clerk of the parliament; and thence it was ſent into the king's bench by *mittimus* under the great ſeal commanding that court to proceed to execution, which was accordingly done in the king's bench by *ſcire facias* about 23. *Car.* 2. in Cole's caſe of Gray's Inn.

CHAP.

CHAP. XXIX.

CONCERNING SUPERSEDEAS BY WRITS OF ERROR IN PARLIAMENT, AND CONTINUANCES BY ORDER PROROGATION OR ADJOURNMENT.

WE are to know, that the lords houſe may be conſidered as a court by itſelf without the commons, or as a conſtituent part of the parliament together with the commons. In the former conſideration it proceeds in points of judicature belonging to their ſeparate juriſdiction as a diſtinct court of itſelf; as in writs of error, and ſome other points of juriſdiction before mentioned belonging thereunto. In the latter conſideration it proceeds on the legiſlative power, paſſing of acts, which cannot be without the conſent of the king lords and commons; and this is indeed the ſupreme court of parliament, the *commune conſilium regni*.

As the parliament hath its beginning by the king's writ of ſummons under the great ſeal; ſo it hath its prorogation and continuances by the like writ ordinarily.

WE are to obſerve theſe ſeveral methods of continuances of the parliament, or of either houſe thereof, or of the buſineſſes depending therein.

(1.) THERE are continuances of particular cauſes depending in the lords houſe during the ſeſſion of parliament, much like the continuances in other courts, by *dies dati*, or orders of continuances of particular cauſes.

(2.) THERE are adjournments and continuances of each houſe of parliament by their own adjournments. This doth not determine, or put without day, or diſcontinue, any buſineſs depending in either houſe by bill, by petition, or in the lords houſe by writ of error, or otherwiſe.

(3.) THERE are prorogations by the king's writ of prorogation after the ſummons and before the day of ſeſſion appointed by the writ of ſummons unto ſome other day, and ſometimes to ſome other place, as *clauſ.* 12. *H.* 6. *m.* 15. *dorſ.* from Lincoln to Weſtminſter. Sometimes it is to ſome farther day and place, as in frequent inſtances: the writ of prorogation reciting the former ſummons at a day to come, and ſometimes the cauſe of prorogation, ſometimes only *certis de cauſis.*—The operative words are only *parliamentum prædictum uſque* ſuch a day *duximus prorogandum, per quod ad dictum diem et locum prædictum accedere vos non oportet iſtâ vice,* with a command to appear at the day given by the prorogation. And ſometimes it is prorogued till a new ſeſſions, which in effect is a diſſolution of the former ſummons. Thus *clauſ.* 22. *E.* 3. *part.* 2. *m.* 17. *dorſ.* the parliament was ſummoned to be held at Weſtminſter *die lunæ poſt feſtum ſancti Hilarii*; then *clauſ.* 22. *E.* 3. *part.* 2. *m.* 3. *dorſ.* prorogued to *quindenam paſchæ* next by reaſon of the plague by writ bearing teſt 1. *Jan.* 22. *E.* 3. and then *clauſ.* 23. *E.* 3. *parte primâ m.* 19. *dorſ.* by writ bearing teſt 10. *Martii* prorogued *uſque ad novam præmonitionem per nos inde faciendum.*—Thus the writs run, that were directed to the lords.—But the writs directed to the ſheriffs run as before to the words *prorogandum*; and then *per quod milites cives et burgenſes, quos ad veniendum ad dictum parliamentum ad dictam quindenam tenendum per te ſummoneri præcipimus, ad locum prædictum ad eandem quindenam accedere non oportet, quouſque de mandato noſtro de novo fuerint præmoniti; et ideo tibi præcipimus, quòd executioni dicti mandati noſtri devenire faciendo hujuſmodi, milites cives et burgenſes ad dictum parliamentum ad quindenam prædictam faciendum omnino ſuperſedeas.*

BUT

But there was no reſummons of thoſe that were formerly elect, but an entirely new parliament ſummoned. *Clauſ.* 24. *E.* 3. *part.* 2. *m.* 3. *dorſ.* The like *clauſ.* 5. *E.* 2. *m.* 17. *dorſ.*

I find two extraordinary kinds of writs relating ſomewhat to the matter of prorogation, viz.—*Clauſ.* 28. *E.* 1. *m.* 2. & 3. *dorſ.* whereby after the former parliament diſſolved there was a reſummons of the ſame knights citizens and burgeſſes to a new parliament. This was accordingly *de facto* done, and the parliament accordingly ſat: but it was irregular and not agreeable to law, and therefore was never after practiſed.—*Clauſ.* 17. *H.* 6. *m.* 1. *dorſ.* a parliament was ſummoned *in quindenâ Michaelis*; and after by writ bearing *teſte* 3. Auguſt, entitled *de abbreviatione parliamenti*, reciting the former ſummons, *nos tamen certis de cauſis urgentibus, &c. diem parliamenti prædicti duximus abbreviandum, et parliamentum noſtrum apud palatium noſtrum Weſtmonaſterii in craſtino ſancti Matthæi apoſtoli proximè futuro teneri ordinavimus*; and a command to the peers, &c. to attend accordingly, which was accordingly then held.

(4.) There are adjournments of parliaments by the king after they are begun and held. Theſe are oftentimes called prorogations, and the word *prorogandum* was ſometimes uſed therein.

Claus. 21. *R.* 2. *m.* 19. *dorſ.* The writ recites the ſummons of parliament holden *die lunæ poſt feſtum ſanctæ crucis ultimo præterito pro quibuſdam arduis et urgentibus materiis et negotiis in eodem parliamento adtunc penantibus, quæ adhuc commodè terminari non potuerunt, dictum parliamentum uſque quindenam ſancti Hilarii proximè futuram apud Salop in ſtatu quo tunc fuit duximus prorogandum et continuandum: vobis præcipimus* to attend at that day and place, *veſtrum conſilium impenſuris, et inde abſque licentiâ noſtrâ non receſſuris, teſte rege quinto Novembris.*

And

And indeed it is frequently in records ſtiled a prorogation; though it is but an adjournment. *Vide rot. parl.* 27. *H.* 6. *n.* 12. But this hath been altered of latter times.

In the point of adjournment theſe things are obſervable.

1. The adjournment of the parliament is by the king, or the king's commiſſion to adjourn the parliament; and this is done in the houſe of lords, ſometimes and moſt commonly the commons being called up and preſent, and ſometimes only done in the lords houſe and notified to the commons in their houſe.

2. Though there may ſometimes iſſue a writ to call the lords to the parliament, as was done in the caſe of 21. *R.* 2. beforementioned; yet in truth the effective and operative adjournment is the king's declaration, being preſent by the mouth of the chancellor, or if abſent then by the commiſſioners. And thus it was done *rot. parl.* 21. *R.* 2. *n.* 36. which is the foundation of the writ abovementioned to notify it.

3. Though it be ſometimes called a prorogation in the very record of adjournment; yet in truth and propriety of ſpeech it is no prorogation; for that is *before* the day of ſeſſions by the ſummons, but adjournment is *after* the ſeſſions begun. And the records of the commiſſion to adjourn have therefore of latter times omitted the word *prorogandum*, and run only thus: *præſens parliamentum et omnia negotia cauſas et materias inceptas et non adhuc terminatas adjurnare et continuare uſque talem diem ibidemque tunc tenendum et proſequendum.*

Now in relation to theſe various continuances ſomewhat is obſervable touching parliamentary proceedings in both or either of the houſes. It ſeems therefore,

1. That

1. That the private adjournments of the houſes by themſelves make no alteration or diſcontinuance of ſuits in the lords; no, nor of their committees or bills.

2. A prorogation before a ſeſſion doth not diſcontinue a writ of error, nor a *ſcire facias* thereupon, but carries it over to the day given by prorogation.

3. An adjournment of the parliament by the king, or by his commiſſion, in ſuch manner as is above declared, what effect it hath, was a buſineſs formerly of great debate: but now it is by uſe and cuſtom and partly by declarative 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 adjourn 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 ſuch caſes by adjournment, but they are to proceed as they left the cauſe the laſt ſeſſion. And truly it ſtands with reaſon; for theſe proceedings are in the lords houſe as a diſtinct court.—2. But then what ſhall be done as to bills or acts depending in either houſe? In the parliament of 18. *Jac.* Coventry then attorney reported, that upon ſearch he found not the word *proroguing* in ſuch adjournments; and therefore May 21. in that parliament reported, that ſuch an adjournment determines committees, but not bills. But this report of his hath not obtained; for it is the conſtant uſe after ſuch adjournments by the king or by his commiſſion, that all bills and matters relating to both houſes do begin *de novo*, as well as committees. And it ſtands with reaſon: for this is a proceeding before them, as both houſes conſtitute one court and alſo a great council wherein there may be many changes of advices as well as perſons.

But

But if the parliament be diſſolved before judgment affirmed or reverſed, then the writ of error is wholly diſcontinued and abated, and the court below may iſſue proceſs and execution upon the record remaining with them, without any formal remiſſion of the tranſcript from the houſe of lords, upon a ſuggeſtion entered thereof upon the record before the judges below, that the judgment is neither affirmed nor reverſed.

And therefore I take it, that the granting or continuing of a *ſuperſedeas* by the lords houſe, depending a writ of error, until the next parliament, as it hath been ſometimes done, viz. *rot. parl.* 4. *H.* 4. *n.* 26. in the caſe of the dean and chapter of Litchfield, *rot. parl.* 11. *H.* 6. *n.* 40. in the caſe of Iſabel Beauchamp, was not conſonant to law. For it would be an intolerable delay of juſtice; for no parliament poſſibly would be ſummoned in ſeven years; and it were very unreaſonable, that the plaintiff's execution upon a judgment obtained ſhould be ſo long delayed: and the rather becauſe error in judgments is not preſumed, till it be declared and adjudged by the court where a writ of error is depending.

But if it were only an adjournment of the parliament to a long day, there, according to the reaſon of the reſolution of the lords abovementioned, as the writ of error hath a continuance until the day given by adjournment, ſo the *ſuperſedeas* will alſo have a continuance notwithſtanding ſuch adjournment of the parliament.

A writ of error regularly is not to be brought or ſued out of record, till a parliament be actually ſummoned; for it muſt have a certain return; and the like of a *ſcire facias* upon a writ of error brought and errors aſſigned in parliament; for to bring a writ of error returnable *ad proximum parliamentum* generally is not regular, nor will be any *ſuperſedeas* for the reaſon before given. But the writ of error is to be brought after the parliament ſummoned, and is to

mention

mention the day and place of the parliament ſo ſummoned. Thus it was agreed by the court of king's bench.

AFTER an adjournment or prorogation of the parliament a writ of error may be brought, and is to be allowed; becauſe there is a fixed day of reconvening it; but with this difference. If the day given by adjournment or prorogation be a ſhort time after the iſſuing of the writ of error, it is then alſo a *ſuperſedeas* to the court below to grant execution; as if for the purpoſe the writ bears teſt in Trinity term, and the day of adjournment or prorogation be in the next term, viz. any time in Michaelmas term; becauſe here no mean term intervenes. And accordingly this holds upon writs of error in the exchequer chamber or king's bench. But if a term intervenes between the teſt or allowance of the writ of error and the day of adjournment of the parliament; as if the writ comes to be allowed in Trinity term, and the day of adjournment of the parliament, when the writ of error is returnable, is in Hilary term; this is no *ſuperſedeas* of the execution (but yet the writ of error muſt be allowed) for the great delay that would happen, to thoſe that have had their judgments, by the interpoſition of a term. And this I have known many times ruled, as well upon writs of error in parliament, as upon writs of error in the exchequer chamber.

AND this caſe differs from that before mentioned, where the parliament is adjourned or prorogued either to a ſhort day or long day after the record removed, *and a long day upon the writ of error before the record removed* *: for in the former caſe the court of parliament is poſſeſſed of the record, but not in the latter caſe.

* The words in *italic* want addition to make the ſenſe compleat. But the difference meant to be pointed out is between removal of the record *after* adjournment or prorogation and removal *before*.—F. H.

CHAP. XXX.

SEVERAL INSTANCES OF WRITS OF ERROR, AS THEY OCCUR IN THE PARLIAMENT ROLLS FROM THE BEGINNING OF *E.* 3. TO 1. *H.* 7.

I SHALL now, as I promiſed, give an account of the ſeveral writs or petitions of error in parliament from the firſt year of Edward the third to the beginning of Henry the ſeventh, and the brief memorial of them, and ſome obſervations thereupon; which will both explicate and prove much of what hath been before delivered upon this ſubject.

I SHALL omit thoſe of the earls of Lancaſter and biſhop of Hereford; becauſe mentioned at large *ſupra* CHAP. * . and begin about 4. *E.* 3.

† 4. *E.* 3. *n.* 1. 2. & 3. Attainder of Roger Mortimer and Simon Beresford for the death of *E.* 2. and of John Matravers for the earl of Kent.—N° 6. *Declarations des ſeigneurs en plein parlement, que lour jugement ſur Simon Beresford et autres, que ne fuerent lour peres* NON TRAHATUR IN CONSEQUENTIAM, *par quoi les dits peres puiſſent eſtre charge deſore adjuger autres que lour peres contre le ley de terre, ſi autiel caſe aveigne.*

N° 11. & 12. Petition of error by Eſmon ſon and heir of Eſmond earl of Kent upon the attainder of his father. The like by his widow. But it ended in a reſtitution by the king *par aſſent du parlement.*

* See before, CHAP. XXII. page 128. See alſo page 172. and 173.—F. H.

† The remainder of this chapter is not in lord Hale's own hand-writing, but ſeems to have been tranſcribed by ſome perſon employed by him as an amanuenſis.—F. H.

N° 13.

N° 13. The like for Richard earl of Arundel, but no reverſal, becauſe the attainder was confirmed in parliament, but a reſtitution *par aſſent de parlement.*

21. *E.* 3. *n.* 56. *vel* 65. John Matravers *ſuiſt petition al roy et a ſon councel d'error, que le jugement ſoit veiu et examine en plein parlement devant roy et peres de realme. Nihil factum; ſed poſtea reſtitution,* 25. *E.* 3.

25. *E.* 3. *n.* 54. *Reſtitution de John Matravers par roy ſeigneurs et commons.*

N° 9. *Reſtitution de count de Arundel par roy ſeigneurs et commons.* The petition *al roy et councel en preſent parlement.*

Rot. *parl.* 28. *E.* 3. *n.* 8. Eſmon ſon and heir of Mortimer petitions the king, that the record of his father's attainder *ſoit fait vener devant vous et les peires de la terre,* that the errors therein may be examined and corrected, and right done. *Par vertue de quel peticion le roy fiſt vener devant lui et le prince et duc de Lancaſter, countes, barons, et peres de la terre, les chivalers des countees et totes les autres communs illoque aſſembles, le record et judgment,* which is there entered, viz. that in the parliament of 4. *E.* 3. he aſſigns error, that he was adjudged to death without being put to anſwer. *Et ſur ce eue bone deliberacion par le roy, prince duc prelates countes et barons, il appeirt clerement, que le judgement eſt erroneous, par quoi le roy, et les prelates prince duc countes et barons, par accord des chivalers des countees et des dits communes, repellont et pur erroneous adjugent le record et judgement ſurdit, et agardent reſtitution.*—This record was ſent by writ under the great ſeal into the king's bench; and there *ſcire facias* to be awarded.

Ibid. *n.* 13. Richard earl of Arundel petitions the king, that the record of a ſtatute made 1. *E.* 3. by which Eſmond his father was

put to death be viewed and examined *devant lui et les peeres de la terre*, that he may be reſtored to the inheritance of his father. *Par vertu de quel peticion le roy fiſt ſercher les recordes et remembrances touchant le mort Richard count de Arundel*, which was a recital in a ſtatute 1. *E.* 3. and entered *in hæc verba. Quel ſtatut veiu et entendu par notre ſeigneur le roy, prelates, prince de Gales, duc de Lancaſtre, countes et barons, peires de la terre, et chivalers des countees et totes autres communes de la terre, illoeque aſſembles, riens eſt compriſe forſque recital de ſtatut: et ſur ceo eue bone deliberation par notre ſeigneur le roy prelates prince duc countes et barons avantdits, il appeirt, que Eſmond count de Arundel fuit unduement mis al mort, &c. par quoi notre ſeigneur le roy prelates prince duc countes et barons, par aſſent des chivalers des countees et des dits communes ajugent la recitation, &c. erroneous et nuls*, and that Richard be reſtored, &c.

CLAUS. 1. *E.* 3. *part.* 1. *m.* 21. *dorſ.** Henry brother and heir of Thomas earl of Lancaſter *venit in iſto parliamento, et exhibuit coram domino rege proceribus et magnatibus regni et conſilio ipſius regis tunc ibidem exiſtentibus petitionem*, "*A notre ſeigneur et a ſon councel prye Henry*," &c. that the record of his brother's attainder being in the chancery be examined and redreſſed. *Prætextu cujus petitionis dictum fuit cancellario per ipſum regem, quòd deportare faceret recordum et proceſſum in parliamento*; which was accordingly done and errors aſſigned. *Et quia inſpectis et plenius intellectis recordo et proceſſu prædictis, ob errores prædictos et alios in recordo et proceſſu, conſideratum eſt per ipſum dominum regem proceres et magnates et totam communitatem regni in eodem parliamento*, that the judgment *tanquam erroneum revocetur et adnulletur, &c. et habeat brevia cancellario et juſticiariis, in quorum placeis dictum recordum irrotulatur, quòd recordum prædictum irritari faciant.*

THE ſtile is *placita coram domino rege et conſilio ſuo in præſentiâ ipſius regis procerum et magnatum in parliamento.* 1. *E.* 3.

* See alſo *rot. parl.* 1. *E.* 3. *r.* 1.—F. H.

THE

THE like judgment for Roger Mortimer.—The like for the biſhop of Carliſle.

ROT. *parl.* 40. *E.* 3. *m.* 2. The proof of age and livery admitted *coram domino rege prælatis magnatibus et communitate regni Angliæ in parliamento.*

50. *E.* 3. *n.* 48. Complaint of biſhop of Norwich of erroneous judgment in *C. B. A quoi eſt reſpondu finalment par commun aſſent de touts les juſtices*, that it doth not lie till affirmance or reverſal in *B. R.*—*Nota*, the petition is not of record.

1. *R.* 2. *n.* 29. The earl of Saliſbury petitions the king for the reverſal of a judgment given againſt him in the king's bench for error, and prays the king *a commander faire vener le record et proces devant vous et votre tres ſage councel en ce preſent parlement*; and proceſs againſt Mortimer to hear the errors, &c. *Quel petition eue et entendue en meme parlement, commande fuit en ceſt parlement par les prelats et ſeigneurs peres de parlement a Johan Cavendiſh cheiſe juſtice, q'il ferra vener le record et proces entre rolls de divers autres records ſans delay*, who *apporta les record et proces en rolls de diverſes autres records.* The earl thereupon aſſigns errors by word of mouth, and prayed a *ſcire facias* againſt Mortimer returnable the next parliament, which is granted. At the end of the parliament the chief juſtice carries back the rolls; and it is ordered, that the record be brought into the next parliament. *Nota* the petition to the king, but tranſmitted to the lords, and thereupon the lords make theſe awards.—At another parliament, *rot. parl.* 2. *R.* 2. *part.* 1. *n.* 19.* the former record recited. The *ſcire facias*, accordingly reciting the petition, *nos ſupplicationi prædicti comitis annuentes recordum et proceſſum prædicta tam coram nobis quàm prælatis et magnatibus in dicto parliamento venire fecimus*; and command to the ſheriff of Salop, *quòd ſcire facias Edmundo*

* It ſhould be *part.* 1. *n.* 31.—F. H.

Mortimer,

Mortimer, &c. quòd ſit coram nobis in proximo parliamento ubicunque tunc fuerit auditurus recordum et proceſſum, &c. et ulterius facturus et recepturus quod conſiderari contigerit tunc ibidem. Teſte 1. *Decemb.* 1. *R.* 2. NOTA, the former parliament ended 28. Novemb. 1. *R.* 2. This parliament held 25. May * 2. *R.* 2. So the *ſcire facias* iſſued after the end of the former parliament and before this of *R.* 2. ſummoned.—The ſheriff returned *nihil habet.* The earl petitions the king for a new *ſcire facias* returnable the next parliament *in totidem verbis* as the former. Mortimer returned ſummoned. The parties appear. Exception taken to the return; and the earl prays, *a notre ſeigneur le roy et al ſeigneurs de parlement*, that he may aſſign errors, and that the record may be examined and reverſed. *Par aſſent du parlement jour eſt done al parties tanque prochein parlement. Rot. parl.* 2. *R.* 2. *part.* 2. *n.* 31. † This parliament began *die Mercurii* 20. *Octob.* 2. *R.* 2. ‡ The former proceedings of the earl of Saliſbury recited; a new *ſcire facias facias* prayed; *quel brief par notre dit ſeigneur le roy par adviſe des ſeigneurs et autres ſages de parlement eſt graunt returnable prochein parlement, et que les record et proces ſoient en dit prochein parlement.* NOTA, this ſeems to be the ſecond *ſcire facias* abovementioned.

§ [2. *R.* 2. *part.* 1.] *n.* 36. 37. Alice Peres ‖ judged in parliament brought a petition of error. She could not purſue it by attorney without the king's licence. Licence is granted by the king. The bill is indorſed by the king, and *envoy a ſon grand councell en parlement, a queux le roy ad commiſe la diſcuſſion de meſme bill:* which bill *eſtoit puis apres par meſme le grand councel en plein parlement, par auctoritée a eux done par le roy, reſpondue et endorſée, &c.* "*il ſemble as*

* It ſhould be 20. October.—F. H.

† It ſhould be *n.* 19.—F. H.

‡ It ſhould be 25. April.—F. H.

§ What is between the crotchets not in the original; but neceſſary in point of reference.—F. H.

‖ In the printed roll of parliament the name is *Perriers* and *Perrers.*—F. H.

"*ſeigneurs*

" *ſeigneurs* * *de councell noſtre ſeigneur le roy, que le roy le poet faire de ſa* " *grace. Pur quoi il eſt aſſentuz, que les ſuppliantz ſoient reſceuz a* " *purſuer la ley par leur attournes.*"

ROT. *parl.* 3. *R.* 2. *n.* 19. This parliament held Monday after the feaſt of Saint Hilary 3. *R.* 2. There the whole record and continuance of the proceeding of the earl of Saliſbury in parliament are again repeated, and the continuance thereof is made to this that was the next parliament. It is commanded by the king *et autres ſeigneurs avantdits*, that the record and proceſs be brought in and read. But now Mortimer earl of March hath the king's protection *per unum annum duraturam*, and ſo the plea put without day.

ROT. *parl.* 7. *R.* 2. *n.* 20. A judgment given in the king's bench for Richard Seymor againſt the prior of Mountegne in a *ſcire facias*.—Firſt, the prior delivers a petition *al roy et al ſeigneurs en ceſte parlement*, that a judgment *quòd reſpondeat ouſtre* given againſt the prior omitted to be entered of record by the juſtices may be entered.—The record brought into parliament *par commandment des ſeigneurs*, and the record viewed and examined in preſence of the lords and the juſtices *de utroque banco* and barons of the exchequer. *Et par advise des juſtices et autres ſages eſt agardez et commandez en parlement, que l'enrolment ſoit amendez*; and the old rolls taken out of the bundle and new-amended rolls inſerted.—The enrolment being amended by the ſaid award in parliament, a petition of error is brought by the prior directed *al roy et al nobles ſeigneurs en ce preſent parlement*; and it prays, *que ordeine ſoit en ce preſent parlement, que certains gents de councell le roy ſoient aſſignes, devant queux le record ſoit envoy, et q'ils eint poiar par force de ce ordinance* to examine the errors, and warn Richard Seymor to appear before them *ad audiendum errores*, and to redreſs the errors. *Quel bill lu en parlement eſt agard par aſſent de par-*

* What follows is in the original imperfect; and is therefore taken from the printed roll of parliament.——F. H.

lement,

lement, that the prior ſhould have *ſcire facias* returnable next parliament to warn Richard Seymor *ad audiendum errores, et ulterius facturum et recepturum ce que par ley de terre ſera adiuge en ce cas*, and that the record and proceſs be in the next parliament, and no protection to be allowed.—*Rot. parl.* 8. *R.* 2. *n.* 15. In the parliament held at Weſtminſter *craſtino Martini* 8. *R.* 2. the proceedings at the former parliament are recited. A *ſcire facias* iſſues to the ſheriff of Somerſet *teſte* 15. *October* 8. *R.* 2. *per petitionem de parliamento. Quòd ſcire facias Richardo Seymor, quòd ſit coram nobis in parliamento apud Weſtmonaſterium in craſtino Martini proximè futuro ad audiendum recordum et proceſſum et errores, &c. ſi ſibi viderit expedire, et ulterius ad faciendum et recipiendum quod curia noſtra conſideraverit in hâc parte.* This writ iſſued not till the new parliament was ſummoned and agreed. *Scire feci* returned. The petitioners appear. *Et præceptum eſt per regem et dominos in eodem parliamento* to the chief juſtice to bring the record *in dictum parliamentum*, which was forthwith done accordingly, and entered *in hæc verba*. Thereupon the prior aſſigns ſeveral errors; and to every material error aſſigned the court gives their opinion, viz. *et ſuper hoc auditis allegationibus utriuſque partis, et viſis et examinatis recordo et proceſſu prædictis,* * *ideo ob errores illos conſideratum eſt, quòd judicium prædictum tanquam erroneum revocetur ceſſetur et penitùs adnulletur*; *et quòd prior* ſhould have reſtitution *unà cum exitibus, &c. Et præceptum eſt vicecomiti Somerſet reſtitutionem et ſeiſinam de manerio prædicto, &c. et quòd inquirat de exitibus, &c. Et præceptum eſt cancellario domini regis in* PLENO PARLIAMENTO, *quòd tam de ſeiſinâ et reſtitutione, &c. quàm de exitibus, &c. ſecundùm legem et conſuetudinem regni Angliæ plenam executionem fieri faciat et demandet.* NOTA the command of reſtitution *en* PLEIN *parlement*, which appears to be both houſes preſent, as appears *rot. parl.* 10. *R.* 2. *n.* 35.

* In the printed roll the following words of judgment are preceded with an opinion upon each material error. *Rot. parl.* vol. III. page 194.—F. H.

THE

THE like 16. *R.* 2. *n.* 17. for John Frere.

ROT. *parl.* 13. *R.* 2. *n.* 16. Error in parliament by petition *al roy et ſeigneurs* by John Mothan for erroneous charging him as abettor in an *appel de mort* at 500 marks. The record brought into parliament: a *ſcire facias* thereupon awarded returnable *a prochein parlement a oyer les errours*, and to receive *ce que en le dit prochein parlement ſerra adjuge*, and that the record ſhould be there, and the petitioner's bail to pay the damages ſtated or render his body.

ROT. *parl.* 16. *R.* 2. *n.* 18. a petition of error by John Shepey upon a judgment in the king's bench directed *al notre ſeigneur le roy et al nobles ſeigneurs*, and praying *que pleſe al roy et al ſeigneurs, de faire vener le record en ce parlement, et a faire garnir le prior d'eſtre à ce parlement.* And *dictâ petitione in parliamento lectâ conſideratum eſt, quòd Johannes habeat breve de ſcire facias* returnable *proximo parliamento ad audiendos errores*, and *ad ulterius facturum et recepturum quod per legem terræ conſideratum fuerit in hâc parte*; and the record to be in the next parliament.—And now the writ abated *certis de cauſis*; and a new *ſcire facias* was granted returnable *ad proximum parliamentum.*

16. *R.* 2. *n.* 19. the like petition *al roy et nobles ſeigneurs* by Eſmond Baſſet. The petition continued till the next parliament *in ſtatu quo nunc.*

ROT. *parl.* 17. *R.* 2. *n.* 11.* *et ſequentibus* in this parliament held *in quindenâ Hillarii* a petition of error by the dean and chapter of Litchfield againſt the prior of Newport: *et dictâ petitione in parliamento lectâ de aſſenſu ejuſdem parliamenti conſideratum eſt, quòd habeant breve de ſcire facias* returnable *proximo parliamento, ad audiendum errores, et ad faciendum ulterius et recipiendum quod per legem terræ in eâdem curiâ parliamenti adjudicaretur in hâc parte*; *et quòd recordum et proceſſus præ-*

* N° 15. in the printed rolls.—F. H.

dicta ſint in proximo parliamento ex cauſâ prædictâ. The petition was *al ſeigneur le roy at a les nobles ſeigneurs de ce parlement.*—The *ſcire facias* iſſued 15. November 18. *R.* 2. returnable *coram nobis in parliamento noſtro in quindenâ Hillarii proximâ futurâ tenendo, ad audiendum recordum et errores, et ad faciendum et recipiendum quod curia noſtra conſideraverit in hâc parte,* which writ is then accordingly returned by the ſheriff.—This writ iſſued after the new parliament ſummoned. Thereupon *in eodem parliamento præceptum eſt capitali juſtitiario banci regis, quòd recordum et proceſſus prædicta in dictum parliamentum deferret:* which he accordingly did, and the record entered *in hæc verba.* The dean and chapter aſſign errors in parliament upon the judgment of reverſal given in the king's bench. *Super quo viſis et examinatis recordo et proceſſu prædictis, videtur curiæ in iſto eodem parliamento, quòd prædicti juſtitiarii ad placita coram rege tenenda aſſignati erraverunt: ideo conſideratum eſt in eodem parliamento, quòd judicium revocationis primi judicii redditi, &c. caſſetur et pro nullo habeatur.* And the firſt judgment in the common bench affirmed. *Et præceptum eſt in eodem parliamento cancellario domini regis, quòd faciat executionem. Intentionis tamen cuſtodis Angliæ et dominorum in eodem parliamento exiſtentium eſt, quòd decanus et capitulum habeant tantùm unum annuum redditum viginti librarum.* This judgment of reverſal was in the lords houſe. Yet the words of the whole proceeding are as applicable to the whole parliament, as that before of the prior of Mountegne. *Nota* this parliament held by the *cuſtos regni.*

1. *H.* 4. *n.* 90. Thomas Haxy's petition of error upon attainder of treaſon, *a noſtra ſeigneur le roy et a les ſeigneurs du parlement noſtre; et a quel petition ovē record et proces d'icel lue et entendue, noſtre ſeigneur le roy par adviſe et aſſent des ſeigneurs ſpirituall et temporall ad ordein et adjuge, que le dit judgment rendu in parliament 20. R. 2. ſoit de tout caſſe revers et repeale, &c. et que le dit Thomas Haxy ſoit reſtore, &c.*

NOTA

NOTA *ibidem n.* 104. there was a bill for the reverſal delivered to the commons, and by them preſented *inter petitiones communitatis:* and the king anſwers, *le roy voet d'adviſe et aſſent de ſeigneurs ſpirituells et temporalls, que le judgment ſoit revers, ut ſupra.* So it paſſed as an act.

2. *H.* 4. *n.* 37. John Holt and William Burgh attaint in the parliament of 11. *R.* 2. petition the king *(al roy notre ſeigneur) de granter et adjuger, q'ils ſoient reſtores a leur terres, &c.* The record thereupon brought out of chancery *devant le roy et les ſeigneurs en parlement; et illoeque lue et entendue, error y ad apparent; pur que accord eſt par les ſeigneurs ſuſdits de aſſent le roy, que le record et judgement ſoient ceſſes adnulles et reverſes, et les petitioners reſtores a leur terres unà cum exitibus.* And a writ to the ſheriff of Somerſet under the great ſeal to reſtore them to poſſeſſion *unà cum exitibus* *.

IBID. *n.* 38. *A roy notre ſeigneur* a petition of error by Eſmond Baſſet upon a judgment in *B. R.* given againſt him in *B. R.* for king *R.* 2. in a *ſcire facias, que pleſe al roy et les nobles ſeigneurs avantdits, a faire vener record et proces devant eux en ceſt preſent parlement, et a corriger les erreurs come ley et reſon demandent.* The record is accordingly removed, and continued *in ſtatu quo nunc* till the next parliament. The record is entered at large.

IBID. 39. *Al ſeigneur le roy et ſon tres ſage councel en preſent parlement ſupplie Roger coſin et heyre Simond de Burley, que pleſe a granter, que un judgement rendus envers Simond en le parlement* 11. *R.* 2. *ſoit revers et adnulle en ceſt preſent parlement. Aſſentuz eſt et accordez par le roy et les ſeigneurs en ceſt parlement, que le judgement envers Simond Burley ſoit revers et adnulle.*—NOTA *la petition al roy et councel le*

* The printed roll of parliament is not in the ſame words of reverſal as are given here; and the reſtitution is ſilent as to profits of the lands, whilſt out of poſſeſſion of the two attainted perſons.—F. H.

reverſal par roy et ſeigneurs. But it was a ſpecial reverſal, and not to extend to certain lands granted to the free chapel of Saint Stephen.—*Vid.* more of this matter *rot. parl.* 5. *H.* 4. *n.* 54.

IBID. *n.* 40. Petition of error for the prior of Newport Pagnel. A *ſcire facias* granted and now returnable continued *in ſtatu quo* to the next parliament. *Et vide rot. parl.* 4. *H.* 4. *n.* 26. The error was brought upon the judgment of reverſal given 17. & 18. *R.* 2. in parliament. And now the errors aſſigned by the prior principally were, that a *ſcire facias* was granted in parliament before the record brought thither. *Sed nihil actum ulterius.*

6. *H.* 4. *n.* 61. * *A notre ſoveraigne ſeigneur et a ſeigneurs en ceo preſent parlement* the petition of Roger Deyncourt againſt a judgment given againſt him in a *ſcire facias* in *C. B.* and affirmed in *B. R.* upon a forged fine, *q'il pleſe a votre gracieus ſeigneurie et a votre tres ſage councell en ceſt parlement aſſemble*, to grant to the petitioner *de ſuer devant vous en ceſt preſent parlement et aillours par auctoritée d'icelle d'adnuller* the note of the fine, although *il ne ſoit party ou privy*, and that the record *ſoit envoy devant vous en parlement, et appellez devant vous et votre dit conſeil* the demandant *d'oyer et terminer les erreurs.* † RESPONSIO. *Pur eſchuir les perils et inconveniences; ine purront advenir en ce cas, le roy par auctoritée du parlement voet aſſigner certeins ſeigneurs oveſqu' les juſtices, d'examiner la matire compriſe en ceſte petition: et ſur ce aient meſmes les ſeigneurs et juſtices poiar, par auctoritée ſuiſdite, de purvoer de remede en ce cas, come mieull leur ſemblera par leur ſages diſcrecions.*—NOTA the petition read, and the record brought into parliament.—NOTA this was a petition promoted by the commons as it ſeems ‡, and ſo in nature of a bill.

* See alſo *n.* 31. in the printed rolls of parliament.——F. H.

† The anſwer here given is from the printed roll of parliament; the extract in the manuſcript being imperfectly and inaccurately given.——F. H.

‡ See *n.* 63. of the printed roll of parliament of 6. *H.* 4.——F. H.

1. *H.* 5. *n.* 19. *A noſtre ſeigneur le roy et a les nobles ſeigneurs en ce preſent parlement* a petition of error by John Gunwardby upon a judgment in *B. R.* at the ſuit of John Windſor in a reverſal of an aſſize. *Pleſe al roy et ſeigneurs a faire venir record devant eux en ce preſent parlement, et a garnir Johan Windſor d'oyer le record le prochein parlement.* Then *ex præcepto domini regis de aſſenſu dominorum in eodem parliamento aſſiſtentium, capitalis juſticiarius detulit in hoc parliamento recordum et proceſſum prædicta; quibus recordo et proceſſu lectis et auditis et plenius intellectis in præſenti parliamento, necnon erroribus per prædictum Johannem Gunwardby allegatis, conceſſum eſt, quòd habeat ſcire facias verſus Johannem Windſor* returnable *in proximo parliamento, in quocunque loco teneri contigerit, ad auditurum recordum et errores prædictos, et ad faciendum et recipiendum ulterius quod* CURIA *parliamenti adtunc in hâc parte conſideraverit.*—NOTA better order now ſettled than formerly, viz. the record brought into parliament and read, and errors aſſigned and read, before any *ſcire facias* iſſued.—NOTA the *ſcire facias* returnable *proximo parliamento.*—NOTA lords houſe called *curia parliamenti.*—NOTA *rot. parl.* 2. *H.* 5. *part.* 2. *n.* 11. a parliament held *ultimo Aprilis* 2. *H.* 5. The *ſcire facias* bears teſt 18. Feb. 1. *H.* 5. returnable *in parliamento apud Lincolniam* ultimo Aprilis proximi futuri tenendo.* So it was not taken out till the parliament ſummoned.—NOTA it agrees *verbatim* with the award.

ROT. *parl.* 2. *H.* 5. *part.* 2.† *n.* 12. The earl of Saliſbury petitions *a notre ſeigneur le roy* for error in a judgment given againſt his father 1. *H.* 4. whereby he was attaint of treaſon after his death. It prays, *que le record et proces del judgement ſoient faits vener devant vous et les peres de terre* to examine errors. The record of the judgment and declaration is brought out of the chancery into the parliament, and the record entered *in hæc verba.* The earl aſſigns errors, and among others that the judgment was given by lords temporal

* It ſhould be *Leiceſtriam.*——F. H.

† In the printed rolls of parliament it is *part.* 1.——F. H.

only

only *de aſſenſu regis*, and without the aſſent of the commons, *queux de droit ſerront peticioners ou aſſentours de ceo que ſera ordein pur ley en parlement.* Continued to the next parliament. The judgment * given *rot. parl.* 2. *H.* 4. *n.* 30.—NOTA the judgment affirmed, *per dominos in præſenti parliamento de aſſenſu regis, quòd judicium verſus Johannem Comitem Sarum affirmetur. Rot. parl.* 2. *H.* 5. *part.* 2. *n.* 13. & 14. And *rot. parl.* 9. *H.* 5. *n.* 19. a ſpecial act of reſtitution.

3. *H.* 5. *n.* 19. Richard Caterman petitions *a noſtre ſoveraigne roy et tres nobles ſeigneurs en ce parlement pur erreur ſur jugement* in *B. R.* in treſpaſs, *que pleſe roy et ſeigneurs a commander cheif juſtice, de faire vener devant eux le record et proces, et de faire garnir* the plaintiffs in the action *par agard de meſme ceſt parlement d'eſtre al prochein parlement d'oyer les erreurs* which ſhall be aſſigned. *Quâ quidem petitione in parliamento ipſo publicè lectâ, de aſſenſu ejuſdem parliamenti conſideratum eſt, quòd Richardus habeat breve de ſcire facias* returnable the next parliament, *ad audiendum errores, et ulterius recepturum quod per legem terræ in curiâ parliamenti contigerit adjudicari in hâc parte.*—NOTA IN PARLIAMENTO, DE ASSENSU PARLIAMENTI, and CURIA PARLIAMENTI. Yet all in the houſe of lords.

ROT. *parl.* 8. *H.* 6. *n.* 70. *Al roy et al ſeigneurs ſpiritual et temporal en ce parlement*, the petition of the prior of Lanthony againſt an erroneous judgment given in the parliament of Ireland in reverſal of a judgment in the king's bench in Ireland, becauſe the juſtices of the king's bench in England † *n'ont poiar a juger et terminer ceo que fuiſt fait en parlement d'Ireland.*

10. *H.* 6. *n.* 52. *A notre ſeigneur le roy ſupplie Johane de Beauchamp*, for error in a judgment againſt her for the king in a *ſcire facias* upon a recognizance. *Pleſe a vous a faire vener record et proces devant vous*

* That is, the judgment of attainder.—F. H.

† 1. *E.* 4. *n.* 15. 35.

on

en ce parlement, et illoeques par aſſent des ſeigneurs ſpirituall et temporall et par auctoritée de votre dit parlement corriger et amender the error. *Super quo præceptum eſt capitali juſticiario, quòd recordum et proceſſum in dictum parliamentum deferret,* which is done accordingly and entered *in hæc verba. Quibus lectis et auditis* ſhe preſently aſſigns her errors in writing. And *pro eò quòd curia parliamenti nondum adviſatur, ideo conſideratum eſt, quòd Johana habeat diem uſque proximum parliamentum, quòdque recordum* * *et proceſſus cum omnibus ea tangentibus in dicto parliamento continuè ſint parata, et interim ſuperſedeatur executioni.*—NOTA no *ſcire facias,* becauſe the king party only †.

* 1. *R.* 2. 87.

† It is obſervable, that though lord Hale at the beginning of this Chapter expreſſes an intention of extending his account of writs of error to the beginning of the reign of Henry the ſeventh; yet here he ſtops at the tenth of Henry the ſixth.—F. H.

CHAP.

CHAP. XXXI.

CONCERNING APPEALS AND REVERSALS OF DECREES IN CHANCERY, AND THE JURISDICTION OF THE LORDS HOUSE IN RELATION THEREUNTO.

I HAVE been the longer and the more particular in the diſcuſſion of the juriſdiction of the lords houſe in writs of error or bills of error, partly becauſe the learning touching it is not ſo commonly known or underſtood; and partly, becauſe it makes way to the better diſcovery of the lords juriſdiction in point of decrees in courts of equity, and their examination by way of appeal or petition of reverſal, which hath cauſed ſo great and warm conteſts between the two houſes of parliament.

TOUCHING the juriſdiction of the court of chancery in cauſes of equity, certainly it was not very ancient, as I have before ſhewn *; wherein I have alſo ſhewn the degrees and methods whereby it hath attained *de facto* that ample juriſdiction in cauſes of equity, that now it hath in effect ſwallowed up the courts of law, and indeed in a great meaſure altered and in effect abrogated the common law.

BUT this court hath now ſo long been in the poſſeſſion of this equitable juriſdiction, and the eſtates contracts and aſſurances of lands and perſons are ſo much intereſted in that juriſdiction, that it is not only a vain thing for any one perſon to contend againſt it, but a ſudden alteration therein may be of very ill conſequence to the public. Neither is ſuch alteration or abridgment of the power of the chancery to be attempted without authority of parliament; and that alſo with great and deep deliberation, and with a convenient time given before ſuch alteration made, that men may accordingly

* See before, CHAP. VI.—F. H.

order

order their contracts ſettlements and dealings with a due proſpect to ſuch alteration.

But yet the late arrival of the court of chancery to this exerciſe of juriſdiction muſt needs have this effect, that we are not like to find in ancient records and monuments frequent precedents, that may direct our inquiry touching this matter of appeals. But the beſt meaſures we can take herein will be,—I. To examine the matter by reaſon.—II. To examine it by the analogy, that it holds or may have with writs of error and reformation of judgments in the courts of common law by the lords in parliament.—III. To conſider of what antiquity ſuch reverſals are in the lords houſe of decrees in chancery, and how made.—IV. To conſider ſome things *de bono*, what is fit to be done, as well as *de vero*, what may be done, eſpecially where there is difficulty in the matter of fact.

Preliminary to this argument we are firſt to conſider thoſe methods for the rectifying of erroneous decrees in courts of equity, which are not relative to parliament, and touching which there is no colour of controverſy. And the methods are three.

1. By a *rehearing* of the cauſe by the chancellor himſelf, which he may do, and if he ſee cauſe may alter his decree. But this muſt be before the decree be enrolled of record; for when it is ſigned and enrolled by the ſtile of that court it cannot be reheard.

2. By *bill of review* in the ſame court. And this is after the decree ſigned and enrolled. But this is ſomewhat a ſtrait-laced remedy. For they neither examine, nor read the proofs in the cauſe, whether they warrant the decree; neither is this bill of review allowed, unleſs the decree be performed, if it concern payment of money. But all the matters, that maintain ſuch a bill of review, muſt be ſome error appearing in the body of the decree or in the proceed-

ings of record, or ſome matter *ex poſt facto*, which hath happened ſince the cauſe or come newly to be diſcovered, which, had it been known and alledged and due proof thereof made upon the hearing, would probably have ſuſpended or altered or annulled the decree.

3. By *appeal to the king*, by petition, ſetting forth the matter of the decree, the unwarrantableneſs of the decree by the proofs in the caſe, the untruth of the ſuggeſtions on the decree, and thereupon praying a rehearing of the cauſe either before the king himſelf or ſuch commiſſioners as he ſhall aſſign by commiſſion under the great ſeal to hear examine and determine the cauſe. And thereupon the king uſually iſſues his commiſſion under the great ſeal to ſome of his privy council and to ſome of the judges for this purpoſe, before whom the cauſe is to be heard *de novo* from the beginning, and to be affirmed or reverſed as there is cauſe. And ſuch commiſſions as theſe have ſometimes iſſued; and the reaſon, why they have not iſſued oftener, is in reſpect of the great charge and delay in ſuch commiſſion, and the uncertainty of the ſucceſs becauſe of the great uncertainty and arbitrarineſs uſed in equitable proceedings. But that this is the regular and legal way of appealing from and reverſal of decrees in chancery, we have not only the judgment of the lords themſelves in the parliament of 21. *Jac.* in Mathew's caſe hereafter mentioned, but the reſolution of all the judges, long before this queſtion ſtarted, *Hill.* 13. *Jam. Roll's Rep.* 331. and *Bulſtr.** in the caſe between Vawdry and Pannel, and *Mich.* 42. & 43. *Eliz.* in the caſe of the counteſs of Southampton againſt the earl of Worceſter certified by the judges under all their hands.

And whether the petition of appeal be made to the king in ſuch caſe in parliament or out of parliament, ſuch a commiſſion may be thereupon iſſued; for it is the king's commiſſion, that gives the juriſdiction in this caſe.

* 1 *Ro. Rep.* 331. 3. *Bulſt.* 116.—Ft. H.

Again,

AGAIN, in parliament, if a parliamentary petition of appeal be delivered to the king and anſwered by him or by his direction, the anſwer is of itſelf a commiſſion according to the tenor of the endorſement, and gives as full a power to thoſe to whom the hearing and determining of the complaint is referred, as if it were a commiſſion under the great ſeal; and though this latter be more regular and formal, yet they are both equally effectual. And therefore if the petition be indorſed, *ſoit cette matiere oyée et terminée par les ſeigneurs ſpirituall et temporall, en parlement*, or *par les juges*, or by a ſelect number of lords and judges, or by the *auditores querelarum*, it gives them a full commiſſion for the determining thereof, as if it were by commiſſion under the great ſeal: for the petition and the king's anſwer indorſed are a record; and by what before is ſhewed touching writs of error, a petition of error thus indorſed is as full a commiſſion to the lords in parliament to examine and reverſe or affirm a judgment at law, as if it had been done by writ, for in thoſe caſes the king's anſwer is an effectual commiſſion according to the tenor of it.

AND therefore if in parliament there be a petition of appeal againſt a decree in chancery, and the king indorſes the petition, *ſoit mande as ſeigneurs ſpirituall et temporall*, or to a ſelect number thereof, *a oyer et terminer ceſt appeale*, there is no queſtion to be made, as I conceive, but that according to the tenor of endorſement there may be a proceeding in parliament to hear and determine *ex integro* the juſtice or injuſtice of ſuch decree; for the king, that is the fountain of juriſdiction, hath hereby delegated the ſame by ſuch his endorſement of the petition as effectually as if it were done by commiſſion under the great ſeal.

THE true ſtate therefore of this queſtion is, whether the houſe of lords, by a kind of innate inherent juriſdiction, have power, without any ſuch commiſſion or delegation from the king, to receive appeals againſt decrees in chancery, and to hear and determine them upon a plenary hearing of the cauſe; or not.

And I ſhall not intangle the queſtion with this; whether they may immediately before a bill of review in the court below proceed to the hearing and determining of ſuch appeals. For therein I think this difference will obtain. If the cauſe of appeal be ſuch a matter, as the party petitioning may have remedy by bill of review in the court below, then I think he ought not *per ſaltum* to come to the lords before ſuch bill of review had and finally determined; for it is a proceeding *per ſaltum*, and extraordinary remedies are not to be uſed till the ordinary remedies fail; as in the caſe of the biſhop of Norwich, *rot. parl.* 50. *E.* 3. *n.* . where it was reſolved, that a writ of error lies not in parliament upon a judgment given in the common pleas, till the ſame is affirmed or reverſed in the king's bench. And thus I have known it often reſolved in the lords houſe in parliament, where petitions of appeal againſt decrees in chancery have been diſmiſſed, if they contain only matter of review remediable below, and no bill of review either purſued or finally determined in the chancery.

But the queſtion in controverſy is touching ſuch appeals, as require an entire rehearing of the cauſe upon the proofs had therein; which cannot be done by bill of review, but muſt be done in another way. This is that, which is the true matter and ſtate of the queſtion.

CHAP.

CHAP. XXXII.

THE REASONS AS WELL FOR, AS AGAINST, THE JURISDICTION OF THE LORDS HOUSE AS SUCH IN CASES OF APPEALS FROM DECREES IN EQUITY.

THE reaſon aſſerting this juriſdiction inherent and radical in the lords houſe are as follow:

1. It ſeems a thing highly unreaſonable, that the decree of a chancellor, who may err as well as another man, ſhould be ſo concluſive, that the ſame ſhould be unexaminable by any other court, but be binding as the laws of the Medes and Perſians, or as an act of parliament.

2. The court of parliament, as ſitting in the lords houſe, or the lords ſpiritual and temporal aſſembled in parliament, are the higheſt court of juſtice in the realm: and here the judgments at law of the greateſt ordinary court of juſtice, namely the king's bench, are examinable and reverſible for error. And what reaſon can there be, that a decree in a court of equity ſhould have a greater ſacredneſs than a judgment at law?

3. There are ſeveral precedents in the lords houſe of reverſals of decrees in courts of equity and ſentences in the court of ſtar-chamber, upon petitions immediately preferred to the houſe of lords, without any commiſſion or indorſement of a petition by the king; eſpecially in the long parliament begun in 1640. And now muſt all thoſe reverſals fall to the ground, upon ſuppoſition that the lords had no juriſdiction in the caſes? Nay, there are ſome inſtances of ſuch reverſals in the parliament of 3. *Car.* 1. and poſſibly upon further

further ſearch there may be more precedents found much more ancient.

On the other ſide, there are reaſons of great weight againſt an original inherent juriſdiction in the houſe of lords, without a ſpecial commiſſion or delegation of ſuch authority from the king, either by commiſſion under the great ſeal, or by endorſement of ſuch petition or bill of reverſal firſt made to the king.

1. Although that the Engliſh monarchy is not in all reſpects abſolute and unlimited, but hath certain qualification of monarchical power, eſpecially in point of making laws and impoſing taxes upon the people; yet certainly, ſince the denomination of government is *ad plurimum*, the government is monarchical, and not ariſtocratical or democratical. And hence it is, that all juriſdiction in this realm, whether eccleſiaſtical or civil, is derived from the crown; and that the exerciſe thereof in the miniſters or judges, to whom it is ſo delegated by the crown, is in right of the crown and by virtue of a delegation from it. And it were a thing ſcarce conſiſtent with the monarchical government, that thoſe ſentences judgments or decrees, which are pronounced and given by the king's authority and commiſſion, ſhould be examined by an original juriſdiction lodged in the houſe of lords without eſpecial authority given by the king by writ commiſſion or endorſement. This were to make the baſis of the government ariſtocratical; ſince the laſt divolution of appeals would be, from the king and the judgments given by his authority, unto the lords.

2. I have at large ſhewed, in the * Chapter, that the review or reverſal of judgments given in the king's courts is *inter caſus reſervatos*, and cannot be put in ure *ſine ſpeciali mandato*. And therefore judgments given in the loweſt courts cannot be reformed without a writ of falſe judgment, and judgments in the king's courts

* See before, Chap. XXIII. p. 153.—F. H.

are

are not to be examined in the lords houſe without a petition to the king and a bill ſigned or writ of error under the great ſeal. And the ſame reaſon holds in decrees in chancery; for (as by uſe and long cuſtom the ſame has been practiſed and ſettled) thoſe decrees are made by the chancellor by the king's authority, and in his right, and as the ordinary judge in cauſes of equity thereunto deputed by the king, and therefore not to be examined or ſhaken without the king's conſent. For it were an effort to ſet a ſuperintendency of the juriſdiction of the lords houſe above the juriſdiction of the crown in caſes of appeal: for it carries over the dernier reſort in caſes of this nature ſingly to the houſe of lords.

3. SINCE there can be no juriſdiction in this kingdom, but what is by charter, or by commiſſion from the king, or by uſage or preſcription, which always implies a tacit derivation; and ſince there is nothing of ſuch juriſdiction given expreſly to the lords, for the writ whereby they are ſummoned is *ad tractandum nobiſcum ſuper arduis negotiis regni*; it remains, that they, that will aſſert this juriſdiction in the lords houſe in caſes of appeals without any particular commiſſion or authority by bill ſigned, muſt make it out by proofs of record of unqueſtionable authority and good antiquity; which can never be done; but the contrary thereof will appear, when we come to anſwer the reaſons aſſerting this juriſdiction.

Now as to the reaſons of the affirming aſſertion.

1. As to the firſt, it is certainly moſt juſt and reaſonable, that there ſhould be by law appointed ſome means for examining and reforming errors in decrees. The law itſelf and the government were lame and defective without it. This therefore is not the queſtion. But the queſtion is, whether the houſe of lords have a radical and inherent power to do it without a ſpecial commiſſion from the king; for of all hands it is agreed it may be done by ſpecial

cial commiſſion either under the great ſeal or by the king's endorſement of a parliamentary petition to that purpoſe.

2. And the ſame anſwer is to the ſecond reaſon. Though the court of parliament of the lords houſe were the higheſt ordinary court; yet that doth not therefore enable them to reverſe judgments or decrees without a ſpecial commiſſion by letters patent bill ſigned or writ of the king enabling them thereunto. The king's bench out of parliament is the higheſt court of ordinary juſtice; yet they cannot reverſe judgments in inferior courts without a writ of error under the great ſeal.

But by the way, though the court of the lords houſe in parliament be higher than other courts, yet we muſt not take it to be the ſupreme court; for ſuch only is the ſupreme court of parliament, conſiſting of the king as the head and the two houſes of parliament, conſtituting all together a ſovereign court *.

* The precedents, which make the third reaſon for the houſe of lords, are the ſubject of the next Chapter. — F. H.

CHAP.

CHAP. XXXIII.

CONCERNING THE PRECEDENTS OF THE EXERCISE OF JURISDICTION IN THE LORDS HOUSE, IN REVERSALS OF DECREES IN CHANCERY IN CAUSES OF EQUITY.

IF the lords could give us good evidence of record, of their ancient and common practice of reverſal of decrees in chancery by an inherent original juriſdiction reſiding in that houſe without commiſſion or delegation from the king, it would be of great moment for the aſſerting of their juriſdiction in this particular.

BUT upon a ſtrict ſearch and inquiry, we ſhall find a great defect in the proof of the fact.

IT is true, there hath been ſince 1. *Car.* 1. ſome inſtances, and ſince 16. *Car.* 1. many more in the long parliament, of ſuch reverſals of decrees. And this practice had its riſe upon theſe three * occaſions.

1. THE lord Verulam being chancellor made many decrees upon moſt groſs bribery and corruption, for which he was deeply cenſured in the parliament of 18. *Jac.* And this gave ſuch a diſcredit and brand to the decrees thus obtained, that they were eaſily ſet aſide, and made way in the parliament of 3. *Car.* for the like attempts againſt decrees made by other chancellors.

2. MR. SELDEN, being a man of great learning, was employed by the lords in parliament 18. *Jac.* to collect the privileges of the

* In the original it is two. But what follows apparently requires, that *three* ſhould be ſubſtituted.—F. H.

lords; which was done and preſented to the lords, and by them ordered to be bound up and preſerved as a kind of ſtanding evidence of their juriſdiction and privileges; as appears by the Journal of that parliament, viz. 30. Novemb. 1621. and 15. Dec. 1621. which book is ſtill reſerved among their archives and is printed. And this book gave the lords occaſion of looking into the *Placita Parliamenti tempore E.* 1. which they applied ſingly to the houſe of lords; and thereupon began in the parliament following, viz. 21. *Jac.* to enlarge their juriſdiction, not only to cauſes of appeals, but almoſt to all kind of juriſdiction in the firſt inſtance: ſo that there was little wanting, but that they had gotten it to be a ſettled court by petition to themſelves in all cauſes as well civil as criminal. But this held not long.

3. AGAIN, when the long parliament came after intermiſſion of parliaments, and the grievances of the ſubjects by the reaſon thereof were very many and importunate, ſuch a throng of complainants preſſed into parliament, eſpecially into the lords houſe, as tranſported proceedings in that houſe beyond the known ancient and regular bounds thereof. Complaints of decrees ſentences and judgments came in apace, and were promiſcuouſly heard. And indeed it would be too hard a taſk for any perſon to juſtify all proceedings of that time to be conſonant to the ancient and regular proceedings of parliament.

THESE then were the reaſons that let the lords into this exerciſe of juriſdiction of appeals, as ſuppoſed to be radically inherent in the houſe. And I could never yet ſee any precedent of greater antiquity than 3. *Car.* 1. nay ſcarce before 16. *Car.* 1. of any ſuch proceeding in the lords houſe.

BUT I ſhall now ſhew, what was the firſt attempt of ſetting up this juriſdiction in the lords houſe, and what ſucceſs it had.

BE-

BEFORE the parliament of 18. *Jac.* wherein the lord chancellor Bacon was cenſured for corruption, the courſe for reverſal of decrees was,—either by petition to the king, and thereupon a commiſſion iſſued to examine the decree and proceedings, whereof there are ſome precedents;—or elſe to ſet it aſide by act of parliament; and ſuch was the proceeding of 26. *Maii* 21. *Jac.* for reverſing a decree for the felt-makers and ſome others about that time.

BUT, even in theſe latter parliaments in king James's time, the reverſal of decrees by the inherent power of the lords houſe was either not known, or ſo new that it was ſcarce adventured upon by the lords.

IN the parliament of 18. *Jac.* viz. Journal of 3. Dec. 1621. ſir John Bourchier petitioned the lords againſt a decree by the then lord keeper in nature of an appeal, becauſe his witneſſes were not read; and prayed the lords, that they would rehear the cauſe upon the proofs. The lords referred the buſineſs to a committee to examine and report what had been done in like caſes.—10th December the lords referees report, that they could find but one of that nature againſt Michael de Pole lord chancellor, and that upon bribery and corruption. The lords thereupon examined parties, whether the proofs were refuſed to be read in ſir John Bourchier's caſe; and finding upon examination, that all material proofs that were deſired by ſir John were read, they cauſed ſir John Bourchier for the ſcandal put upon the keeper to aſk his pardon; but would never proceed to rehear the cauſe upon the merits thereof, as deſired by the petition.

IN the parliament of 21. *Jac.* the caſe of Mathews, as it is reported by the Journal of the lords houſe, is very ſignal, and expreſly againſt this radical inherent juriſdiction in the lords houſe.

8. MAY 1624. William Mathew preferred a petition to the lords in parliament againſt a decree made in chancery for his brother George Mathew in diſcharge of a debt of 5260l.—After ſeveral hearings by the lords committees for petitions, the lords committees 28. May 1624. report their opinion to the houſe; which was in effect to reverſe the decree, and to charge the lands of George Mathew with the debt, and that the execution hereof be referred to the chancery. The ſame 28. *Maii* in the afternoon George Mathew prefers his petition to the lords, ſetting forth, that the decree had been long ſince ſubmitted to; that to hear a cauſe after a ſubmiſſion, no corruption appearing, would be a dangerous precedent; and that it had not been the courſe of this houſe to reverſe decrees by petition, but by bill legally exhibited, eſpecially no corruption appearing *. He prays, that he may have the liberty of a *ſubpæna*, and that he may not be concluded, nor a decree ſubmitted unto overthrown, nor his inheritance taken from him by this honourable houſe only upon a petition. Thereupon four lords were appointed to ſet down an order in this cauſe, viz. the earl of Montgomery, the biſhop of Lincoln, lord Say, and lord Denny.—29. *Maii* 1624. theſe lords report their order, viz. that the cauſe depending between William and George Mathew be reviewed in chancery by the lord keeper, aſſiſted by ſuch of the lords in parliament as ſhall be nominated by the houſe and by any two of the judges whom the lord keeper ſhall name; for which end the lord keeper is to be an humble ſuitor to his majeſty from the houſe, for a commiſſion unto himſelf and the lords that ſhall be named by the houſe, for the ſaid review and final determination of the cauſe, as to them ſhall appear juſt and reaſonable; and that the lords deſire may be done with all convenient ſpeed. The which order being read, the houſe approved thereof. And theſe lords were named by the houſe to be joined in

* The petition alſo ſtated, that the decree was made in the life of the petitioner George Mathew's father, and that *George Mathew himſelf was never party to the ſuit*, and that *there was not any ſuit depending*.—F. H.

com-

commiſſion with the lord keeper, viz. the lord chamberlain, the earl of Montgomery, the earl of Bridgewater, the lords biſhops of Durham and Rocheſter, the lords Denny and Haughton: and the houſe ordered the cauſe to be heard and determined the beginning of next term.—And note this parliament continued by ſeveral adjournments from 29. *Maii* to 2. *Novembris*, and thence till 16. *Februarii*.

Now here was the true and regular way of reviewing a decree; namely, by commiſſion. And this done, not upon a ſudden, but after ſeveral hearings and a report from the lords committees of petitions for vacating the decree. Yet after all this the lords themſelves put it into a commiſſionary way; which is an inſtance of greater weight againſt the inherent juriſdiction of the lords, than a cart-load of precedents ſince that time in affirming of their juriſdiction. And ſo much the rather, becauſe this method of reverſing of decrees in chancery holds an analogy with the reverſal of judgments in parliament, wherein the king's commiſſion, either by writ of error, or by indorſement or anſwer of a petition of error, or both, always precedes the lords proceeding to reverſe judgments for error; and holds analogy with the ſtatute of 14. *E.* 3. touching delays in judgment, wherein there is directed, that a commiſſion iſſue under the great ſeal to the lords and judges appointed for that purpoſe; and agrees with the conſtant law of this kingdom, that lodges the original of juriſdiction primitively in the crown, whence it is derived by charter commiſſion or writ to the courts of juſtice.

INDEED afterwards, in the parliament of 1. *Car.* the lords, finding that no commiſſion iſſued, blamed the lord keeper Williams for not effectual proſecuting that order. The lord keeper excuſed it; becauſe the king abſolutely refuſed to iſſue any commiſſion but by his own mandate. Yet to give a countenance to their juriſdiction, 23. *Martii* he is brought to a public acknowledgment in the lords houſe, that thoſe orders were juſt, and to aſk pardon from the houſe.

Where

Where yet by the way obſerve, that every affirmation impoſed by the lords is an affirmation, that the reverſal of decrees ought to be by commiſſion under the great ſeal; for that was the order of 21. *Jac.*

So that upon the whole matter, if the queſtion be *de vero* or *de jure*, there is no ſuch radical inherent juriſdiction in the houſe of lords, without a ſpecial authority derived to them, either by the king's commiſſion, or by indorſement of a petition of review or reverſal, to examine errors in decrees in the chancery.

And thus far touching the queſtion *veri* or *juris* of the lords juriſdiction in this caſe.

CHAP.

CHAP. XXXIV.

TOUCHING THE QUESTION *DE BONO*; AND WHAT EXPEDIENTS MAY BE THOUGHT OF, FOR ACCOMMODATION OF THIS DIFFERENCE, WITH A DUE SAVING OF THE KING'S RIGHT, THE INTEREST OF THE PEOPLE, AND THE HONOUR OF THE PARLIAMENT.

IT hath been ſaid, that the method of reverſal of decrees in chancery by the houſe of lords, upon the account of their own inherent radical juriſdiction and as juſtices of the laſt reſort, is moſt ſafe and convenient for the people. For what if the king will grant no ſuch commiſſion to examine an erroneous decree, ſhall the ſubject be without remedy?—Again, we know, the king by his commiſſion may name whom he pleaſe, that may be perſons unindifferent. Nay, if it ſhould be placed in the judges; yet the judges are all made by the king's commiſſion, and may be ſuch as may be at the king's pleaſure removed, and are under greater danger of being overbiaſſed. 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, and ſo they are the leſs capable to be overborne or overpowered by other influences.

To this I ſay, that,—1. This kind of reaſoning ſeems as ſtrongly to conclude, that all juriſdiction ſhould be exerciſed by the lords. Whereas we know, that by the ſettled laws of this kingdom all the judges of Weſtminſter-hall, juſtices of gaol-delivery *oyer & terminer* and peace, commiſſioners of ſewers, &c. are all conſtituted by the king; and ſo have always been; and yet the adminiſtration of juſtice in all ages performed by perſons thus commiſſionated. And to ſay the truth, it is of greateſt concernment to the crown, that ſuch com-

commiſſioners and juſtices ſhould be appointed as are both learned and juſt; for otherwiſe the damage will be of greateſt moment to the crown. And beſides, as his own intereſt and the intereſts of his ſubjects oblige him to be highly careful in ſubſtituting ſuch judges and commiſſioners as may beſt perform that employment; ſo he is under the ſolemn obligation of his coronation oath to be highly careful in this buſineſs, that juſtice be duly adminiſtered. Otherwiſe the beſt ſtrength of government will be loſt or ſhaken.—But 2. Who conſtitutes new lords, who conſtitutes the lords ſpiritual? Yet theſe have their voice in the reverſal or affirmation of judgments. And yet the ſame objection may be made againſt their ſuffrage in this caſe.—Again, 3. The ſame kind of reaſoning would give the lords an inherent radical juriſdiction, without writ bill ſigned or commiſſion, to reverſe judgments at law; which yet are not examinable by them without the king's writ, or at leaſt a petition to the king indorſed or anſwered to bring the record into parliament.

But on the other ſide, if we look upon inconveniences, we ſhall find it highly inconvenient, that there ſhould be ſuch a radical juriſdiction in the houſe of lords, eſpecially in relation to decrees in equity.

1. It is true, the lords are of a noble extraction and education; they may be experienced in politics, in military affairs. Yet no one will ſay, that *eo nomine* that they are lords they are all competent judges of caſes of law or equity. How many young lords are there, that are not thirty years old? How many are unacquainted utterly with the proceedings or rules of law or equity? Yet one of theſe may have the odd caſting voice, which ſhall overturn judgments or decrees made with greateſt deliberation of moſt learned chancellors or judges.

2. Again, as to matters of equity, they are governed in a great meaſure by circumſtances, and are not under ſuch exact rules, as the

the common law courts or cauſes are. And therefore, without a very great adverſence and attention, the true equity of a cauſe is not ſo eaſily diſcerned: and therefore it is, that there daily happens great diverſity of opinions among learned men, when they come to particular caſes of equity. What kind of uncertainty ſhall we then find, when an hundred or more unexperienced men ſhall be judges of cauſes of equity? The antient rule is a certain truth. Better a miſchief in a particular caſe, than a common inconvenience. It were far better, there were no relief at all in cauſes of equity, than to have every cauſe under the various ſentiments of a hundred judges.

3. AGAIN, we daily obſerve, that in particular caſes, when they come before a multitude of judges, eſpecially that are great men and therefore not eaſily controulable, perſons concerned in ſuits meet with ſome, that are their kindred friends favourers landlords tenants or relations. And it is grown a faſhion in the lords houſe, for lords to patronize petitions: a courſe, that, if it were uſed by the judges of Weſtminſter-hall, would be looked upon, even by the parliament itſelf, as undecent, and carrying a probable imputation or temptation at leaſt to partiality. Such addreſſes as theſe are undecent and unſafe, and indeed intolerable to be found among judges, who muſt not know perſons in judgment, nor be ſweetened by ſuch kind of applications. Yet I leave it to any obſerving perſon to conſider, whether he think it poſſible, or at leaſt probable, that theſe applications can be avoided to ſo many and ſo great perſons and of ſuch extenſive relationſhip.

THESE and many more inconveniences attend this judicature at large in the lords houſe.

AND now therefore to bring this buſineſs and this book to a concluſion, I ſhall adventure to propound ſomething, that may prevent and remedy theſe and the like inconveniences; and that may preſerve

ſerve the juſt rights of the crown, the ſafety and ſecurity of the ſubject, and the honour and dignity of parliament. Which is this.

1. THAT the appointment of tryers of petitions, which is always done by the king the firſt day of a ſeſſion, may not be a piece only of name and formality, as it is now uſed; but that a ſelect number of the moſt judicious lords ſpiritual and temporal, and that not in too exceſſive a number, together with the judges, be appointed, and theſe to be commiſſionated under the great ſeal for that purpoſe, to whom as occaſion requires petitions for reverſals of decrees may be referred. And the like commiſſion for examining of judgments in writs of error. Only the judges of that court, out of which the record is removed, to be omitted in that commiſſion; and only to be preſent if occaſion require to hear the reaſons of their judgments, as in error out of the exchequer chamber before the treaſurer and chancellor.

2 THAT, according to the antient courſe, all petitions of reverſals of decrees in chancery preferred in parliament be directed to the king or the king and his council, and delivered to the receivers of petitions; and the king and his council to be attended by the receivers of petitions, and endorſements to be thereupon made according as the caſe ſhall require. *Soit cette petition bayle a tryers de petitions &c. a oyer et terminer ſolonc droit et raiſon; et eux, ou aſcuns 6 &c. d'eux, quorum &c.* And becauſe it may not be determined in that ſeſſion, then a ſpecial commiſſion to the tryers, whereof ſome of the *quorum* to examine and determine the errors in the decree; and ſo in writs of error.

THIS courſe,

1. PRESERVES the king's right as the fountain of jurisdiction: and as the decrees are paſſed by the king's authority, ſo by the ſame authority they are avoided, if there be cauſe; and not by a kind of

primitive

primitive ſuperintendant inherent juriſdiction in the lords houſe; which ſome may poſſibly think ſavours too much of an ariſtocracy, giving an appeal from the king to the lords by an inherent right of a dernier reſort, which ſeems not agreeable to the conſtitution of the Engliſh government.

2. THIS method is moſt ſuitable to the method that the parliament hath chalked out in caſes of a like nature, as any man that attentively reads the ſtatute of 14. *Eliz. cap.* 5. for reformation of delays in judgments may eaſily obſerve.

3. THIS method ſuits with the antient form of reverſal of judgments in the lords houſe; which, as hath been at large ſhewn, was antiently by a ſelect number of lords thereunto appointed by the king, and no bill or writ of error in parliament without a previous petition to the king and a bill ſigned for its allowance.

4. THIS prevents the many miſchiefs and inconveniences, that happen upon promiſcuous determining of ſuch cauſes, by the ſupernumerary vote poſſibly of one perſon, and he poſſibly not ſo competent a judge in ſuch caſes.

5. THIS preſerves a handſome decorum and dignity in the lords houſe, wherein ſome of their members are always in commiſſion upon this occaſion.

6. THIS is the means to have ſtability and firmneſs in proceedings. Men's decrees ſhall not be broken, nor reverſed, without juſt cauſe and due examination by perſons experienced and learned in matters of this nature; for the judges here are not only to be aſſiſtants to adviſe, but commiſſioners to aſſent or diſaſſent, as they are by the ſtatute of 14 *E.* 3. *cap.* 5.

7. This is a proceeding regular, conſonant to law and the true intereſt of juſtice; and ſuch as even the lords themſelves, in the parliament of 2. *Jacobi*, owned as the ſafe and regular method of proceeding for reverſal of decrees in equity.

8. This is a great means, as on the one hand, to keep the chancellor or keeper and judges under a juſt care that their decrees and judgments be well grounded; for there is a due and regular method of appeal: ſo on the other hand is a good ſecurity provided for ſuch as have now run it may be a long and expenſive ſuit for the obtaining of a decree or judgment (and poſſibly all the ſubſtance of himſelf and his family or ſome purchaſer for valuable conſideration are laid upon it) that it ſhall not be lightly or looſely thrown off by perſons unacquainted with proceedings of this nature, and yea and poſſibly by the vote of ſuch as never heard the cauſe (if proxies be allowed, which I know not whether they are or not) or poſſibly by the vote of one that never obſerved or heard one half of the cauſe, or if he heard it yet never heard a cauſe before.

This method of proceeding, as well in writs of error upon judgments as in appeals from decrees, would render the proceedings of the lords much more regular and orderly, much more agreeable to the laws of the kingdom and the king's juſt right, much more ſafe for the people and conſonant to the true and antient ſtile and order of parliament, with leſs expence. And buſineſſes of this nature would receive their determination before the commiſſioners, though the parliament ſhould be prorogued adjourned or diſſolved, without forcing the complainant to begin all anew.

For a concluſion of this diſcourſe, I muſt needs take notice of ſome extravagant aſſertions, that have been uſed by ſome in their aſſerting the lords juriſdiction.

They

THEY tell us, it is the ſupreme court; a court, from which no appeal lies; that it hath a primitive inherent juriſdiction; that it is the place of juriſdiction unto which is the laſt appeal, the dernier reſort:—which expreſſions, as they are very untrue, ſo they are very unwarily uſed by them; and I dare ſay, they either do not underſtand, or do not conſider the conſequence of them.

THE regiment of England is monarchical, and the king is the ſupreme head thereof. This is the chief article of the oath of ſupremacy.

BUT it is true, that in ſome points of ſupreme government this monarchical regiment is qualified. The king cannot make laws, nor impoſe taxes, without the advice or aſſent of both his houſes of parliament. But when laws are ſo made, yet they are the king's laws, though not to be altered or abrogated without the like conſent by which they are made.

AND the ſupreme court of this kingdom is neither the houſe of lords alone, nor the houſe of commons alone; no, nor both houſes without the king.—The high court of parliament, conſiſting of the king and both houſes, is the ſupreme and only ſupreme court of this kingdom, from which there is no appeal. Wherever the dernier reſort is, there muſt needs be the ſoveraignty; and ſo this word is conſtantly uſed and joined with it.

WHEN 36. *E.* 3. king *E.* 3. gave the principality of Aquitain to the Black Prince, they forgot to inſert or well expreſs the ſoveraignty that the king intended to reſerve to himſelf, the *jus ſummi imperii*. Thereupon there was a declaration made (which you may read *Seld. Titles of Honor, page* 461 *) by the king, *que le direct ſeigniory, toute la ſouveraignty, et le reſort, ſoient et demurrent a toujours*

* In the edition of 1631, it is in page 487.—P. H.

a nous

a nous et a nostre majestee. And in pursuance thereof the king made his delegates there or his judges *de souveraignty et du resort*, that heard all causes upon appeal from the prince's jurisdiction.

THE great usurpation of the pope upon the king's authority was, that he reserved and practised the dernier resort and appeal to himself: which by the statutes of 24. *H.* 8. c. 12. & 28. *H.* 8. c. 10. was resumed to the crown, and the last divolution of appeals to the king, and declared by that former * statute that the king within this kingdom is the seat of jurisdiction as well ecclesiastical as civil, and that the dernier resort was to be to him and not to any foreign power.

AND now let any man consider the rashness of the beforementioned assertion, that the dernier resort in all cases is radically in the house of lords; which certainly is one of the greatest points of sovereignty that can be and is coincident with it.

AGAIN, if this should be, that the supreme jurisdiction without appeal the dernier resort, were to the house of lords, then is the legislative power virtually and consequentially there also; or at least that power lodged in the king and both houses were insignificant. For what if the lords will give judgment against an act of parliament, or declare it null and void? If they have the dernier resort, this declaration or judgment must be obsèyed and obeyed and submitted unto irremediably; for no appeal lies from their judgment, if they be the supreme court. And if it be said, this shall not be presumed they will do: I say, if this position were true, they may if they will; and the laws of this kingdom have better provided for the preservation both of the king's rights and the people's, than to put them and all the laws of the kingdom into the power of the lords, though otherwise their justice should be unquestionable.

* The word *former* not in the original; but added to make the passage more correct.—T. H.

THE

THE truth is, it is utterly inconſiſtent with the very frame of a government, that the ſupreme power of making of laws ſhould be in the king with the advice of both his houſes of parliament, and judgment ſhould be in one of the houſes without the king and the other. A ſupreme power of making laws ſhould be thus in the king, and monarchical; and the ſupreme deciſive power or juriſdiction and dernier reſort ſhould be radically in the lords, and ſo ariſtocratical. Therefore it is not only *de facto* true in our government, but it is moſt neceſſary, that the ſupreme deciſive power or juriſdiction and the dernier reſort muſt be where the legiſlative power is. And it is impoſſible it ſhould be otherwiſe, unleſs we wholly diſſolve the legiſlative power of the whole body of the parliament, king lords and commons, and put it into the houſe of lords; who, by their ſupreme deciſive power without appeal, and as the dernier reſort originally radicated in them, may at their pleaſure render the legiſlative power idle vain and inſignificant.

AND by this, which has been ſaid, any man with half an eye may ſee the great inconvenience of lodging any judicatory at all in the houſe of lords ſingly, except touching their privileges; and upon what great reaſon this juriſdiction came to be diſuſed by their noble anceſtors, whoſe ſenſe of the common good of the king and kingdom, yea and of their own poſterity, did at laſt relinquiſh the exerciſe of juriſdiction ſingly for ſome hundreds of years.—And it is this.

THE high court of parliament conſiſting of the king and both the houſes of parliament are certainly the only ſupreme court of this kingdom, to whom the divolution of the laſt appeal or dernier reſort doth belong. And the lords are a conſtituent part of this ſupreme court; without which as no law can be made, ſo no final unappealable judgment can be given. Though it cannot finally and without appeal be given by them, ſo it cannot be given without them. If therefore the lords ſhould have a power of judication, an

appeal

an appeal muſt neceſſarily be to the whole parliament, king lords and commons. And yet the lords, without whom ſuch judgments cannot be repealed, ſhould, if they ſhould have or exerciſe ſuch a judicial juriſdiction, be prejudicated neceſſarily by their own judgment, and an anticipation of that determination, which (as parts of the true ſupreme power) they muſt now reverſe. And ſo the true intereſt of the ſubject to have his laſt appeal, his dernier reſort, to the true ſupreme court, the high court of parliament conſiſting of king lords and commons, is loſt, or muſt neceſſarily be fruitleſs; becauſe the lords, who as part of the parliament muſt have voice in that appeal, are already prejudicated by their own judgment and anticipated by it.

And all this inconvenience would be remedied, if, according to the antient courſe in writs of error, and according to the method propounded as well in writs of error as appeals from decrees, a certain ſelect number of the lords with the judges were commiſſionated by the king to examine hear and determine errors in judgments and decrees. For that would not engage the whole houſe; but they would be free to give their judgment upon appeals to the whole parliament.

THE END.